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THE

CENTRAL LAW JOURNAL

—EDITED BY—

HON. JOHN F. DILLON AND SEYMOUR D. THOMPSON.

VOL. 1. 1874.

PUBLISHED BY
SOULE, THOMAS & WENTWORTH,
ST. LOUIS, MO.

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, JANUARY 1, 1874.

SUBSCRIPTION:
$8 PER ANNUM, in Advance.

WE present to the legal profession and the public, the first number of the CENTRAL LAW JOURNAL. We have not undertaken this enterprise without due consideration of the nature of the task before us, nor without making extensive enquiry, by correspondence and otherwise, to ascertain the needs and expectations of the profession in regard to such a publication. We have chosen to make it a weekly in preference to a monthly or quarterly, not because this form promises more profit in proportion to the labor and money expended upon it, but because a paper published weekly, will afford, as we conceive, the highest degree of usefulness.

It concerns the bench and bar to know, at the earliest possible period, the rulings which are being made in courts of eminent character and of last resort. This information we shall endeavor, as far as practicable, to supply. Opinions which possess a general interest or peculiar local value, will be published in full, with carefully prepared head-notes, and such other annotations as may seem appropriate. Other decisions will be presented in the shape of editorial notes of greater or less length, according to the supposed importance of the questions adjudicated. This plan, while it involves more labor, seems to us preferable to the "digest" plan adopted by most of the legal publications. It gives us more freedom of expression, enables us to add where it seems necessary, our own notes and comments, and brings us more nearly into a sort of conversational connection with our readers.

Most of the matter used in these notes, coming from courts in the Mississippi Valley, will be furnished by our own special correspondents and reporters. For such as comes from courts at a greater distance, we shall be indebted, principally, to our legal and other exchanges.

In view of the growing importance of the Federal Courts, it will be a special feature of the JOURNAL to advise its readers at the earliest practicable date, of the important questions therein adjudicated. It will give, from week to week, a summary of the proceedings had in the Supreme Court of the United States during its sessions; and special pains will be taken to keep its readers fully advised of the important questions decided in that court. It will also contain early advice of the important matters transpiring in the English courts.

In a department of "Notes and Queries" we shall answer, as well as we can, any questions of general interest propounded to us by correspondents.

Some space will also be devoted to news items of interest to lawyers; embracing such matters as the death of eminent judges and lawyers; changes in the constjtution of important courts; the doings of Congress, of constitutional conventions, and of the state legislatures, so far as they involve important legal matters; and any like items of news that may be supposed to be of interest to the profession.

We shall examamine, with what care our time will permit, and notice editorially, any important law book sent to us for that purpose. While we cannot hope to devote to any book more than a hasty examination, we shall endeavor in these notices to be candid and impartial; to avoid extravagant praise on the one hand, and unjust censure on the other. The department of "Book Notices" will not be kept open as an advertising medium; it will be under the exclusive control of the editors; the publishers will have nothing to do with it.

Judges and counsel, who furnish us with early copies of important decisions, will place us under special obligations to them. We shall be under like obligations to reporters who may favor us with advance sheets of their reports.

Correspondence on topics of current legal interest, is solicited. It will be scarcely necessary to advise correspondents to be brief. In a busy profession, like that of the law, few persons can afford the time or find the patience to peruse long articles; nor can a weekly journal, dealing with a great variety of topics, afford the space to print them.

Hoping to be able to improve upon each number of the JOURNAL, until it approximates somewhat to our conception of what such a legal serial should be, we commit this first number to the criticism of the legal profession, and, we trust, to their support.

The Bankrupt Act—Shall it be Repealed?

In a commercial, manufacturing and trading country, a bankrupt system so framed as to be adapted to the circumstances of the people, is beneficial alike to the debtor and the creditor. Such a system is particularly desirable in a country of vast extent. Divided, as the United States is, into forty states, each of which, in the absence of a bankrupt enactment, makes the laws which regulate the relation and rights of debtors and creditors within its limits—if credit is to be extended and commercial intercourse freely maintained between the people of the different states and sections, a bankrupt system, wisely conceived, becomes almost a necessity.

Without a bankrupt law, each state has its separate collection and attachment laws, under which the creditor who first moves, secures a preference over the rest; and the local or the favorite creditor fares well at the expense of all the others. A bankrupt law, also, affords the only means by which debtors who have failed in business, can be relieved from the load of hopeless insolvency.

We doubt whether the present bankrupt law is worse than the system which it superseded. Doubtless, it has many faults

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and defects. Most of these, however, are not intrinsic, but remediable by well-considered legislation. Undoubtedly, that portion of the involuntary feature of the present law, which makes it an act of bankruptcy merely to suspend payment, or fail to meet one's commercial paper for fourteen days, is, under the existing state of the finances of the country, harsh and oppressive, and it ought to be immediately repealed, or essentially modified. There is no such feature in the English bankrupt laws. By the English acts, "the suspension of payment by a banker, merchant, or trader, of his commercial paper and liabilities, is resolved into an act of bankruptcy by summoning him before the court of bankruptcy, and if the debt or demand be not paid or arranged to the satisfaction of the creditor within a prescribed time, the non-arrangement or non-payment, within such prescribed period, constitutes an act of bankruptcy." (James, Bankrupt Law, 261; In re Clemens 2 Dillon C. C., 536.) This provision is much preferable to the similar one in our act, and even this might be too stringent at the present time.

In a gust of seeming popular feeling, the house of representatives recently passed a bill for the absolute repeal of the bankrupt act. The senate seems wisely to insist upon time for consideration. In a matter of so much consequence, it would appear to be the part of true wisdom, to repeal at once only those portions of the law which are not adapted to existing circumstances, and which work harshly, and then, following the course which is so often adopted in Great Britain in respect to important legislation, appoint a commission to investigate the defects and imperfections of the present act, and report such changes as experience has demonstrated to be necessary for the successful working of the system. Such a commission, composed, in part, of members of congress and of one or more of the federal judges, and an attorney of large experience in bankruptcy proceedings, would doubtless be able to suggest such amendments to the existing law, as to make its workings satisfactory to the country at large.

The Late Mr. Justice Nelson.

The death of this distinguished jurist, which occurred on the 13th of December last, at his home in Cooperstown, N. Y., makes it fitting to refer to his life and character, and to draw from them the lessons they are so well calculated to teach. We have long regarded him, in his personal and judicial character, as the highest type of an American judge. His whole life was given to his profession. Born in 1792, he was admitted to the bar in 1817, and continued in the practice until 1823, when he was appointed one of the circuit judges of the state. In 1821, however, he was a member of the constitutional convention of New York, and it is said that it was in this body that his great legal abilities first became generally known, and that this led to his selection and appointment to the bench two years afterwards. He went upon the circuit bench in 1823, and remained there until 1831, when he was transferred to the supreme bench of the state, in the place of Judge MARCY, elected to the senate, and he continued to be an associate justice of that court until 1837, when he was commissioned to be its chief justice, and he remained such until 1845, when he was appointed by President Tyler, an associate justice of the Supreme Court of the United States, and remained such until his voluntary retirement from the bench in November, 1872.

Lacking but a few months, therefore, he was a judge, without interruption, for fifty successive years. He was, in fact, judicially employed for more than fifty years; for, after his retirement, he investigated a most complicated cause, and prepared an elaborate and masterly opinion in it, which was completed only a short time before his death.

Judge NELSON'S personal appearance was impressive. No one who ever saw his erect bearing, his massive frame, his large head, with its flowing white hair, the clean cut features of his handsome but strong face, could forget his striking presence.

But his character as a judge is that which endears his memory, and will perpetuate his fame. His integrity—that commonest, but indispensable quality in a judge—no man ever questioned. The simplicity of his nature was never corrupted, nor its strength enervated by the luxurious and extravagant tastes and habits which, unhappily, have become too prevalent in these latter days. To the end, he preferred the quiet of his rural home, beside the waters of the beautiful lake on which he lived, to a residence in the great metropolitan city, within his circuit, or in the feverish atmosphere of the capital.

His love of justice was intrinsic, predominant and supreme. He had been favored by nature, in an extraordinary degree, with what may be called the *judicial temperament.*

His patience was invincible; his equanimity of temper never deserted him; and he was incapable of becoming a partisan in the trial or hearing of a cause, or of receiving an undue bias, or of yielding to hasty and crude views.

We have good authority for the statement, that in the heat and ardor which sometimes attend the discussions of the conference room, one member was never known to lose his evenness of temper, and that was the illustrious deceased.

His judgment was almost unerring, and was noted for its breadth and soundness. His learning was varied and extensive, and he brought to the discharge of his duties in the federal courts, the great experience of his long service upon the *nisi prius* and appellate bench of the state.

The opinions of no judge in the country were more deferentially submitted to than his; and he seemed equally conversant with the peculiar and difficult questions of federal jurisprudence, which arise under the constitution and statutes of the United States, and with questions of commercial, international and admiralty law. His knowledge of the law relating to patents for inventions, and his skill and judgment in the decision of questions of novelty and infringement have, perhaps, never been surpassed.

An admirable judicial quality of Judge NELSON'S was his utter want of pride of individual opinion. He seemed to care nothing for views which he had expressed when upon the supreme bench of the state or upon the circuit. If satisfied, after more reflection and further argument, that he was mistaken, he would be the first to insist on setting the law right, and correcting his own errors. The judgment of the future will confirm the verdict of the present, that the deceased wa-

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a great judge; not great in the sense of originating legal reforms, or in the field of original investigation, but great in the power to decide correctly, according to the principles which the courts and legislature have established for the settlement of judicial controversies. The judicial annals of America are bright with the names of MARSHALL, STORY, TANEY, KENT, GIBSON and SHAW. To these is now to be added the name of NELSON, the mild lustre of which will remain undimmed as long as the constitution endures, and the law is reverenced.

Power of Constitutional Conventions—New Constitution of Pennsylvania.

The extent of the power of a convention "to revise and amend the constitution" of a state, or rather the right of the legislature in the enactment authorizing the calling of such a convention to limit the powers of the convention, and to prescribe its mode of action, has been recently considered by the supreme court of Pennsylvania, in a case which has attracted great attention throughout the country.

On July 2, 1871, pursuant to provisions in the existing constitution, the legislature passed "an act to authorize a popular vote on the question of calling a convention to amend the constitution of Pennsylvania;" and the proposition having been carried, the legislature, on the 11th day of April, 1872, passed "an act for calling a convention to amend the constitution." Among other things, this act contained a provision (Sec. 6) "that the election to decide for or against the adoption of the new constitution, or specific amendments, shall be conducted as the *general elections of this commonwealt hare now by law conducted.*"

The convention, before adjourning, passed "an ordinance" regulating the time and manner of holding the election for voting on the proposed constitution, which ordinance was opposed in its provisions, to the general election laws of the state.

A bill was filed to enjoin the commissioners appointed by the ordinance from acting under the ordinance, and from appointing election officers, or making a registration of voters, or directing or controlling the election; and in the case of Wells v. Bain and Fitler et al (Phila. Legal Gazette, Vol. 5, p. 400, Dec. 12, 1873) the supreme court sustained the bill and awarded the injunction. The opinion of the court appears to have been unanimous, and was delivered by Chief Justice AGNEW, on the 5th day of December, 1873.

Grave doubts, however, attend the doctrine of the supreme court, that it is competent for the legislature in the absence of constitutional provision, or a vote of the people upon the point, to limit in this manner the mode of action of a constitutional convention, lawfully assembled. The view of the supreme court of Pennsylvania, however, is very strongly argued by the chief justice, and the substance of his argument appears in the syllabus of the case, which, as found in the Legal Gazette, *supra*, is as follows:

The constitutional convention of Pennsylvania, before adjourning, passed an "ordinance," regulating the time and manner of holding the election for voting upon the proposed new constitution prepared by them. The ordinance provided, *inter alia*, for the appointment of election commissioners for the city of Philadelphia, who were to conduct the election in that place, in accordance with the regulations laid down for their guidance in the ordinance. These regulations being contrary to the general election laws of the commonwealth, as applicable to Philadelphia, an injunction was sought or to restrain the commissioners, and the officers appointed by them, from conducting the election, and to restrain the city officials from furnishing blanks, etc., to the commissioners, or otherwise expending the city moneys for the expenses of said commissioners. The supreme court at *Nisi Prius* granted the injunction, holding as follows:

1. The constitutional convention was the offspring of *law*, which law was the only form in which the legislature, *the body invested with the powers of government*, could act, and thereby its (the legislature's), own consent be given and revolution avoided.

2. The law being the instrument of delegation, the act of assembly, or warrant to the delegates from the people (*i. e.*, the members of the convention) was the only chart of their powers.

3. The delegates possess no inherent power, and when convened by law at the time and place fixed in it, sit and act under it, as their *letter of attorney* from the people themselves.

4. The act of assembly of April 11th, 1872, which provided "for calling a convention to amend the constitution," gave the convention no power to frame the ordinance in question, which is, therefore, illegal and void.

5. The court has jurisdiction to restrain invasions of right, without authority under the exising laws, and therefore has jurisdiction of this case.

We may observe, that in the case of Woods v. Hare, 5 Phil. Legal Gazette, 397, the court of common pleas of Allegheny county, held the following propositions:

"1. The act of assembly of 1871, providing for a vote of the people upon the question of calling a constitutional convention, and the act of 1872, which provided for calling it, were both constitutional and valid.

2. There is underlying our whole system of government, a principle of acknowledged right, in the people, to change their constitutions, *except where specially prohibited in a constitution itself*, in all cases and at all times, whether there is a way provided in their constitution or not.

3. A convention to amend the constitution without the power passed upon by the people, in determining the question of amendments, has inherently, by the very nature of the case, under the great principle, quasi-revolutionary in its character, above mentioned, absolute power, so far as may be necessary, to carry out the purpose for which they were called into existence by the popular will.

4. Unless prohibited or restricted in the manner specified by the people, the convention has a right, untrammeled by mere legislative limitations, to propose to the people for their consideration and adoption, any plan they may see fit."

But this last named court did not pass upon the question of the right of the convention to provide a mode of submission to the voters, differing from, and in substance, repealing the act of the legislature under which the convention was called together.

The general subject is exhaustively discussed by Judge JAMESON in his valuable work on Constitutional Conventions, and his views favor the judgment of the supreme court of Pennsylvania. But the doctrine that a convention lawfully assembled, to amend a constitution, can be trammeled and restricted as to the mode in which it shall submit its work to the people, by an ordinary act of legislation, is by no means clear to our mind, and seems to be open to grave objections, and might be used to perpetuate abuses, or deprive the people of powers and rights which justly belong to them.

Taxation of the Union Pacific Railroad by the States.

The Union Pacific Railroad Company is a corporation chartered by congress, and was aided by the general government by bonds and lands, and subjected to military and postal duties. The relation of this corporation to the public, and to the state of Nebraska traversed by it, is anomalous and peculiar, and has given rise to some interesting and important questions. The circuit court of the United States for the district of Nebraska, in 1871, held that the state had the power to tax the road-bed and rolling stock of the company, for the reasons which appear in the report of the case. Union

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Pacific Railroad Company v. Lincoln county, 1 Dillon C. C. R., 314.

Its judgment in this case was affirmed by the Supreme Court of the United States a few days since, the case in that court being entitled "The Union Pacific Railroad Company v. Peniston, Treasurer of Lincoln county." The case in the Supreme Court was argued in behalf of the state by *Mr. Woolworth*, and for the company by *Mr. Evarts*. The main ground urged against the power of the state to tax was that the road was a federal instrumentality, and that the recognition of the right of the state to tax and sell the road, was inconsistent with the purpose of congress, in creating the corporation, and with the rights of the government in the road. The act of congress is silent as to taxing the road. A majority of the court decided against the *implied exemption* of the road from the power of the state to tax it. We have not seen the opinion of the court, which was delivered by Mr. Justice STRONG; but it proceeds, we understand, upon the ground that "the tax in question is too remote in its effects upon the efficient exercise of the federal power, to be for that reason inhibited by the constitution. To hold otherwise would be to deny to the states all power to tax persons or property; for every tax levied by a state withdraws from the reach of federal taxation, a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. Admitting fully that the company is an agent of the general government, both military and postal, no constitutional implications prohibit a state tax upon the property of an agent of the government, merely because it is the property of such an agent. United States mails, troops, and munitions of war, are carried upon almost every railroad. Telegraph lines are employed in the national service; so are steamboats, horses, stage coaches, wagons, foundries, ship yards, and multitudes of manufacturing establishments. These are the property of natural persons or corporations who are instruments or agents of the general government. Were they exempt, as here claimed, it is manifest that the state government would be paralyzed. The decree below is affirmed."

Mr. Justice BRADLEY, dissenting, says, that if the road-bed may be taxed, it may be seized and sold for non-payment of taxes, separated by county or state lines, and thus the whole purpose of congress, in creating the corporation and establishing the line, may be subverted. In his judgment the tax was unconstitutional. Mr. Justice FIELD concurred with Mr. Justice BRADLEY. Mr. Justice HUNT dissented from the opinion of the court, but wrote no opinion.

Mr. Justice SWAYNE wrote an opinion, concurring in the result reached by the majority of the court.

Railway Aid Bonds.

We publish elsewhere the elaborate opinion of NAPTON, J., in the case of Smith & Hall v. Clark county, as well as the two brief opinions delivered in overruling the petition for a re-hearing. The great importance of this case, not only to the state of Missouri, but to the profession, and to the holders of municipal bonds throughout the country, justifies us, notwithstanding its length, in publishing it in full, and in accompanying it with a note intended to show the views of the supreme court of Missouri, from the beginning to the present time, upon the nature of such securities, and the defences which may be made thereto, when in the hands of innocent holders for value. In many respects, the law applicable to city and county bonds issued under authority from the legislature, has, so far as respects the federal tribunals, been settled by the Supreme Court of the United States. But under the constitutional provision, and the legislation of Missouri, some cases have arisen novel in their facts, if not in the principles upon which they must be decided; and the decisions which have recently been made upon these securities by the federal courts in Missouri, we shall publish from time to time, as opportunity and space will permit, commencing next week.

As to the nature of the power to issue such securities, and the defences which may be made to them, there exist some differences of opinion between the Supreme Court of the United States and some of the state tribunals. This difference will be illustrated by the very recent decision of the supreme court of Kansas, in the case of Lewis v. Bourbon county, which will appear in our next number.

Constitutionality of Acts Passed Under a Former Constitution.

In Spencer v. Klinger, determined at St. Louis, November 24, 1873, the supreme court of Missouri put to rest a very important question in a few words. The action was ejectment. The plaintiff had, in 1864, conveyed the land to the defendant, and now brought suit to recover it, on the ground that she was a minor at the time the conveyance was made, and that the conveyance was hence void. The defendant was in her eighteenth year when the conveyance was made, but had previously procured a special act of the legislature, declaring her of lawful age, and legally competent to transact her own business. It was now insisted that the act was unconstitutional and void, and that the deed made in pursuance of it, therefore passed no title.

WAGNER, J., said: "Whatever might be our opinion in regard to the policy or even validity of such acts under different circumstances, we are constrained at the present day to hold them good. An examination of the session acts will show, that from an early period in our state's history, acts of this description were passed at almost every session, that their legality was never challenged, and that they were constantly acted upon.

It would be entirely safe to say that millions of dollars have been invested upon the strength of these titles, and for the court, at this day, to declare the acts and titles made in pursuance of them void, would be a hazardous undertaking, and would unsettle property rights to an alarming extent.

"We must therefore decline to go into the question, or consider it open to discussion. The constitution of 1865, very wisely prohibits, in express terms, the special enactment of such laws; and the abuses which were practiced under the former constitution in this respect cannot again occur. But past titles which were made and received when the acts giving them validity were universally acquiesced in, cannot be disturbed. The court below decided for the defendant, and its judgment must be affirmed."

The other judges concurred.

JUDGE HALE of New York, now a member of the National House of Representatives, has been tendered by Governor Dix, the position of judge of the court of appeals in that state, and it is understood he will resign his seat and accept.

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Validity of County Bonds Issued to Railroad Companies.

SMITH & HALL v. CLARK COUNTY.

Supreme Court of Missouri, Saint Louis, October Term, 1873.

WASH ADAMS,
DAVID WAGNER,
W. B. NAPTON,
H. M. VORHIES,
A. T. SHERWOOD. } Judges.

1. **Jurisdiction—Pecuniary Limit.**—Although the Circuit Court of Missouri is limited in its jurisdiction in actions upon contracts, to amounts not less than one hundred dollars, yet it may entertain an action upon a number of coupons for thirty-five dollars each, detached from the same series of bonds, if such coupons amount in the aggregate to one hundred dollars or more. [The same principle in the Federal Court. Judson v. Macon County, 2 Dillon, C. C. 213.]

2. **Coupons—Negotiability**—Coupons, although not payable to any particular person, are, nevertheless, negotiable. [Acc. McCoy v. Washington County, 3 Wall., Jr. 381.]

3. **Construction of Railroad Charter—Privilege.**—The charter of the Alexandria and Bloomfield Railroad Company, provided that the company should be entitled to all the privileges, rights and immunities which had been previously granted to the North Missouri Railroad Company. The charter of the latter company provided that the county courts of any county through which any part of the road passed, might subscribe to the capital stock of said company. *Held*, that the effect of this provision in the charter of the Alexandria and Bloomfield Railroad Company, was to re-enact, as to that company, the provision above stated of the charter of the North Missouri Railroad Company, so as to authorize the county court of a county in which the former road was situated, to subscribe to its stock. The power thus conferred on the county courts to subscribe to the capital stock of a railroad company, may well be termed a "privilege" granted to the company.

4. **Repeal of Special Provision in Charter by General Law.**—A provision in the charter of a railroad company, authorizing the county courts of the counties through which the road passes to subscribe to its capital stock, without requiring a vote of the people of the county, is not repealed by a general law subsequently passed, prohibiting such subscriptions without an affirmative vote of the people of the county, when such subscription is proposed. [Acc. State *ex rel.* Mo. and Miss. R. R. Co. v. Macon County Court, 41 Mo., 453.]

5. **Recitals in Bonds—Estoppel.**—If the power existed in a county court to issue certain bonds, a false recital of such power on the bonds themselves, will not vitiate them in the hands of an innocent holder; although it might create an estoppel against the county or its agent. Thus, where certain county bonds purported to be issued under the general law of 1855, the holder was not estopped from showing that they were, in fact, issued under a special act chartering a railroad company, passed in 1857. [Per NAPTON, J., *arguendo*. See opinion on motion for rehearing.]

6. **Agent of Municipal Corporation—Derivation of Power.**—The doctrine recognized, that the agent of a municipal corporation, derives his power to subscribe for stock in a railroad company, or to issue bonds of the corporation, not from the people of the municipality, but from the legislature. The law gives the power, but restricts its exercise, by requiring a vote of the people. [Per NAPTON, J., *arguendo*. See opinion on motion for re-hearing.]

7. **The Same—Ultra Vires.**—If there has actually been a grant of power to an agent to execute a negotiable instrument, the instrument is valid in the hands of an innocent holder, and the principal is bound, although the agent may have exceeded his instructions in executing the power, or may have executed it in a different manner from that prescribed. [Per NAPTON, J., *arguendo*. See opinion on motion for re-hearing.]

8. **The Rule Applied to Municipal Bonds.**—In accordance with this principle, a *bona fide* holder for value of a bond of a municipal corporation issued under an act of the legislature of a State, has a right to presume that all precedent requirements of the act conferring the power have been complied with If, therefore, the act under which such a bond purports, on its face, to have been issued, or its amendments, required an election by the people of the municipality, and an affirmative vote, before such bond should be issued, it is no defence to a suit on such bond by a *bona fide* holder for value, that no such election was, in fact, held. [Per NAPTON, J., *arguendo*. See opinion on motion for re-hearing.]

ON MOTION FOR RE-HEARING:

9. **Provision in Railroad Charter—Vested Rights.**—The court does not mean to intimate that the provision of a railroad charter, allowing the county courts of counties through which the road passes, to subscribe to its capital stock, and issue the bonds of the county in payment of the same, is a franchise which it was not competent for the legislature to repeal, either before or since the adoption of the new constitution.

10. **Action of County Court—Estoppel.**—A majority of the court hold that the recitals in the bonds issued by the county court to the railroad company in this case, are not conclusive, and do not amount to an estoppel against the county, notwithstanding the settled doctrine of the Supreme Court of the United States to the contrary; and that it was not necessary to the determination of this case, so to hold.

11. **Opinions of Supreme Court—Arguments—Illustrations.**—In delivering opinions, the judge who delivers them is allowed to make his own arguments and illustrations, without compromitting the other judges; and in concurring in the result, the other judges do not necessarily sanction the illustrations used by the judge who delivers the opinion.

12. **Bonds Issued to Defunct Corporation—Collateral Proceeding.**—It is no objection to the validity of bonds issued by a county court to a railroad company, that the charter of the company had expired before the company was organized, if the corporation existed as a matter of fact, and was in the exercise of its chartered franchises, at the time the subscription was made and the bonds issued. In such a case, whether or not the corporation had a legal existence before the subscription was made, cannot be tested in this collateral way. Such a question can only be raised in a direct proceeding by *quo warranto*, on the part of the State.

Barrow & Higbee, *Dryden & Dryden*, and *R. E. P. Anderson*, for plaintiff in error; *Spangler, Givens & Day*, for defendants in error.

NAPTON, J., delivered the opinion of the court:

This suit was brought in August, 1867, on seven coupons, detached from bonds, dated January 1, 1865, due in twenty years and payable to the Alexandria and Bloomfield Railroad Company or bearer. The bonds are in these words:

"$500. United States of America. No. 51. Alexandria and Bloomfield Railroad Company, county of Clark, state of Missouri, bond due in twenty years from date. Know all men by these presents, that there is due from the county of Clark to the Alexandria and Bloomfield Railroad Company or bearer, five hundred dollars, lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first day of each year, at the treasury of the said county of Clark, on the presentation and surrender of the annexed coupons; the principal to be due and payable twenty years after date hereof; for the performance of all of which, the faith of said county of Clark is irrevocably pledged, as also the property, revenue and resources of said county of Clark. This bond being issued and pursuant to orders of the county court of Clark county, as authorized by an act of legislature of the state of Missouri, entitled, "An act to authorize the formation of railroad associations and regulate the same," approved Dec. 13, 1855. In testimony whereof, the said county of Clark has executed this bond by the presiding justice of the county court of Clark county, under the order of said court, signing his name hereto, and by the clerk of said county, under the order thereof, attesting the same and affixing the seal of said court. This done in the town of Waterloo, county of Clark aforesaid, this, the first day of Jannary, 1865. HARVEY SEYMOUR,
Attest: Presiding justice of county court of Clark county.
G. M. OCHILTREE, clerk of the county court of Clark county."

Coupons are as follows:

"State of Missouri. Bond No. 51. $35. The county of Clark will pay thirty-five dollars on this coupon on the first day of January, 1867, at the treasury of said county. G. M. OCHILTREE,
Clerk of the Clark county court."

The petition states that the coupons due in 1866 were paid, but that the coupons sued on, due in January, 1867, were not paid, although duly presented. There were separate counts on the seven coupons sued on.

The answer denies that said bonds were issued in conformity to the law of Dec. 13, 1855; asserts that no vote of the qualified voters of the county authorized the issue of the bonds for $50,000.

After a trial and a multiplicity of pleadings and a change of venue, the case was finally determined in the circuit court upon an agreed state of facts, which were substantially these:

1. That the A. & B. R.R. Co. was incorporated by the act of February 9, 1857, and subsequently, to-wit, on the 17th of September, 1864, duly and legally organized.

2. It is admitted that sections 8, 9, 10, 11, 14 and 19 of the act incorporating the N. M. R. R. Co. (approved March 13, 1851,) were on the 17th of September, 1864, specially adopted by said A. & B. R. R. Co.

3. That after the organization of said company, to-wit: on the ——— day of ——— 1864, the following entry was made on the books of said company:

"We, the undersigned judges of ——— to subscribe

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$200,000 to the A. & B. R. R. Co., payable in county bonds, due in twenty years, at seven per cent. per annun, for said county of Clark, state of Missouri.

"Harvey Seymour, B. P. Hannan, Jacob Tinsman. Number of shares, 20,000; amount, $200,000."

That said H. Seymour and B. P. Hannan, signed the same at Luray in said county, and Tinsman at his residence during the vacation of the county court.

4. That afterwards, to-wit: on the ——— day of ——— by an order of said county court, duly entered of record, the question as to whether said county should subscribe 200,000 dollars to the capital stock of the A. & B. R. R. Co., was submitted to the resident qualified voters of said county, to be voted upon at the general election for state and county officers, held on the first Tuesday of November, 1864, at which said election a majority of the resident voters of said county voted not to subscribe said sum; that afterwards, to-wit: on the 6th day of June, 1865, the said county court, by its order duly entered of record, having ordered the same, a special election was held for the purpose of voting upon the question submitted to the resident voters of said county, as to whether said county would subscribe 100,000 dollars to the capital stock of said company, at which election a majority of the resident voters of said county voted not to subscribe said sum.

5. That afterwards, to-wit: on the 10th day of June, 1865, and at the dates subsequently, as the same appear in the transcript from the records of said county court hereto attached, marked "A" and made a part hereof, the said county court made the order, as in said transcript set forth, that on the said 10th day of June, and in pursuance of said order of that date, the county court issued and delivered to the A. &. B. R. R. Co. one hundred $500 negotiable bonds, with twenty interest coupons thereto attached to each of said bonds, of which exhibit "B" herewith filed, is admitted to be a copy, each coupon for the sum of $35, said bonds payable to said company or bearer, of which the bonds and coupons described in plaintiffs' petition and the coupons sued on, were a part; that said bonds were dated January 1, 1865; that afterwards, J. H. Crane, the duly authorized agent of said railroad company, before the maturity of said bonds and coupons sued on, for a valuable consideration, sold, transferred and delivered the said bonds and coupons to plaintiffs, who were then partners doing business under the firm name and style of Smith & Hall, who received said bonds and coupons in good faith, without actual notice of any defects in their issue, and that upon the representations of said Crane, that said bonds and coupons were issued to said company in payment of subscription of said county of Clark to the capital stock of said company; that the bonds and coupons now belong to plaintiffs, and are due and upaid.

6. It is admitted that, in pursuance of the order of the county court, authorizing him so to do, as the same appears in the exhibit hereto attached, marked "A," G. M. Ochiltree was present at an election held by said railroad company for the election of officers, on the first Monday of May, 1866, and as the agent of said county cast the vote of said county, in which he represented and cast 500 votes for and on behalf of said county, which said votes represented $50,000 stock of said company.

7. It is admitted that the first annual and a large proportion of the second annual instalment of coupons on the bonds described in plaintiffs' petition, were paid by the said county, on the presentation of said coupons at the county treasury; that the coupons sued on were presented to the county treasury on the 29th March, 1867, and payment demanded, and payment was refused, as will be shown by reference to endorsements on the back of said coupons. The coupons sued upon were made part of this statement.

Signed by Hagerman, attorney for plaintiffs, and Lipscomb & Anderson for defendants.

The order of the county court, referred to in the foregoing agreement, is as follows: "Whereas, heretofore, on the —— day of ——, 1864, the county court of Clark county, entered into a certain obligation to and with the A. & B. R. R. Co., by signing the books of said company, and subscribing $200,000 to said company's stock, by which obligation the county became liable to a prosecution for the said sum of $200,000; therefore, it is ordered by the court, that the county of Clark issue the sum of $50,000 in seven per cent. bonds, payable twenty years from date, interest payable annually, which is to be received by said A. & B. R. R. Co., in full satisfaction for the adjustment of said former liability, and that said bonds be placed in the hands of the county treasurer, to be by him paid out to said A. & B. R. R. Co., as other subscriptions are by the rules of said court required to be paid."

Section 14 of the North Missouri railroad charter, which is incorporated in that of the A. & B. R. R. Co., as authorized by section 10 of its charter, reads as follows:

"14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, &c."

Section 10 o the A. & B. R. R. charter (Feb. 9, 1857), is as follows:

"Said company shall in all things be subject to the same restrictions, and entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad company, by an act entitled 'an act to incorporate the North Missouri Railroad company,' approved March 3, 1851, so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein enacted."

Various declarations of law were asked, but the plaintiff had a judgment on the facts agreed.

I. A question is raised here whether the court had jurisdiction, on the ground that each count declared on a coupon for $35, which is a sum below the jurisdiction of the circuit court, but the aggregate of the coupons sued on, is admitted to be within that Jurisdiction. In the United States courts where the amount of $500 is essential to confer jurisdiction, the aggregate of the coupons sued on, has been always, impliedly or expressly assumed as determining the question of jurisdiction. The point was expressly decided by Judge DILLON at the spring term of the circuit Court in Jefferson City. We know of no decisions in our courts to the contrary.

II. Another point made in the case, is that the coupons in the case, not being made payable to any particular person, are not negotiable. That point is decided in McCoy v. Washington county, 3 Wallace, Jr., 381.

III. It is apparent from the agreed statement in the case, that the main and important question in it is, whether the court had the authority to issue the bonds in question under the act of 1857, which was the charter of the company, or whether the recitals in the bonds that they were issued under the General Statutes of 1855 were obligatory, and therefore, that the failure to call an election the recited act requires, vitiates the bonds.

The ground on which the circuit court decided the case, was that the charter of the company authorized a subscription without a vote; and we will examine that point first.

The charter of the A. & B. R. R. Co. was passed in 1857. It was enacted that the company should be entitled to all the privileges, rights and immunities which were granted to the N. M. R. R. Co., as fully and completely as if the same were re-enacted in the charter.

The charter of the N. M. R. R. Co. contained a provision that the county courts of any county in which any part of the road passed, might subscribe stock.

It is objected that the right of subscription granted to the counties on the line of the N. M. R. R., is not a privilege or immunity of the railroad company, but of the counties, and is therefore not transferred to the A. & B. R. R. Co. The section (14) conferring the power, as it appears from the agreed statement of facts, was

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expressly adopted by the A. & B. R. R. Co. It was undoubtedly the intention of the legislature to give to the last named company the same privileges that had been granted to the former. The county court had no power to subscribe to the stock of the railroad corportions, without a special authority from the legislature, either express or implied. The power thus conceded to the courts or other municipal bodies, may well be termed a privilege to the corporations, and we see no substantial objection to a transfer of such a privilege, by simply, in general terms, embodying the section of the original act which granted it, into the new law. That such was the intention of the legislature and of the railroad, company, is clear; and if the word "privilege" admits of the narrow construction claimed, the practical construction it has received in this State, as may be seen by reference to the decisions of our courts, would preclude any enquiry into the subject now. These provisions were the principal means by which this and other roads were built, and without them the charter would have been of no value. Hannibal & St. Joe Railroad Co. v. Marion county, 36 Mo., 295.

IV. The important question however remains: Whether this charter granted to the A & B. R. R. Co., on February 9, 1857, or rather, whether the section of it referred to, allowing subscriptions from county courts of counties along the line of the road, without a previous vote of the people, is not repealed by the subsequent acts of the legislature passed in 1860 and 1861, and before the subscription made in this case.

The law in the Revised Code of 1855, concerning railroad corporations does not require any election. The thirtieth section reads: "It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized, under this or any other act in this State, and the county court or city council subscribing or proposing to subscribe to such capital stock, *may for information* cause an election to be held to ascertain the sense of the tax-payers of such county or city as to such subscription, and as to whether the same shall be paid by issue of county or city bonds, as the case may be, or by taxation."

The act of January 14, 1860, amendatory of this law, merely changes the words, "may for information," into "shall for information."

That of March 3, 1861—which was also an act amendatory to the general statute in the Revised Code of 1855—requires an election to be held, and positively prohibits a subscription, if the result of such an election shows a majority of the votes of the county against it.

It is not of any importance, therefore, to enquire, whether the act of 1855 would not, of itself, be regarded as an expression of the intention of the legislature to prohibit the county and city authorities from subscribing to railroad corporations, without ascertaining the wishes of at least a majority of the people within their respective municipalities, because the amendatory act of 1861, undoubtedly so declares; and this act, as well as that of 1860, was passed before the subscription now in question was made.

At the same time, the charter of the A. & B. R. R. Co.—and we may add, without going outside of the history of various and repeated State adjudications and State legislation, the charters of a number of other railroad companies—allowed the counties, cities and towns, to subscribe without any vote of the people. The question is, whether the provisions in the general law, on the subject of railroad corporations, repealed the specific provisions of the special acts, chartering particular companies.

In 1867, the Macon county case was decided (41 Mo., 450) and the subject was there discussed and decided. It is true that the act of 1861, though referred to by counsel, is not particularly noted in the opinion of the court, but the act of 1865, which passed before the subscription made in that case, is fully considered, as well as the prohibitory clause of the constitution of 1865. The act of 1865 is just as stringent as the act of 1861, so far as the necessity of the vote is concerned, and it was more so in regard to the number of votes essential to authorize the subscription. The subscription in that case was made in 1867, after the adoption of the new constitution, and after the passage of the act of the legislature carrying into effect the constitutional provision.

In this case, (the Macon county case), the case of Alexander v. Saint Louis, 23 Mo., 483, is particularly examined, and the opinion of the court in this last named case is reaffirmed, and the doctrine applied to the case under consideration. It was held that a general prohibition is not inconsistent with a special indulgence, and that a special indulgence is not repealed by a general prohibition, though the latter is subsequent in time to the former. In the case of Alexander v. St. Louis, the city was, by its charter, expressly prohibited from subscribing to the stock of *any* corporation, and a special act passed before the passage of the charter allowing it to take a certain amount of stock in the Ohio and Mississippi Railroad Company, was held to be valid, and not affected by the general provision of the charter. In the Macon county case, the same doctrine is adopted; and the same subject—though not in regard to railroad corporations—is discussed in Deters v. Renick, 37 Mo., 597; in Vastine v. Probate Court, 38 Mo., 529; and in the City of St. Louis v. Md. Ins. Co., 47 Mo., 149; and a similar conclusion reached.

Moreover, the Macon county case was followed by the Nodaway county case, decided in 1871, [47 Mo., 346; S. C., 48 Mo., 339,] and the Sullivan county case, decided by this court at the February term, 1873, [51 Mo., 522], re-affirming the former decisions.

So that the provisions of the Rev. Code of 1855, and the amendatory acts of 1860 and 1861, and the constitutional prohibition and the legislative adoption of that prohibition, immediately after its passage, have been held by repeated adjudications, and without any conflicting opinions of the court, or any individual judge thereof, so far as the reports show, not to affect the repeal of the privilege contained in special charters.

That this was understood to be the law of the state, appears also to have been recognized by the legislative department of the government; for in 1872 the legislature passed "an act to repeal certain sections of the law, granting to county courts and other corporate bodies the power to subscribe stock to railroad corporations." This act was approved January 30, 1872, and specifically repeals certain designated sections in certain acts particularly specified and including among the twenty or thirty charters enumerated, the charter of the A. & B. R. R. Co. This was, or would have been, a mere act of supererogation if it had been understood or supposed, that previous legislation on this subject had already effected this object.

Thus it will be seen that, up to January, 1872, the decisions of the Supreme Court had been acquiesced in, and no doubt acted on, by the railroad corporations and the municipal authorities, of various counties, cities and towns; as the judicial history of the state undoubtedly shows. The necessary result was the investment of vast amounts of money in securities issued by counties, cities and towns, by virtue of the provisions in the charters of railroad corporations. After the acts of 1855, 1860, 1861, 1865, the subject was regarded as *res adjudicata*, and upon this view, millions of dollars have been invested.

Whatever, therefore, might be the opinion of this court, or of any individual judge, had the question come up for examination, as an open one, we are all of opinion that it is now too late to disturb the received construction.

V. But it is objected in this case, that the bonds, upon their face, purported to have been issued under the act of 1855, and that the holder is estopped from claiming that they were issued under the special act of 1857, which was the charter of the company.

Whether the recital in the bonds, would constitute an estoppel

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against the makers, it is not important to enquire; if it were so, it would not follow that the purchaser or holder is bound. If he can show that the power existed, a false recital of it, however obligatory upon the county or its agent, would not defeat its efficacy, in the hands of a party in nowise concerned in the perpetration of the falsehood. Crane v. Lessee of Astor, 6 Peters, 598.

Conceding, however, that the law is otherwise in regard to this recital, the question would still remain, whether a recovery on such bonds could be defeated by proof on the part of the county, that no election was held. This question was presented by instructions in the circuit court, and decided; and, although it might be passed by in the case, yet as it is an important question, and arises in other cases, now before the court, it may as well be considered here.

In the examination of this question, it is proper to enquire what determination, if any, has been reached by the Supreme Court of the United States, on this point. The decisions of that court are not obligatory on this court, in questions of that character; but it is certainly very desirable, and of great importance to such of our own citizens as may have invested in such securities, that they should not be depreciated below their value in the hands of citizens of other states, or foreigners. The federal courts, having long since determined that these securities occupy the footing of commercial paper, do not consider themselves bound by the decisions of the courts of the state where they are issued, and have, in fact, utterly disregarded them in various instances, as the numerous cases in the Supreme Court from Iowa, and some from Michigan, show. The only effect, therefore, of contradictory decisions here, if such should occur, would be to compel our citizens, who hold such bonds, to sell them, perhaps at a ruinous discount, to citizens of other states, who can sue in the federal courts.

I do not propose reviewing the numerous cases in the Supreme Court of the United States, on this subject. They run over a considerable period, commencing, perhaps, with the case of Knox county v. Aspinwall, 21 How., 539, and terminating, so far as the published decisions go, in the case of Grand Chute v. Winegar, 15 Wallace, 355. There may be more recent cases, but I have not access to them.

In this case of Grand Chute v. Winegar, the question came up in a shape which renders the view of that court on it clear and unmistakable. The point is presented by a plea and demurrer, and is, therefore, not liable to be misunderstood, or to admit of conflicting constructions, as the general issues or abstract propositions stated in other cases, seem to have been considered. The seventh plea was, "that no special election, such as the act prescribed, had been called or held, previous to the issue of the bonds." The act, under which the bonds were issued, § 6, declared, "no bonds shall be issued by any town, in pursuance of this act, unless a majority of the votes, cast in said town, at the election hereinafter mentioned, shall be in favor of the same." Section 7, says, "a special election should be called and held in each of the towns before named, for the purpose of carrying this act into effect, within six months after the passage of this act," and then proceeds to specify particularly the mode of conducting the election. To this seventh plea, there was a demurrer, and the demurrer was sustained by the circuit court before which the case was tried, and on appeal to the Supreme Court, the judgment was affirmed.

Mr. Justice HUNT, who delivered the opinion of the court, refers to Knox County v. Aspinwall, 21 Howard, 539, Mercer County v. Hackett, 1 Wallace, 83, and Meyer v. the City of Muscatine, 1 Wallace, 384, and quoting the language of Judge NELSON in the first named case, says that a *bona fide* holder for value of a bond issued under an act of the legislature, has a right to presume that all precedent requirements of the act conferring the power, have been complied with. He says emphatically that "the cases cited are an answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents."

Now, in this case, "the form of law" not complied with, was the total absence of any election at all, which the law required; and this fact was specially pleaded, and to this plea there was a demurrer, which, of course, admitted the fact. There is, therefore, no room for misconception, as there was in some of the other cases which decided the same thing in general terms. The plea was held bad, and the want of an election held to be no defence.

The court, however, go further—I may say the court, for no dissent of any of the judges appears in the report—and quote with approbation the head-note of the reporter in the Aspinwall case, and apply it to the case then under consideration. In the Aspinwall case there had been an election, but upon an insufficient notice; but the court in the Winegar case, where there was no election at all, apply the principle or doctrine as announced by Judge NELSON, and put at the head of the case by the reporter, "that where the bonds on their face import a compliance with the law under which they issued, the purchaser is not bound to look further for evidence of a compliance with the conditions of the grant of power."

Notwithstanding some fluctuations of opinion as to the extent to which the doctrine in the Aspinwall case went, we may assert with confidence, that, with the exception of the case of Marsh v. Fulton County, all the cases since have conformed to the spirit and meaning of the Aspinwall decision. There were at first some dissenting judges who sought to establish different views, but recently it seems to be conceded, that the court has fully and finally settled on the doctrine of this leading case, and sustained the validity of municipal bonds in the hands of *bona fide* holders, wherever an authority to issue them is conferred by law although that authority may have been accompanied with conditions and limitations, which were disregarded by the municipal authorities. At times, this presumption of a compliance with the law on the part of the agents designated by the legislature, seems to have been based on estoppels, such as recitals on the face of the bonds, the fact that the county or city had levied taxes to pay interest on them, or had received in exchange for the bonds certificates of stock from the railroad companies. This last was the only estoppel in the case of Pendleton County v. Amy, 13 Wallace, 297. But the court ultimately take the broad rule heretofore stated, and which is announced in the City of Lexington v. Bullen 13 Wallace, 296, "that when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and are no more liable to be impeached in the hands of such a holder than any other commercial paper."

This being the result of the adjudications of the Supreme court of the United States, let us see how the question stood here at the time the bonds in question were issued and purchased.

In 1863, the case of Flagg v. the City of Palmyra was decided. In that case, the return of the city officers set up, as a defence, among other matters, that there was no election, though required by the act of the legislature authorizing the subscription. Issue was taken on this plea, but the evidence on the trial is not reported or noticed in the opinion of the court, for the manifest reason, as it will appear from the opinion, that the court regarded the issue as immaterial. For the court say: "In this case, if the bonds have been issued by the city of Palmyra, in apparent compliance with the law, and themselves gave no evidence of a want of performance of the prerequisites to their issuance, and no actual notice of any such defect is traced to the bondholder, we will not hold the bondholder to be affected by a failure of the officers of the city of Palmyra to perform all that was required by law of them, in anticipation of and preparation for the issuing of these bonds. Being issued in apparent conformity to the law,

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the public (any of whom might acquire the bonds) is entitled to view them as issued in actual conformity to the law, and to suppose that all the acts required of the people and officers of the city of Palmyra had been duly performed.

"To apply these principles to the present case, we hold the bondholder to a knowledge of all that is combined in the act of the general assembly, to incorporate the city of Palmyra and the assembly acts above quoted; but in the absence of actual notice, do not hold them bound to enquire whether an election had been held as to the making of a registration of stock in the Q. & P. R. R. Co., or as the regularity of such an election of the qualified voters thereat, or whether the city of Palmyra had actually registered its stock in the Q. & P. R. R. Co., or whether such registration was made by the proper officer or officers of the city of Palmyra, The issuing of the bonds authorized the receiver or purchaser thereof to suppose that all those things, if required by law, had been done in the true form and substance required by law."

This language is plain, pointed and unambiguous, and substantially enumerates the doctrine of the Supreme Court of the United States, in the cases to which we have referred.

This was the law of this State in 1863, and continued to be the law, until the case of Steins v. Franklin County, 48 Mo. R., was decided, which was in 1871, eight years after the decision in Flagg v. Palmyra. The bonds in controversy in the case now under consideration, were issued in 1865, so that the law as declared by this court in the case of Flagg v. Palmyra, is the law which ought to govern the rights of the parties. Gelpcke v. City of Dubuque, 1 Wallace, 175; Thompson v. Lee County, 3 Wallace, 330; Havemeyer v, Iowa County, 3 Wallace, 303.

I have been unable to see the force of the distinction which this court has recently made, between the various prerequisites imposed by law upon the action of municipal bodies, and the grounds upon which a prominence is given to a mere election, without regard to the substantial defects which may accompany it.

It would seem that an election without notice, or upon insufficient notice, or one in which the requisite majority is not obtained, or at which disqualified votes are allowed, would be as worthless as no election at all. Of course, mere formal defects occupy a different position and may well be passed over, but it is conceded in all the cases, that every question as to regularity of the election and the result, is closed against the municipal body that issues the bonds, and it is only essential to their validity in the hands of *bona fide* holders, that some sort of an election should be held. It may be, that there is only a majority vote for the subscription, when the law requires two-thirds; it may be, that from want of sufficient notice, a mere fraction of the voters appear at the polls; it may be that hundreds of minors and other disqualified persons have voted; and in all these cases, the prerequisite of an election is as completely and essentially evaded, as if no election had been held. Yet the officers of the municipality are allowed to decide upon the question, and their decision is held conclusive. Why not hold it equally conclusive when no election at all is pretended? It is said that the power to subscribe is derived from the people of the county or city, and if this be conceded, a fraudulent or unfair and illegal election is as fatal to the exercise of the power, as a subscription without any election at all.

VI. But the power is derived from the law, without which the unanimous vote of every voter in the county or city could not confer it. The law gives the power, but restricts its exercise by requiring an election. The power is not derived from the people of the city, or the county, or township, but from the legislative branch of the government. The municipal subdivisions are allowed to issue negotiable securities upon certain conditions, and one of the conditions is not complied with. All the conditions and restrictions and limitations are equally binding. The absence of one of the prerequisites is as fatal as another. The securities are negotiable, and go to the market as negotiable paper. Is the buyer bound to enquire whether the prerequisites have been complied with? Or is he authorized to assume that these municipalities have done their duty, as the bonds on their face certify?

VII. As I understand the doctrine of agency, a negotiable instrument can not be defeated by a plea that the agent who executed it exceeded his powers; provided he was authorized to execnte such an instrument upon conditions such as he failed to observe.

If a clerk or cashier issues paper, as an agent, to an amount exceeding that allowed by his principal, the holder can recover from the principal. Farmer's Bank v. Butchers Bank, 16 N. Y. 125.

If a security on a negotiable instrument makes the principal his agent, and instructs him to deliver it only in case some other person signs it, and the agent delivers it without such additional signature, all the cases hold that the security can not defend on the ground of want of authority. This is decided in a case at the present term.

VIII. The result of the decisions of the United States Supreme Court and of this court, at the time of the issuance of the bonds in controversy, is, that the holder had a right to presume that the act of 1855 and the amendments thereto had been complied with, and therefore, the defence of no election is unavailing.

It will, of course, be understood, that throughout this opinion, all the questions examined are in regard to the rights of *bona fide* holders of municipal bonds, and are not intended to indicate any opinion upon questions arising on mandamus or injunction, or other form of proceeding to arrest the action of municipal bodies or their officers. We have not referred to the decisions of this court on such questions, because very different conditions enter into such adjudications. Moreover, the law inflicts heavy penalties upon municipal officers who exceed or disregard their powers in subscribing to railroad companies, not only pecuniary, but personal.

In conclusion, I venture to copy and adopt the opinion of Judge GRIER, in Wood v. Allegheny County, 3 Wall, Jr. 267, whose opinion, however, bluntly, and, perhaps, quaintly expressed, seems to me quite as applicable to the condition of affairs in Missouri, as he supposes it to be in Pennsylvania:

"If the right of a municipal corporation to subscribe, even when authorized by the legislature, to purposes so alien to its general purposes, in the construction of works of improvement, and which, in the largest part, are in distant counties and other states, were open to me for consideration as a new point, I cannot say that I would hold such subscription other than simply void. The strongest arguments at law have been made against such subscriptions, and they are worth recurring to, as containing true and lawyer-like views of the extent and character of municipal powers. But the matter is not open in this court. The legislature of Pennsylvania has authorized counties to make such subscriptions, and the supreme court of the state has decided, though by a bare majority, that the act is constitutional.

"In spite, then, of all resistance by the county to paying these bonds, here are the bonds, upon which the county promises to pay. The county said to the railroad companies: 'We want to help you; we have not the money, but we will lend you our credit, our promise to pay.' That promise is, or ought to be, sacred. Doubtless many improper things have been done. The whole business of making cities and counties to subscribe to railroads, was unwise. This will be admitted now; though the counsels of the able and conservative men who took ground against it, were not heeded when given. Mercantile and popular clamor demanded 'subscription;' traders, politicians and all kinds of interested jobbers, urged and drove the matter, while commissioners, grand jurors and legislators have been led in the train. It is to be lamented that such things should be done, but they have been done. If the electors of our cities choose to hand over the

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great concerns of our public offices to ignorant and unprincipled administrators, they must suffer by it. They must, themselves, bear the burdens which they put it in the power of knaves to pile upon them. Whatsoever a man soweth, that he shall reap, and when he sows the wind, he is apt to reap the whirl-wind.

"The objections urged against the plaintiff's claim would have force, if the questions were between the county and the railway companies. But it is not. It is between an innocent holder for value of a bond payable to bearer, and the party who sent it out into the market, or handed it over to others to do so, where it has been sold in the course of trade. It is useless to bring forward here, as against the business operations of this day, abstract dogmas out of Blackstone or the Institutes of Coke. Such instruments as these were never dreamed of in their day. The laws of trade suggest and govern these matters. As I said in the beginning, there is the bond; here is the fact. Your promise to pay is put upon the market. You gave it this negotiable and coupon form, for the purpose of facilitating sale and preventing all questions of equity about it, and now, when the promise has been put upon the market and sold to an innocent holder, you set up these equities. That would do. Why did you issue your bonds if you meant that the holder should look to the railways? Why did you not leave the railways to issue their own? For this reason only, that you knew that capitalists would trust you and would not trust them. I esteem the bold, hardy and industrious people of this country; I feel for them, with this load of debt put upon them by the careless and unworthy persons whom they have elected to office. But they have allowed the bonds to be issued and sold, and they must pay for them."

The judgment of the circuit court is affirmed, with the concurrence of all the judges except Judge SHERWOOD, who is absent.

AFFIRMED.

On a subsequent day of the term, a motion for rehearing was made; upon which ADAMS, J., delivered the opinion of the court, as follows:

This motion was not filed within the time prescribed by the rule of this court, requiring such motions to be filed within ten days after the opinion of the court shall have been delivered. But, as it is a very important case, and as there seems to be some misunderstanding in regard to the precise points passed upon by the court, we have considered the motion, and in overruling it, I deem it proper to state briefly what was concurred in by us.

We assented to the proposition that the charter of the railroad company, which was enacted in February, 1857, allowed counties to subscribe to the stock of the company without taking a vote of the people. In regard to this matter, the charter is plain and positive. The next point was, whether this provision of the charter had been repealed by any subsequent legislation, or by the new constitution of 1865. This point was considered settled by repeated decisions of this court, to the effect that no subsequent act of the legislature or the constitution had repealed that provision of the charter.

On the faith of these decisions, large amounts had been invested, and we considered that the question had been put at rest, and had become a rule of property, which we had no right to disturb. This decision only applies to such charters as were granted prior to the constitution of 1865. There is nothing in the opinion which will warrant the conclusion that has considered that part of the charter, allowing such subscriptions a franchise which could not be repealed, either before or after the adoption of the new constitution.

It was not necessary to decide that the recitals, in the bonds issued by the county court to the railroad company, were conclusive or amounted to an estoppel. In my judgment, and in the judgment of a majority of the court, they do not amount to an estoppel. Although that is the settled doctrine of the Supreme Court of the United States, it has not been sanctioned here so as to make it a rule of decision in this State. These bonds were issued after the opinion of this court in Flagg v. City of Palmyra, and before the Franklin county cases.

In delivering opinions, the judge who delivers them is allowed to make his own arguments and illustrations, without compromitting the other judges. It is unnecessary to say that the illustrations indulged in by the learned judge, who delivered the opinion under review, were his own, and it was not necessary for the other judges to sanction them in order to concur in the result.

The only new point in this motion, not passed upon by the court, is, that the charter of the company had ceased before the company was organized. Whether the corporation had a legal existence or not when the subscription was made, is a question that cannot be raised in a collateral proceeding. It did exist as a matter of fact, and was in the exercise of all its chartered franchises, when the subscription was made and these bonds issued. The only proper way to test this matter is by a direct proceeding by the sovereign power of the State. It is a question between the state and the company, and a proceeding by way of *quo warranto* is the proper remedy. State Bank v. Merchants' Bank of Baltimore, 10 Mo., 124.

The motion for a rehearing is overruled. Judge NAPTON filing a separate opinion.

The other judges concur.

NAPTON, J., said: In the opinion overruling the motion for a rehearing, I concur.

In the opinion of the court, heretofore filed, I discussed no question which was not raised by the record. The points were two: First, whether the laws passed since 1857, the date of the charter in question, repealed the privilege granted in that charter of taking subscriptions from counties without a vote, and upon that point the court was agreed that they did not, on the authority of various decisions referred to.

The next point was, whether, if the bonds were conceded to have been issued under the law of 1855, which, on their face, they purported to have been, the absence of an election defeated a recovery on them; and, upon this point, I referred to the decisions of the Supreme Court of the United States, and to the decisions of this court anterior to, and long after, the issue of the bonds in controversy, and showed that both courts held such bonds valid, in despite of the want of an election, and as such was recognized to be the law, both in this state, and by the Supreme Court of the United States, *at the time of the issuance and purchase* by the holders, the bonds could not be defeated by such a plea; although this court might have held differently since, and might entertain a different opinion now.

Upon both these points, I adhere to the opinion heretofore given.

There was, of course, no opinion given, in regard to bonds issued under charters, general or special, granted since the new constitution; for no such question arose; nor could any such question arise in regard to special charters, as the new constitution prohibited any such charters.

NOTE.—The leading cases in the Supreme Court of Missouri, on the subject of municipal railway aid bonds, are Flagg v. Palmyra (city of) 33 Mo., 440, 1863; Steines v. Franklin county, 48 Mo., 167, 1871; Carpenter v. Town of Lathrop, 51 Mo., 483, 1873, and Smith v. Hall v. Clark county, above given, decided November 3, 1873. The case of Flagg v. Palmyra, was decided after the Commissioners of Knox County v. Aspinwall, 21 How., 539, 1858; Bissell v. Jeffersonville, 24 How., 287, 1860, and Moran v. Miami County, 2 Black, 722, 1862; and when it is read in connection with these cases, it will he seen that the observation of Mr. Justice NAPTON in the principal case, is quite correct, that it "substantially enunciates the doctrine of the Supreme Court of the United States." The bonds in the case of Flagg were issued under a special act of the legislature, authorizing their issue, by the city of Palmyra, in case a majority of the qualified voters should, at an election to be called by the City Council for that purpose, so determine. It appears that an election was held, and that the bonds issued by the city of Palmyra, were in the hands of *bona fide* holders

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for value. It was contended that the bonds were void, because proper notice of the election was not given, and because the bonds showed on their face that they were dated prior to the passage of the ordinance of the city, under which the bonds purported (according to their recitals) to have been issued, etc. These defences were held to be unavailing, and, in giving the judgment of the Court, BATES, J., uses the language quoted in the principal case.

In 1871, Steines v. Franklin county, *supra*, was decided, and it was there held where the county court issued bonds without *any vote whatever* of the people, when the statuted require a precedent vote, that such bonds were void even in the hands of a *bona fide* holder for value, though it was competent for the legislature to validate them. Mr. Justice WAGNER comments on the leading cases in the Supreme Court of the United States, and calls attention to the contray views asserted by some of the state courts. In the course of his opinion, he remarks: "But the Supreme Court of the United States, in a series of adjudications, have established a different principle, and one which we believe is more in consonance with justice and reason. We have heretofore conformed our ruling on this subject, with the decisions of the National Court, not on account of its paramount authority, for on this question it has none—but, because it inculcated an unbending principle of right, and a rigorous morality. Whether any of the cases have gone sufficiently far to warrant the holding of these bonds binding and valid, is now to be enquired into."

Commenting also on the language of the opinion in Flagg v. Palmyra, quoted by NAPTON, J., in the principal case, WAGNER, J., observes: "This language is exceedingly broad, and if it is construed as applicable only to the facts in the case, it is sustained by numerous cases. But, if it is intended to assert that a court or a city council, who have power under certain circumstances, to make contracts and issue bonds, may disregard these circumstances or conditions entirely, and then issue bonds purporting to be in pursuance of authority which will be binding, and against which no defence can be made, we dissent from it."

And the conclusion is reached in the Franklin county case, that it is consonant with the decisions of the Supreme Court of the United States, and with Flagg v. Palmyra, to hold that bonds issued without *any* election, when the statute conferring the power requires an election, and the sanction of a popular vote, are, in whosoever hands they may be, utterly void. [But on this point, see the decisions of the United States Supreme Court since pronounced: *Pendleton* v. Amy, 13 Wall. 297; Lexington v. Butler, 14 Wall. 282, and particularly Grand Chute v. Winegar, 15 Wall. 355; Kennicott v. Supervisors of Wayne county, 16 Wall. 452; and Rogers v. St. Joseph Township, 16 Wall. 644; and on the other hand, Lewis v. Commissioners of Bourbon county, recently decided by the Supreme Court of Kansas, and which will be published in our next number.]

In Carpenter v. Town of Lathrop, *supra*, decided at the February term, 1873, 51 Mo., 483, which was a case in which the bonds were in the hands of an innocent holder, and recited that they were issued "under and pursuant to an order of the board of trustees of the town, * * and authorized by a vote of the people of the said town at a special election held for that purpose," and in which an election had been in fact held, the plaintiff was non-suited in the inferior court, and the judgment of non-suit was affirmed by the supreme court, on the ground that the *holder of the bond*, in order to recover must, by evidence *aliunde* the recitals in the bonds, "show, with reasonable certainty, that an election was held, at which the vote was taken, and that it had been taken and the result decided substantially in conformity to the law." In his opinion on this point, VORIES, J., 51 Mo., 498, says: "In a case like the present, it devolves on the plaintiff to show with reasonable certainty, that the authority to issue the bonds had been conferred by an election authorized by law, and that the vote had been preserved by poll-books or otherwise, by persons authorized to do so, and that the votes had at least been received and passed on by some persons authorized to pass upon them, and decide whether the election had been carried, or whether the voters had assented to the subscription. * * The recitals in the bonds are not sufficient evidence to bind the defendant, or to show that the power existed in the trustees [of the town] to execute the bonds. The recitals would, doubtless, be sufficient to justify an innocent purchaser in receiving the bonds, without being charged with notice of any mere irregularities in the conferring or exercise of the power necessary to their issue, and I think, that this is the only effect the recitals could have. The plaintiff would still have to show with reasonable certainty, that an election was held, at which the vote was taken, and that it had been taken, and the result decided substantially in conformity to the law."

This brief reference to the State adjudications prior to the principal case, in connection with the several opinions in that case, above given, will, it is believed, show with accuracy and sufficient fullness, the views of that tribunal on the subject of the power to issue bonds of this character, and the defences that may be made to them. This is the only purpose of the present note. We shall soon publish other decisions upon the same subject, rendered in the Federal Courts for Missouri, and by the Supreme Court of Kansas and elsewhere.

"Fleeing From Justice"—Construction of the Act of 1790.

THE UNITED STATES v. THOMAS M. O'BRIAN.

United States Circuit Court, District of Kansas, November Term, 1873.

Before DILLON, Circuit Judge.

Crminal Law—Limitation of Prosecution—Fleeing from Justice.—A "fleeing from justice" within the meaning of the Act of Congress limiting Criminal Prosecutions, is to leave one's home, residence or known place of abode, within the District, or to conceal oneself therein, with intent, in either case, to avoid detection or punishment for some public offence against the *United States*.

The defendant was indicted under the act of February 5th, 1867, Sec. 1, (14 Stats. at Large, 383), for selling to Hines & Eaves, bankers in Leavenworth, a check drawn by the Paymaster of the Army of the United States, upon the Assistant United States Treasurer at New York, with a forged indorsement of the name of the payee thereon, with the intent by the said Act prohibited. Under the plea of not guilty, the main question in the case was whether the offense was barred by the Statute of Limitations (1 Stats. at Large, 117, Sec. 32; 1 Bright. Dig. 322, Sec. 107). To take the case out of the Statute, the Government relied upon the proviso that the act shall not "extend to persons *fleeing from justice*."

In relation to this defence, the jury were charged orally as given below.

C. I. Scofield District Attorney, and *Thomas Ryan*, for the United States; *Thos. P. Fenlon* and *J. W. English*, for the defendant.

DILLON, Circuit Judge: The offence is charged to have been committed on the 31st day of December, 1867, and the indictment was not found until the 6th day of May, 1873—more than five years afterwards. The indictment alleges also that the defendant is a person fleeing from justice in this district, and that he has been thus fleeing since the first day of December, 1869.

The limitation statutes of Congress require an indictment for an offence, such as that here charged, to be found within *two* years from the time the offence was committed; but the statute contains a *proviso*, that the bar or the limitation shall not "extend to any person or persons *fleeing from justice*."

It becomes necessary to construe this proviso, and to instruct you as to its meaning. It is in evidence that the defendant left the district of Kansas in August 1869, and that he was afterwards publicly employed in the Paymaster's Department of the army in New Orleans, and that he afterwards resided for a time in Little Rock, St. Louis, and in Colorado, where he was arrested after this indictment was found. Before August, 1869, he had resided for some years in Leavenworth, doing business as claim agent and was well known there, and evidence has been introduced by the defendant to show that after he left Leavenworth, he was seen by different citizens of that place, in the cities above named, and that his whereabouts was generally known in Leavenworth and among all his acquaintances.

There is also evidence that there was a criminal proceeding pending against him when he left Kansas, in the *State* Court at Leavenworth for a violation of the laws of the State. There is no evidence that the defendant voluntarily returned to the district of Kansas, or had been therein since his departure in 1869.

It becomes necessary for you to determine upon the evidence, the motives of the defendant in leaving the State in the summer of 1869—or more specifically to determine whether he at that time fled from justice.

What is "fleeing from justice," within the meaning of the statute? Having reference to the facts of this case, my answer is, it means to leave one's home or residence or known place of abode,

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with intent to avoid detection or punishment for some public offence against the United States.

It results from, or is implied in this definition, that if the defendant left his home in Leavenworth solely to avoid the criminal justice of the *State* of Kansas, and not to avoid the criminal justice of the United States — this will not deprive him of the two years limitation.

The criminal codes of the General Government and of the States are entirely distinct, as was held by this court in Hawthorne's case, (1 Dillon, C. C. R., 422); and in my opinion it can not be supposed that Congress intended to make any provision in respect to persons fleeing from the justice of the States.

It is implied also in the definition above given, that mere departure by the defendant from the limits of the District of Kansas, irrespective of the motives and purposes of such departure, is not a fleeing from justice. An offender may flee from justice, within the meaning of the statute under consideration, though he never left the limits of the District; as for example, by secretly concealing himself, or by not being usually and publicly known as being within it. If the defendant, after his departure from Kansas, publicly resided in various places in the United States, did not conceal his whereabouts, and kept up an open correspondence with his friends in Kansas, these facts may properly be taken into view by the jury in connection with the other circumstances in evidence, in forming their opinion of his intent and purpose in leaving the State in August 1869.

[The jury found for the defendant, on the ground that the prosecution for the offence was barred.]

NOTE.—The decisions upon the proviso of the Act of April 30, 1790, as to "fleeing from justice," are not numerous.

It was decided by Chief Justice ELLSWORTH in William's case, that it need not be a fleeing from prosecution already begun — so stated by Mr. District Judge EDWARDS in the United States v. Smith, which was a case in the Circuit Court for the District of Connecticut, reported 4 Day, 121, 1809, and where the same view was taken. Nor need it be a fleeing from process issued. United States v. White, 5 Cranch, C. C. R., 38, 1836; S. C. Ib. 116, 368, 457.

Whether mere departure from the United States is a fleeing from justice, or whether if the defendant *fled* the district, but within two years openly returned to it, he can avail himself of the Statute — see the cases above cited.

The case of O'Brian seems to be the first one which has ruled the point that the fleeing must have been from the criminal justice of the United States—and that it is not sufficient if the sole motive of the defendant in leaving his known place of abode was to avoid the criminal justice of the State. The point, however, is not free from difficulty.

Although the indictment in O'Brian's case alleged that the defendant had fled from justice, this is not necessary. The defendant may avail himself of the statute of limitation, either by special plea or under the general issue. If he pleads specially, the Government may reply that he fled from justice. And under the general issue, the prosecutor may introduce evidence to bring the defendant within the exception of the statute. United States v. Cooke, decided at the Dec. Term, 1872, of the U. S. Supreme Court, where the subject is fully examined by Mr Justice CLIFFORD; S. C., with valuable note, 12 Am. Law Reg, (N. S.) 682.

Trustee's Sale — Fraud — Payment of Debt Before Sale.

A. M. FERGUSON v. WILLAM COWARD.

Supreme Court of Tennessee, Jackson, Nov. 5th, 1873.

A. O. P. NICHOLSON, Chief Justice.
P. TURNEY,
ROBERT MCFARLAND,
JAMES W. DEADERICK, } Judges.
THOS. J. FREEMAN,
JOHN L. T. SNEED,

1. Practice—Ejectment—Fraud.—In an action of ejectment by the purchaser at a trustee's sale, to recover the land purchased, the defendant cannot set up as a defence that there was fraud in making the sale. Such a defence is not available at law.

2. Trustee's Sale—Payment of Debt.—It is a good defence in such a suit, that the debt secured by the trust conveyance was paid by the debtor before the sale; and the exclusion of evidence tending to establish this fact, is error. By the payment of the debt by the debtor, the legal title returned to him; and the trustee had no right to sell, and no title to convey.

FREEMAN, J.—Coward brought this action of ejectment to recover a lot in the city of Memphis. A judgment was rendered for plaintiff, from which defendant prosecuted an appeal, in the nature of a writ of error.

The facts necessary to be stated are, that Ferguson conveyed the lot to Samuel H. Coward as trustee, to secure the payment of a debt due plaintiff, William Coward. The trustee sold the lot under the deed of trust, at which sale, William Coward, the beneficiary, became the purchaser; the trustee making him a regular conveyance for the same, under which he sought to recover the lot in this action.

Two questions are presented in the record for decision. First, it was proposed by defendant on the trial, to show that there were fraud and collusion between the trustee and the purchasing beneficiary, in making the sale, and thus obtaining the conveyance of the legal title. On this question, we approve the ruling of the circuit judge, that this could not be set up in a court of law, in the mode attempted, to defeat the operation of the deed.

The other question presented in the record—but not argued before us, there being no counsel for appellant in this court,—is founded on a proposition of defendant's counsel, to prove by a witness, A. M. Ferguson, the maker of the deed, that the debt secured by the deed of trust, had been paid before the sale by the trustee. Plaintiff objected to the introduction of this testimony, and the objection was sustained by the court.

In this the court erred; as we deem it now settled in Tennessee, that on payment of the debt by the mortgagor, the title returns to the former owner; not so, however, in case of payment by a third party, who, in such case would be held the assignee of the mortgage. Carter v. Taylor, 3 Head, 33. If the debt had been paid by Ferguson, before the sale, as was proposed to be shown, then the trustee had no right to sell, or title to convey. We are therefore compelled to reverse this case for the error referred to, and remand for a new trial. REVERSED.

Notes of Recent Decisions.

[We expect soon to have arrangements perfected, by which we shall be regularly furnished with notes of the latest decisions of several of the courts of last resort in the western and southern states, and also of several of the federal courts. Until then we shall be obliged to draw, to quite an extent, from our exchanges for our "notes of recent decisions." Such of the following "notes" of cases as were decided in Pennsylvania, are to be credited to the *Pittsburg Legal Gazette*. The files of our St. Louis contemporary, the *Journal of Law*, have assisted us in making notes of several Missouri cases, there published in full.]

Slander; Damages.—In an action of slander, it is not necessary that there should be an assessment of damages upon each count of the petition. Polston v. See, Sup. Court Mo., Oct. Term, 1873.

———; *Condition in life of the parties.*—The condition in life, both of the plaintiff and defendant, are proper subjects of enquiry in slander cases on the question of damages. Ibid.

———; *Quantum of Proof to Establish Justification.*—In an action for slander, when the truth of the words spoken is alleged as a justification, the defendant must make out such plea *beyond a reasonable doubt.* Ibid. SHERWOOD, J., dissenting.

Chancery Practice; Multifariousness.—A bill praying for a specific performance of a contract to convey land, and also that the defendant account for the rents and profits accruing while he was wrongfully in possession, is not multifarious. Duvall v. Tinsley, Sup. Court Mo., Oct. Term, 1873. Nov. 3.

Tax Title; Adverse Possession.—In Chapman v. Templeton, the plaintiff brought ejectment and exhibited a clear paper title. The defendant claimed under a tax deed, made in 1868, reciting a certificate of purchase

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made in 1858. This was offered as *color of title* to support the defence of the statute of limitations. The only evidence of possession was, that the defendants had permitted the city of Louisiana to build a hog-pen on the center of the block in controversy, which had been occupied about two years, and had then been abandoned and gone to decay, and that the defendants had paid taxes for ten consecutive years. *Held*—

1. That there was no evidence of a continuous adverse possession ten years, so that the bar of the statute of limitations would attach. The continuous payment of taxes is not of itself sufficient to show adverse possession.

2. There being no evidence of a continuous adverse possession during the time prescribed by the statute of limitations, it was not error to refuse to permit the tax deed to be read in evidence. Supreme Court, Mo., Oct. Term, 1873.

Outstanding Title.—Another point made in last case, related to the rejection of evidence that the former owner had conveyed the land in controversy by parol, for the purpose, it would seem, of showing an outstanding title in a third party. The rejection of this evidence was held proper. Since the introduction of the common law, lands cannot be conveyed in this state by parol.

Railway Negligence; Killing Stock.—Where it was proved that the plaintiff's cow was killed by being run over by a train on defendant's railway track, at a point where it passed through the open prairie, and where there was no fence nor crossing;—*held*, that in such cases, the law presumes negligence, and it does not devolve on the plaintiff to prove it. All that the plaintiff was required to show was, that the cow strayed upon the track, without his fault, or by reason of the track not being fenced. Lantz v. St. L., Kan. City and Northern Railway Co., Sup. Court Mo. Oct. Term, 1873.

Consideration; Compounding Debt Due by Insolvent.—Where the plaintiffs and other creditors of the defendant, who was in insolvent circumstances, without any fraud, agreed to accept fifty cents on the dollar in full satisfaction of their respective claims, and the plaintiffs had been paid such composition in full, and had surrendered to the defendant the note held by them upon him in pursuance of such agreement—*held*, that they cannot maintain an action to recover the unpaid balance of such debt. Murry et al. v. Snow, Sup. Court Iowa, Dec. Term, 1873; 7 Western Jurist, 685.

Tender; Admission.—An answer averring a tender of a sum to the plaintiff, and that it is brought into court, is a good plea of tender, and operates as an admission that the sum tendered is due the plaintiff, and authorizes a verdict for the plaintiff in an amount which the jury may find due him, which cannot be less than the sum tendered. Babcock v. Harris, Sup. Court Iowa, Sept. Term, 1873, 7 Western Jurist, 687.

Rape; Evidence of Immediate Outcry.—In Burt v. The State, 23 Ohio State, 394, which was an indictment for rape, the state was permitted to prove that the prosecutrix made declarations soon after the alleged assault, *charging the defendant with being the guilty party*. The part of the testimony indicated by the italics was objected to, and it was urged by defendant's counsel that, although it was competent to admit her declarations immediately after the offence, to show the fact that an offence had been committed upon her, yet that it was incompetent to admit her declaration that *a particular person* had committed it. But the supreme court held that there was no error in admitting the testimony. WELCH, J., said: "Undoubtedly the safer and better rule, in the generality of cases is, to limit the prosecution to a general statement of the fact that complaint was made, or the substance of her declarations, and leave the prisoner to bring out the details, if he chooses to do so. How far the prosecution shall be permitted to go into details, in giving the declarations of the female, must, to a great extent, at least, be left to the discretion of the court. Whether the court might, in any given case, so far abuse that discretion, as to render the proceedings erroneous, we need not now decide. It is enough for this case, to say that we are by no means prepared to lay down as law, the rule insisted upon by counsel, namely, that in proving her declarations, the fact that the prosecutrix charged the crime upon the prisoner, should be suppressed. If she was acquainted with the party, and recognized him at the time, his name would be almost the first word she would utter, in making her outcry or complaint; and the complaint would be constrained without it. It is because it is *natural* for a female to make immediate complaint, when so violated, that the law calls upon her to show the fact of such complaint, and the law will not require her to make a complaint that is *unnatural* and constrained. We think the court did not err in admitting the testimony."

Quo Warranto; Pleading.—The enquiry in proceedings by information in the nature of quo warranto is limited to the charges in the information; and matter set up by way of plea is only material in so far as it shows warrant in law for the exercise of the authority alleged in the information to be usurped. State ex rel., etc. v. Cincinnati, 23 Ohio State, 445.

An information which charges a corporation with usurping certain franchises by acting through other parties, calls in question only the authority of the usurping corporation, and cannot be extended so as to include authority not derivable from the corporation, and which such parties exercise in their own right. Ibid.

Partnership; Dissolution; Preference of Creditors in Distribution of Assets.—The preference which creditors of a partnership may have over those of an individual partner, in the distribution of the assets of the firm, cannot be defeated by a mere executory agreement between the partners, for the sale, or transfer, of the assets of the firm to one of them, unaccompanied by any actual delivery or transfer. A delivery, or transfer, in such cases, will not be presumed, but must be shown, in order to defeat this right of the creditors of the firm; and, therefore, where such purchasing partner dies before the time fixed for the delivery or transfer of the property, assets of the firm subsequently found in the hands of the surviving partner, who is also executor of the deceased, will be presumed to be held by him in his character of surviving partner, and not as executor.

Thus, two partners, A. and G., agreed that the firm should be dissolved at a specified future time, and that A. should then take and own all its property and effects, and should pay all its debts. Before the time named, A. died insolvent, having by his will, appointed G. and another person his executors. Money belonging to the firm was placed by G. in bank in the name of the firm, subject to be checked out in that name, and was so checked out by G. in payment of debts of the firm with the knowledge and consent of his co-executors. *Held*, that so far as regards the rights of creditors so paid, the money is to be considered as assets of the firm, notwithstanding any private agreement or understanding between the executors that it belonged to the estate. Kreis v. Gorton, 23 Ohio State, 468.

Gift from Husband to Wife of Mortgaged Property; Subsequent Insolvency of Husband; Payment of Mortgage Debt Fraudulent as Against his Creditors.—Where a husband purchased lands subject to a mortgage and paid the purchase money less the amount of the mortgage debt, and for the purpose and with the intention of making a gift to his wife, procured the deed of conveyance to be made by the vendor to her, subject to the outstanding mortgage, and at the same time promised the vendor to pay the mortgage debt upon maturity: *Held*, that upon delivery of the deed to the wife she became seized of the equity of redemption only as a gift executed; that the promise of the husband to pay the mortgage debt for her benefit, did not inure to her as a gift, either of an interest in the land or of the money promised to be paid until payment in fact was made; and that, in case the husband became insolvent before payment of the mortgage, the payment thus made was fraudulent as against then existing creditors, although they became such after the delivery of the deed to his wife, and after the promise to pay the mortgage debt was made. Oliver v. Moore, 23 Ohio State, 473.

Book Notice.

A Digest of the Laws of Texas, Containing the Laws in Force and the Repealed Laws on which Rights Rest. By George W. Paschal of Austin, Texas. Vol. I., Containing the Laws from the Foundation of the Republic of Texas; until 1864 Vol. II, from 1864 to 1872. Third Edition. Washington: W. H. & O. H. Morrison, 1873.

We have had frequent occasion to consult the first volume of Paschal's Digest of Laws, and speak with some degree of knowledge as to its merits. We are aware that Judge Paschal takes pains, in the preface to these books, to set forth their good points, of which he shows plainly that he entertains a favorable opinion; and this fact has led some reviewers to dismiss him with little better than a sneer. We do not share in this feeling.

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We think that Judge Paschal has, in these books, done a work of which he may be justly proud. We think it no exaggeration to say that his first volume stands unrivalled among the American codes. It possesses more elements of usefulness than any book of the kind we have ever had occasion to use.

Nothing is more perplexing to the practitioner, than a body of statute law built upon the basis of a highly refined and cultivated analysis, like that of Blackstone's Commentaries. Add to this the entire absence of cross-references, and the poor indexes which characterize many of the codes, and the difficulties of using them become almost insurmountable. Judge Paschal has wisely arranged his titles alphabetically, and has kept up a thorough system of polyglot references between kindred subjects, so as almost to dispense with the necessity of an index.

Immediately under the laws in force, are printed the repealed statutes on the same subject, on which rights may be supposed to be still pending. The old law and the new thus stand side by side, the old frequently furnishing a key to the interpretation of the new. The work also contains a system of exhaustive notes, embracing not only the decisions expounding both the old law and the new, but also, in many cases, extracts from public documents and other historical and political data—making a running commentary upon the text, acquainting the reader with the history and policy of the laws before him, and the exposition they have received in the supreme court of Texas, and in the courts of the United States.

We have but one complaint to make. The notes in the first volume are run together without much apparent system; and, with the evident view of saving space, are packed, so to speak, in very fine type, without paragraphs, and without catch-words to indicate the various subdivisions of the subjects treated of.

In the second volume the notes are thrown into paragraphs, but we miss the catch-words; which, though they might diminish the artistic appearance of the pages, would nevertheless add to the usefulness of the book.

The publishers have done their share of the work well. The second volume, in particular, is a model of typographical excellence.

Notes and Queries.

EDITORS CENTRAL LAW JOURNAL—You would greatly oblige me, if you would give me your opinion (or refer me to authority) upon the following: Has a non-resident, owning property within the corporate limits of a town, the right to go into the federal court to *test the validity of a tax*, which the state courts, having jurisdiction, have decided said corporation has *a right to levy*.

ANSWER—If the tax upon the non-resident exceeded $500, we think he could file a bill in the federal circuit court, if he could bring his case within some recognized head of equity jurisdiction; but if the supreme court of the state had already decided the tax to be valid, and if this decision involved simply a construction of the local laws of the state, the federal court would follow the decisions of the state court.

Thanks.

We return thanks to the following publishers and reporters for sending us exchanges and advance sheets of reports in advance of our first issue:

To Messrs. King & Baird, 608 and 609, Sansom street, Philadelphia, for the *Legal Gazette*.

To J. W. & J. S. Murray, 73 Grant street, Pittsburgh, for the *Pittsburgh Legal Gazette*.

To J. M. Power Wallace, Esq., 132 South Sixth street, Philadelphia, for the *Legal Intelligencer*.

To Messrs. Mills & Co., Des Moines, Iowa, for the *Western Jurist*.

To John M. Shirley, Esq., of Andover, N. H., Reporter for that state, for advance sheets of Vol. 52 of the New Hampshire Reports.

To Messrs. Robert Clarke & Co., of Cincinnati, for advance sheets of Vol. 23 of the Ohio State Reports.

Legal News and Notes.

—THE Supreme Court of the United States adjourned on the 24th of December until the 5th of January.

—THE supreme court of Missouri meets at Jefferson City on the 5th of January.

—THE supreme court of Minnesota is not in session. Judge McMillan is in Florida recruiting his health, and Judge Ripley has been stricken with paralysis. All opinions of any value determined up to this time will appear in the 19th Minnesota, which is nearly ready for issuance. It is not probable that any more opinions will be filed before April next.

—THE circuit court at Murphysboro, Ill., has just decided against the validity of certain bonds issued in compliance with an agreement entered into between the city of Carbondale and the Southern Illinois Normal University commissioners, to secure the location of that institution in Carbondale. The case will probably be taken to the supreme court.

—THE president has nominated for United States attorney for the eastern district of Virginia, Mr. James Lyons.

—THE new constitution of Pennsylvania has been adopted by over 150,000 majority.

—THE new constitution to be submitted to the people of Michigan, provides for an appointed judiciary.

—THE Kentucky legislature has passed a bill providing for a constitutional convention. The *Courier Journal* says: "The friends of constitutional reform achieved a victory in the Kentucky legislature Wednesday, which is of the first significance. The initiatory step for the calling of a convention to revise our organic law was adopted in the senate by a vote of twenty-three to eleven, and in the house by a vote of fifty-eight to thirty-nine—a majority of democrats voting for the measure. It will be seen that in the house seven votes more than necessary were cast for the bill, and of those present, there was a majority of eighteen. This result gives promise of a new and bright career for Kentucky. Those who argued and labored for the measure deserve the highest praise."

—MR. GAGE, the defaulting treasurer of Chicago, accounted for the interest in the public money in his hands, which his predecessors pocketed. In this way he saved for the city, during his term of office, about $130,000. His sureties now propose, in case they are sued for the amount of his defalcation, to endeavor to have the interest so accounted for, deducted as an offset from the amount of their liability. And it is said that legal opinion is divided as to whether this can be done.

—As instances of the extent to which the spirit of reform will go when it gets started, and of the rapid progress which it sometimes makes, particularly when dealing with subjects with which the reformer is not fully conversant, we may note the following:

In the Indiana State Farmer's Grange, which met the other day at Valparaiso, a resolution was introduced, and (we believe) passed, urging that the trial of all offences punishable by fine and imprisonment in the county jail, be committed to justices of the peace.

In the Illinois farmer's convention, which recently met at Springfield, the following resolutions were offered:

"WHEREAS, Our courts, as operated at present, are one of the most grevious burdens borne by the people, and are governed in their action to a great degree, by antiquated precedents of the dead past, in cases having often but little resemblance to the issues of the living present, and are a stigma on the boasted intelligence and progress of the American people, costing a vast amount of money to all tax-payers, simply, in many cases, to gratify a morbid taste for practicing the tricks, and for the beautiful uncertainties of the law; therefore,

"*Resolved*, As the sense of this convention, that the people should imperatively demand immediate legislation for the reconstruction of our courts on principles of common sense, prominent among which shall be a provision setting apart a portion of the time of each session, for the hearing of cases presented by parties in person making joint issue, the decision of the court to be final."

"*Resolved*, That the doctrine of vested rights, by which railroad corporations claim exemption from legislative control, belongs to a past age, and, as it cannot exist without infringing on the rights of citizens generally, it has no legitimate place in the jurisprudence of a free people."

We have not learned what was done with the last two resolutions. It would be well for those who, without being familiar with the present laws or with legal or constitutional history, propose the most radical and fundamental changes in the law, to remember the suggestion of Herbert Spencer, that the substitution of new laws for old ones, not only does not, in many cases, remedy existing evils, but sometimes brings a train of new evils, entirely unexpected and unprovided for.

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, JANUARY 8, 1874.

SUBSCRIPTION:
$8 PER ANNUM, in Advance.

The National Banks not subject to the Bankrupt Law.

We print elsewhere an able opinion pronounced by Judge BLODGETT in the United States District Court at Chicago, on the 30th ult., determining that the national banks in case of insolvency are not liable to be proceeded against under the bankrupt law. The novelty and great importance of this case induces us to publish it in full, notwithstanding the fact that in order to do so, we are obliged to continue a part of another very important case to our next number.

At the conclusion of the reading of Judge BLODGETT'S opinion, the attorneys for the petitioner gave notice that a petition for review before the circuit court would be filed.

Kansas Municipal Bonds.

Within the past two years, the supreme court of Kansas has affirmed the constitutional validity of the legislation of the state, authorizing the issue of bonds in aid of railway enterprises. Leavenworth county v. Miller, 7 Kan. 479; State ex rel. St. Joseph and Denver City Railway company, 7 Kan. 542; Morris v. Morris county, 7 Kan. 576. Before that decision was made, as well as since, a large amount of such bonds has been issued. The bond *diathesis* seems to have been very strongly marked in Kansas, and bonds for legitimate as well as illegitimate purposes issued in extravagant and improvident amounts. Acts authorizing municipal or local public aid to *private* enterprises, have been passed and bonds issued thereunder, but the issue of this class of securities has been effectually checked by the decision of the circuit court of the United States, in the case of the Commercial Bank v. City of Iola, 2 Dillon, C. C. R. 353, which case is now before the Supreme Court of the United States on error.

We commence in this number the publication of the recent opinion of the supreme court of Kansas in the important case of Lewis v. Bourbon county. The amount of the securities which this decision affects, is shown by the report of the auditor of state, just printed. He gives in tabular form the amount of county, city, and township indebtedness, from which it appears that $6,941,816 are county bonds, $2,360,199 are city, and $1,447,430 are township. The bonds issued in aid of railroads are $7,550,256; for bridges, $1,057,550; for other purposes, $2,141,639; total, $10,749,165. The actual debt is $13,379,775; namely, state, $701,745; municipal, $10,749,445; school, $1,928,585.

Extension of Time for Completion of the St. Paul & Pacific Railroad.

In the Senate of the United States on the 11th inst., Senator RAMSEY introduced the following bill for an extension of time to the St. Paul and Pacific Railroad company for the completion of the roads, which was read twice and referred to the committee on public lands:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the time for the completion of the railroad from St. Anthony to Brainerd, in the state of Minnesota, as now limited by law, and of the railroad from St. Cloud to St. Vincent, in said state, as now located, with the approval of the Secretary of the Interior, be extended for the period of eighteen months from the time limited by the acts of congress relating to the same, respectively, and if completed within said eighteen months, the said railroads shall be entitled to all the benefits of the several provisions of the acts of congress relating thereto, in the same manner as if said roads had been fully completed within the time therein limited.

This is the road for which the circuit court of the United States for Minnesota appointed a receiver to borrow money to build the extension lines, in order to save the land grant from lapsing (2 Dillon C. C. R. 248); but whose operations were interfered with by the financial panic which soon afterwards occurred. The Dutch bondholders, who have put some $15,000,000 of money into the enterprise, and the value of whose security depends so largely upon the land grant, upon the faith of which they advanced their money, would seem to have an exceptionally strong equity for the relief which the bill proposes to give them.

Bankruptcy Act—Fraudulent Preference—Lien of Execution Levied Before Bankruptcy Proceedings Commenced.

On the 22d day of December, the Supreme Court of the United States pronounced a very important decision under the bankruptcy act, in the case of Wilson, assignee in bankruptcy of Vanderhoff Bros., against the City Bank of St. Paul, upon a certificate of division from the circuit court of Minnesota.

In this case, Vanderhoff Bros., owing the bank, suffered their *entire stock* of goods to be seized on execution on a judgment by default obtained against them by the bank, and thus, as alleged, they fraudulently preferred the bank over other creditors, against the provisions of the bankrupt act, and the assignee sought to have the proceeds of the sale on execution applied in the claims of all the creditors. The case in the court below is reported in 1 Dillon C. C. R., p. 476, under the name of Vanderhoff's assignee v. City Bank, where the leading facts will be found stated.

On these facts the following questions arose, on which the court divided, and they were certified to this court for answer:

1. Whether or not an intention on the the part of the firm to suffer their property to be taken on execution, with intent to give a preference to the bank, or with intent to defeat or delay the operation of the bankrupt act, can be inferred from the facts stated.

2. Whether, under the facts, the bank in their proceedings had reasonable cause to believe that a fraud on the bankrupt act was intended by the firm.

3. Whether, under the circumstances, the bank obtained by the levy and execution a valid lien on the goods as against the assignee in bankruptcy.

We have not yet received an authenticated copy of the opinion of the Supreme Court, but they are reported to have said, that in their opinion, something more than the passive non-resistance of the insolvent debtor to regular judicial proceedings, in which a judgment and execution are had when the debt is due, and he is without just defence to the action, is necessary to show a preferment of a creditor, or a purpose to defeat or delay the operations of the bankrupt act; that

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the fact that the debtor under such circumstances does not file a petition in bankruptcy, is not sufficient evidence of such preference, or desire to defeat the operations of the act; that though the judgment creditor in such a case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law; that a lien thus obtained by him, will not be displaced by subseqent proceedings in bankruptcy against a debtor, though within four months of the filing of the bill. These propositions require the questions certified to be answered—the first two in the negative, and the third in the affirmative. This decision is supposed to overrule, or largely qualify, what was said by Justice CLIFFORD, in delivering the opinion of the Court, in the case of Buchanan v. Smith, reported in 16 Wall. 277. Evidently the opinion in this case is of great moment, in fixing the scope of the bankrupt act, and particularly of the thirty-fifth section; and on the assumption that the views of the Supreme Court are correctly indicated above, its judgment will somewhat surprise those who have derived their notions upon the subject of illegal preferences under the act, from the opinions of the district, and even the circuit courts, upon the subject. We shall place before our readers at an early day, the text of this important and, doubtless, well-considered opinion.

Railway Aid Bonds.

WILLIAM J. LEWIS v COMMISSIONERS OF BOURBON COUNTY.

Supreme Court of Kansas, Nov. 15, 1873.

SAMUEL A. KINGMAN, Chief Justice.
DAVID J. BREWER, D. M. VALENTINE. } Associate Justices.

1. **Contracts — Province of Courts.**—It is not the province of courts to make contracts between parties, but only to enforce contracts already made.

2. **Principal and Agent—Estoppel.**— A principal is not bound by the acts of his agent, unless authorized, or unless his own acts and representations estop him from denying the authority.

3. **County Bonds — Justice to Tax-payers.**— In controversies between a county and the holder of its supposed securities, good faith to the tax-payers requires that no charge be left on his property unless legally placed there, and that no contract be enforced unless legally made.

4. **Issuing Bonds and Subscribing Stock — Form of Proceeding.**— The form of proceeding in the submission of the question, of subscribing stock and issuing bonds to a railroad corporation, are designed as a protection to the tax-payers; and a due observance of those forms is essential to valid action.

5. **To Whom issued—Corporation Must be in Existence.**—Under the act of 1866, an existing corporation must be named as the recipient of the proposed subscription and bonds; and a submission of the question of issuing bonds to "any corporation now organized, or that hereafter be organized," that shall construct a certain line of roads, is unauthorized and void.

6. **Power to Subscribe construed Strictly.**—The grant of power to a municipality, to subscribe to the stock of a private corporation, is the delegation of an extraordinary power, and should not be extended beyond the fair import of the words used.

7. **Necessity of Legislative Sanction.**—Without legislative sanction, the assent of a majority of the voters would not authorize a municipality to make such a subcription.

8. **Nature of the Authority Given by the Statute.**—The authority given by the statute is not to give so much or pledge so much for the construction of a railroad, but to take so much stock in a railroad corporation.

9. **Election on Question of Subscription—Canvassing Vote.**—The statute does not make the county commissioners the canvassing officers, nor designate the time and place of making the canvass of votes cast at an election held on the question of subscribing of stock in a railroad corporation.

10. **Majority of Votes—Condition Precedent.**—A majority of the votes cast at such election is a condition precedent to the vesting of any authority in the commissioners to make the subscription.

11. **Result of Election — Fraudulent Canvass — Returns from uncounted Townships are Notice to the World**—Where the commissioners omit to prescribe by order the time and place of making the canvass, and where a majority of the votes cast are against the proposition, a canvass made by the commissioners which shows a majority in favor of the proposition, when the canvass appears upon its face to be partial and not to include the returns from some townships, does not conclude the county, as to the vesting of authority in the commissioners, and is notice sufficient to put every one on enquiry as to the actual state of the vote; and when the returns from the uncounted townships are filed in the county clerk's office, on the very day after the canvass, and are placed with the other returns, and so remain, every one is charged with notice of the actual result of the election.

12. **Statute Construed—Curative Act of 1868.**—The curative act of 1868, applied only to cases where "a majority of the persons voting" voted in favor of the subscription. It aimed to sustain, not to defeat, the will of the majority.

13. **Statute Construed—Question of Subscribing Stock to two or more Corporations.**—The statute does not authorize the submission to a single vote, of the question of subscribing stock and issuing bonds to two or more corporations. The question of making the subscription to each corporation, must be submitted separately.

14. **No Recitals in Bonds—Holders Chargeable with Notice of Court Records.**—Where bonds purporting to have been issued by a county, contain no recitals of an election, or of proceedings and orders of the county board, but are naked promises to pay, every purchaser and holder of these securities, is chargeable with notice of whatever appears upon the face of the county records.

15. **The Same—Want of Authority shown by County Records a Defence.**—If, in such case, it appears upon the face of the county records, that the commissioners had no authority to issue the bonds, the county may avail itself of that want of authority, as a defence to an action even of a *bona fide* holder.

16. **Holder chargeable with Notice of Record referred to in Law.**—Where a bond or other instrument purports to have been issued by virtue of a certain order, named and referred to, but not copied or described, every one claiming any rights by virtue of that bond or instrument, is chargeable with notice of the contents of the order.

17. **Holder Chargeable with Notice of what Appears on Public Records.**—Purchasers of negotiable paper issued by an agent, the nature and extent of whose authority must by law appear upon the face of the public records, are chargeable with notice of whatever appears upon those records.

All the justices concurring in the above syllabus.

BREWER, J., delivered the opinion of the court.

This is an application to this court for a writ of mandamus, commanding the levy of a tax to pay the coupons on certain bonds issued by the county of Bourbon to the Tebo and Neosho Railroad Company, and by it sold and transferred to the plaintiff. Two questions exist and are discussed by counsel in their briefs with great ability. *First*, Had the commissioners the authority to issue these bonds? and, *Second*, If not, can this want of authority be set up as a defence to an action by the present plaintiff, who claims as a *bona fide* holder for value?

The material facts are these: On the 8th of March, 1867, without any prior petition therefor, the county commissioners of Bourbon county, ordered "that an election be called on the first Tuesday in May, 1867, for the purpose of submitting the question of voting $150,000 to any railroad running east to connect with the Tebo and Neosho railroad, as per order published." The order published proposed to subscribe $150,000 "to the capital stock of any railroad company now organized, or that shall hereafter be organized, that shall construct a railroad commencing at a point on the Tebo and Neosho railroad, running westward *via* Fort Scott, and that the bonds of said county be issued to said company for the same." On the 10th of May thereafter, being the Friday next succeeding the first Tuesday of May, the commissioners' record shows a canvass of the votes. In this canvass appears in one column the names of the townships, and in columns opposite the number of votes for and against the proposition. The columns are added and show 468 votes for the bonds, and 442 against. Then follows this recital: "Majority for bonds, 26 votes. And it was declared that there was a majority of twenty-six votes cast for railroad bonds. And, it is also further certified, that there was no evidence of an election having been held in the township of Franklin and Walnut." This record is not signed by the commissioners, nor attested by the clerk. The poll-book from Franklin township was filed in the county clerk's office on that day, placed with the poll books from the other townships, and has been there kept ever since. It appears, however, from the testimony, that it did not reach the county clerk's office, and was not filed, until after the commissioners had left the office. This poll book showed 4 votes for, and 134 against the proposition, which, with the votes already counted, would make a majority of 104 against the bonds.

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On the 23d of July, 1869, more than two years after this election, the record of the commissioners shows that application was made by the officers of the Tebo and Neosho railroad for a subscription to the capital stock of that company in pursuance of this vote, and that the board resolved that it was not advisable then to make the subscription. At the same time, an order was made, submitting to the voters the question of issuing bonds to a company building a road west from Fort Scott. At the close of that order appears the following recital: "And, whereas, some question has arisen as to the propriety and legality of subscribing the stock and issuing the bonds provided for by the election of the 7th of May, A. D., 1867, to the Tebo and Neosho railroad; and, whereas, it is considered that the foregoing order, in addition to the one affirmed on the 7th of May, 1867, aforesaid, will be generally satisfactory to the people of this county: It is therefore ordered and provided, that the decision of this question by the qualified voters of said county, at the said election, in favor of such subscription, shall be also a decision in favor of the former subscription of the 7th of May, 1867, being made at once to the Tebo and Neosho Railroad company, and the Board of Commissioners will accordingly, in such case, make the subscription authorized by said election of May 7th, 1867, and will issue the bonds therein provided for, as soon as the terms and conditions of said subscription are complied with by said railroad company." A canvass of the votes cast at this election, showed 1428 votes for, and 703 against the proposition. This result was declared by the canvassers, and thereafter the bonds were issued, and for value transferred to the plaintiff.

Upon these facts, four questions are raised as to the authority of the commissioners to issue these bonds:

1. Was the presentation of a petition signed by one-fourth of the qualified voters a condition precedent to any action by the commissioners, and without which no power to issue bonds passed to the county authorities?

2. Did the failure to name the railroad corporation avoid the whole proceedings? Or, as counsel have stated the question in their brief, could a subscription be made to the stock of the Tebo and Neosho Railroad Company under and by virtue of the order of March 8th, 1867, and the vote of May 7th, 1867, that corporation not being named as the recipient of the proposed subscription? This question is discussed more fully by counsel in a case submitted subsequent to this, that of the Missouri River, Fort Scott and Gulf railroad company v. Miami County, and we may have occasion to refer to the briefs and arguments in that case.

3. A majority of votes having been cast, as a matter of fact, against the proposition, were the county Board authorized to subscribe the stock and issue the bonds.

4. If no authority existed therefor, did the proceedings of July 23d, 1869, and the subsequent vote, confer authority?

Before noticing these specific questions, it may be proper to consider an argument which is often used in cases of this kind and pressed with great force and ability by counsel in this,—the argument of good faith. The county gave the bonds to obtain the road; it has obtained the road; therefore, in good faith, it should pay the bonds. The company has fully complied with its contract; the county ought to do the same. The public conscience is weakened, and public morals suffer whenever a municipality avoids its contract through any technicality. Credit is shaken and confidence undermined whenever promises to pay are repudiated. Considerations of this kind, however, appropriate for individual consciences and as a guide to individual action, can never overthrow settled rules of law. A party may have given to another his note; every consideration of honor and good faith may demand that he pay it; but if suit be not brought till five years from its maturity have passed, and the statute of limitations be pleaded, the courts must sustain the o when so connected with other considerations as to present a case of equitable estoppel, that the courts can interfere. Courts will never make a contract, because they think the parties ought to have made one. Again, in cases like this, the bondholder is not the only party who can rightly press the demands of good faith. The tax-payer is entitled to equal consideration. He is guaranteed protection in property as well as person. He may not be heard in the courts to restrain the issue of these securities. If the authorities, through stupidity or collusion, are placing a burden upon his estate, he is powerless to prevent it. Craft v. Jackson County Commissioners, 5 Kansas, 518. A new election may enable him to change these officials, but the wrong is already done. He has a right, then, in the name of good faith, to demand of the courts that no charge shall be left on his property unless legally placed there, and that no contract shall stand, unless legally made. More than that he has no right to ask; less than that he ought not to receive. True, he is not a nominal party to this action, but he is the real party in interest. The simple enquiry, then, in cases of this kind, should be, whether the forms of law have been so far complied with, that a valid contract has been made. It they have, then the contract should be sustained, and the bondholder have his judgment. If they have not, then the county should have judgment. No considerations of supposed good faith will justify a court in making and then enforcing a contract between the parties. As protection to the tax-payers, the law has prescribed certain forms of proceeding that nothing be done without their consent. These forms are all the protection the tax-payer has; and it is only by insisting on an observance of these forms as a condition of valid action, that any security is offered him. If they are to be frittered away by judicial sanction, it were better to dispense with them altogether, and give the authority to the commissioners to act without the delay and expense of first consulting the voters.

We shall not stop to discuss the first question raised; simply saying, that if this were the only objection, we should deem it cured by the act of 1868 (Gen. Stat., p. 892).

No corporation was named in the proceedings of March, 1867, as the recipient of the proposed subscription and bonds. The proposition in effect was, whether authority should be granted to the commissioners to take stock *in any corporation now organized, or that might hereafter be organized*, that should construct a railroad from the Tebo and Neosho railroad westward *via* Fort Scott. That a vote authorizing a subscription to one corporation will not sustain a a subscription to another, even though the latter build the very line of road contemplated by the former, and sought to be secured by the vote, is settled. St. Joe & D. C. R. R. Co. v. Commissioners of Nemaha County, 11 Kas. See also Marsh v. Fulton county, 10 Wall. 676. The question now is, whether, under the statute, the people must select the corporation, or may they delegate authority to the commissioners to make the selection. The statute reads, "That the board of county commissioners of any county to, into, through, from, or near which, whether in this or any other state, any railroad is or may be located, may subscribe to the capital stock of any such railroad corporation, in the name and for the benefit of such county, not exceeding in amount ———, but no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county," etc. This statute grants to the commissioners an extraordinary power. The constitutionality of such legislation has been questioned, though sustained. Its wisdom has been denied, even where its constitutionality has been sustained. To prevent abuse of this power, a specific, express authority from the voters is required. The manner of proceeding to obtain this authority is prescribed. Without legislative sanction, the assent of a majority of the voters would not bind the county, nor make valid, bonds issued in pursuance thereof. Pendleton county v. Amy, 13 Wall. 304. The assent of a majority binds

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defence. Mere good faith will never give a cause of action; it is the county no further than the legislature has provided it shall. And a statutory power so liable to abuse, should not, by construction, be enlarged beyond the plain warrant of the language used by the legislature. What is the county board empowered to do? It may make a subscription to the capital stock of a railroad corporation. A subscription is a contract. A contract requires two parties. There can be no subscription of stock without a corporation to receive the subscription. The county was not authorized to pledge its funds to aid in building a railroad. It could not bind itself to give so much for a road. The railroad project might be aided, it is true, but only by virtue of the fact that the corporation had obtained a responsible subscriber for a large amount of its stock. But before the board could make a subscription to the capital stock of any railroad corporation, *the question* must first be submitted to a vote of the qualified electors. What question? Manifestly the question of making the subscription—entering into the contract with the railroad corporation. The whole question, not a fragment of it—the question of authority to make *the* contract, not *a* contract. The whole authority delegated to the board by the first clause of the section, rests upon the expressed assent of the voters. It is an entire thing—the consummation of a contract—and to it as an entirety the people must assent. It may be said that the language used contemplates the submission of only the question of issuing bonds. "No such bonds shall be issued until the question shall be first submitted." "If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners," etc. But the issue of bonds is the last act of the board—the consummation of the contract. Bonds are to issue only in payment of stock already subscribed. If the language limits the question to that of issuing bonds, it limits it to that which implies a subscription already made—a contract already entered into—and therefore, an existing and named corporation, the recipient of the subscription and the party to the contract.

In the arguments made in the case of the Missouri River Fort Scott and Gulf Railroad company v. Miami county, to which we referred, some stress is placed upon the use of the verbs "is or may be," in the first sentence of the section, which authorize the commissioners of any county, "to, into, through, from, or near, which any railroad is or may be located, to subscribe to the capital stock of any such railroad corporation," and it is claimed that "is" is used in a continuing sense, and refers, not to the time of the passage of the law, but to the time of making the subscription, and that, therefore, the addition of the words, "may be" contemplates a location subsequent to the subscription. In support of that claim, the case of James v. City of Milwaukee, decided by the Supreme Court of the United States, and reported in Chicago Legal News, of Feb. 22d, 1873, is cited. It is unnecessary to determine whether the citation supports the construction, or whether the construction is correct. For the corporation must exist before it can locate its road, and all that such construction would warrant is, that the subscription might be made, and, therefore, might be authorized, before the corporation had finally located its road, and not that it might be authorized before any corporation existed. The citation might be pertinent, and the construction demand examination, if the language had been "any railroad corporation which is, or may be organized."

It may be asked, what difference does it make? The thing to be secured is the railroad, and if that be accomplished, it is enough. We reply, the legislature has not authorized counties to give their bonds, simply to secure railroads; it has authorized them to take stock in railroad corporations, and pay for it in bonds. It makes the same difference to a county that it does to an individual, as to the corporation in which stock is proposed to be taken. The county, like an individual, might be willing to take $150,000 of stock in a corporation, whose capital stock was only $250,000, thereby securing the control of the corporation, while it might not be willing to subscribe a like amount or any amount to one whose capital stock was $10,000,000, in whose control it would thus have little voice. Again it might be willing to subscribe to and risk its funds with a corporation whose managers were men of known good character and financial responsibility, and not be willing to do the same with one whose controlling men were wholly irresponsible. The fairness and good sense of the legislation is altogether on the side of the construction, which the natural meaning of the language so plainly demands. It seems, therefore, that some corporation must be named as the recipient of the subscription and bonds, or the proceedings will be without warrant of law and void.

A majority of the votes cast at the election of 1867, were against subscribing stock and issuing bonds. This is an undisputed fact. The statute reads, "If a majority of the votes cast at such election shall be in favor of issuing such bonds, the board of commissioners of the county shall issue the same." Laws 1866, page 73, § 1. That an election is a prerequisite to the issue of bonds, is unquestioned. Equally clear is it, that at such election a majority of the votes must be in favor of the issue. Power to issue is not vested in the commissioners by virtue of their office, but given only by express authority of the voters. Issuing bonds without a vote, is no more *ultra vires*, than issuing them against the vote of a majority. Express authority by an affirmative vote, is a condition precedent to the existence of the power. These general propositions will not be disputed, and if the commissioners had at their meeting, on May 10th, 1867, canvassed the entire vote of the county, and declared the result in accordance therewith, (namely, a majority of 104 against the proposition), no one would be foolhardy enough to claim that the commissioners had any power to issue these bonds, given by that election. It is claimed, however, that the commissioners were the proper canvassing officers; that at the legal time and place they made the canvass and declared the result, and that the county is bound thereby. It must be conceded that this claim finds ample support in the language of some of the opinions of the Supreme Court of the United States. That tribunal has uniformly held that the determination of the county board was the adjudication of a competent tribunal, with full jurisdiction, and cut off all enquiry as to the facts upon which the determination, at least after the bonds had passed into the hands of a *bona fide* holder, was based. In the case of the commissioners of Knox county v. Aspinwall, 21 Howard, 539, Mr. Justice NELSON thus stated the proposition in his usual clear and forcible language: "Full power is conferred upon the board, to subscribe for the stock and issue the bonds, when a majority of the voters of the county have determined in favor of the subscription, after due notice of the time and place of election. The case assumes that the requisite notices were not given of the election, and hence that the vote has not been in conformity with the law. This would seem to be decisive, against the authority on the part of the board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held, and a majority of the votes of the county cast, in favor of the subscription? Is it to be determined by the court in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners as a duty imposed upon it, before making the subscription? The court is of the opinion that the question belonged to this board. The act makes it the duty of the sheriff, to give the notices of the election for the day mentioned, and then declares if a majority of the votes given, shall be in favor of the subscription; the county board shall subscribe the stock. The right of the board to act in an execution of the authority, is placed upon the fact that a majority of the votes had been cast in favor of the subscription; and to have acted without first ascertaining it, would have been a clear violation of duty; and the ascertainment of the fact, was necessarily left to the enquiry and judgment of the board itself,

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as no other tribunal was provided for the purpose. This board was one, from its organization and general duties, fit and competent to be the depository of the trust thus confided to it. The persons composing it were elected by the county, and it was already invested with the highest functions concerning its general police and fiscal interests. We do not say that the decision of the board would be conclusive in a direct proceeding to enquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the authority had been executed, the stock subscribed, the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way." We have made this lengthy quotation, because it contains as clear and complete a statement of the views therein expressed, as can anywhere be found; and also, because it is from the leading case in that court. The views therein expressed have been uniformly adhered to by that tribunal: Bissell v. City of Jeffersonville, 24 How. 287; Moran v. Miami county, 2 Black, 722; Gelpcke, v. City of Dubuque, 1 Wall. 175; Mercer county v. Hacket, 1 Wall. 83; Van Hostrup v. Madison city, 1 Wall. 291; Supervisors v. Schenck, 5 Wall. 772; Pendleton county, v. Amy, 13 Wall. 297; City of Lexington v. Butler, 14 Wall. 283. It will be observed that this language does not affirm that the determination of the county commissioners gives authority to issue bonds, but only that that determination estops the county from denying the authority. All that is asserted and all that can be found in any of the opinions is, that that determination is evidence of authority otherwise given — evidence that is conclusive in an action by a *bona fide* holder. It is like other canvass-evidence — nothing but evidence of facts already done, and power already given. It is by universal consent, open to enquiry and attack, unless made conclusive by statute, until, at least, rights have been vested on the faith thereof. It is no more potent to confer authority, than a canvass of votes cast for an office, is to give a right to the office. It should not be so weighty, even as evidence; for in the one case, it is necessary that offices should be filled, and that evidence of who are entitled to fill them, should be easily accessible; while in the other, it is not necessary that county bonds should ever be issued to railroad corporations, and the people's right to control the extent of their obligations should not be frittered away, on a mere matter of evidence. The substantial question is, did a majority of the voters grant the authority? the formal question, what does the canvass show? Reverse the status, for a moment, and suppose the canvass showed a majority of 26 votes against, while an actual majority of 104 votes was in favor of the proposition. Would not the authority to issue, pass to the commissioners, and could there be any question, but that bonds thus issued, even in the hands of the obligee himself, could be enforced. "If a majority of the votes cast at such election," is the language of the statute. Can the commissioners by a canvass destroy the power of the majority, and set at naught the will of the legislature? Can they in defiance of the statute, create an authority in themselves? It was well said by the supreme court of Ohio in State ex rel. Treadwell v. The Commisioners, etc., 11 Ohio State, 183: "The decision of the Supreme Court of the United States must rest on the assumption that it was competent for the commissioners of Knox county by some act of their own, to make their authority complete — an assumption we are not at liberty to make in this case." In that case, the county commissioners of any county, through or in which a railroad might be located by any corporation, were by statute authorized to subscribe stock and issue bonds. Under this statute, bonds were issued and passed into the hands of a *bona fide* holder. In a mandamus proceeding thereon, the answer alleged that the railroad had never been located through or in the county, and this answer was held good, and in holding it good, the court used the language above quoted. Starin v. the Town of Genoa, 23, N. Y. 439; The People v. Mead, 24 N. Y., 114; The People v. Mead, 36 N. Y., 224.

[CONCLUDED IN OUR NEXT.]

The National Banks Cannot be Thrown into Bankruptcy.

IN RE MANUFACTURERS' NATIONAL BANK.

District Court of the United States, for the Northern District of Illinois, Chicago, December 30, 1873.

Hon. HENRY W. BLODGETT, District Judge.

1. **National Banks—Bankruptcy.**—A national bank cannot be proceeded against under the bankrupt law: if insolvent, it can only be wound up in the mode pointed out by the national currency act and its amendments.

2. **Statutory Interpretation—Repeals by Implication.**—A statute, although so general in its terms, that its letter would comprehend all classes of persons and things to which it can relate, will nevertheless be construed by the courts as not applying to a particular class which has been specially provided for and regulated by another statute, relating solely to such class, if there is no language in the general statute repealing the former statute, or in any manner referring to it. Thus, the bankrupt act does not repeal those provisions of the currency act and its amendments, which relate to the winding up of insolvent national banks.

3. **"Act of Insolvency."**—What is an "act of insolvency," within the 52d section of the currency act.

Opinion by BLODGETT, J.

On the 15th day of November last, Messrs. R. J. Smith & Co., filed in this court their petition, setting forth that they are creditors of the Manufacturers' National Bank, of this city, for money deposited with said bank in due course of business, and alleging that the said bank had suspended payment on its commercial paper for over fourteen days, and had, when insolvent, made preferential payments; for which acts they prayed that the bank be adjudged bankrupt.

Being aware that grave doubts had been expressed by many lawyers and business men, as to the application of the bankrupt law to national banks, I directed notice of the application for a rule to show cause, to be served on the officers of the bank, and have heard arguments for and against the application. While the discussion upon the question has been unusually able and exhaustive on both sides, it has not, I must confess, left my mind entirely free from doubt as to the rule to be adopted.

The law now in force for the organization and government of national banks, was enacted on the 3d of June, 1864, and has been amended by the act of Feb. 4, [10?] 1868, the act of Feb. 19, 1869, the act of July 12, 1870, and the act of March 3, 1873. embodied in the original act, are very full and ample provisions for winding up and settling the affairs of these banking associations, mainly through the federal courts. The fundamental purpose of the act and its amendments, was to provide a national currency, and ensure its prompt redemption, and, incidentally, to provide banking or fiscal agencies through which the ordinary financial business of the country could be safely transacted.

The leading features of the system were:

1. The security of the circulating notes of those banks, by the pledge of government bonds in the hands of the treasurer of the United States, and in case of the failure of the bank to redeem its notes, then redemption of those notes by the government, for which it is to be reimbursed by the proceeds of the bonds deposited and a first lien on all the assets of the bank.

2. The responsibility of the stockholders of the bank to the extent of the par value of the stock held by them respectively, in addition to the amount invested in their shares.

3. The whole system to be under the surveillance of the comptroller of the currency, with full powers to examine into the affairs of each bank, and in cases of non-compliance with the provisions of the law, to appoint a receiver to administer and wind up their affairs.

On the 2d day of March, 1867, congress passed an act to establish a uniform system of bankruptcy throughout the United States;

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and by the thirty-seventh section of said act it is declared, "that the provisions of this act shall apply to all moneyed, business and commercial corporations and joint-stock companies," and by the third clause of the same section it is declared, that "all payments, conveyances and assignments, declared fraudulent and void by this act, when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void, when made by a corporation and company."

The forty-eighth section declares that the word "person," when used in this act, shall be held to include and mean corporations; and by the ninth clause of the thirty-ninth section, it is made an act of bankruptcy for any bank to suspend payment of its commercial paper for fourteen days.

The bankrupt law is the latest expression of the legislative will, and its general terms and provisions must be held to repeal all previous statutes necessarily incompatible with it. The question then is, does the bankrupt law repeal and supersede the provisions in the currency act for winding up the affairs of insolvent national banks? or can its provisions be applied to those corporations, and leave intact the provisions of the currency act on the same subject? There is no doubt of the soundness of the general rule of interpretation cited by the counsel for the respondent, that a statute, although so general in its terms that its letter would comprehend all classes of persons and things to which it can relate, will nevertheless be construed by the courts as not applying to a particular class, which has been specially provided for and regulated by another statute, relating solely to such class, if there is no language in the general statute repealing the former statute, or in any manner referring to it. Hume v. Gossett, 43 Ill. 297; The People *ex rel.* Becker v. Miner, 46 Ill. 384; Hawkins v. Gathercole, 6 De Gex M. & G. 1; Williams v. Pritchard, 2 Term R., 2. "A thing which is in the letter of a statute is not within the statute, unless it be within the intention of the makers." Bacon's Abridgment, title Statute. "When the intention of the legislature is not apparent to the purpose, the general words of another and later statute shall not repeal the particular provisions of a previous one." Dwarris on Statutes, 117, quoted from Coke. The rule is thus stated in Sedgwick on Statutory and Constitutional Law: "In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. * * * The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all." Sedg. Stat. and Const. Law, 123.

The currency act provides for the appointment of a receiver to wind up the affairs of a national bank, in the following cases:

1. For not keeping good a surplus—12th section.
2. For not keeping stock at a minimum—15th section.
3. For not keeping good its reserve—31st section.
4. For not selecting a place for the redemption of its notes—32d section.
5. For holding its own stock over six months—35th section.
6. For non-payment of its circulating notes—50th section.
7. For improperly certifying a check—section 1, act March 3, 1869.
8. For failure to pay up capital stock, and for allowing same to become and remain unpaid by losses—section 1, act March 3, 1873.

Upon the happening of either of these contingencies, the comptroller may appoint a receiver to take possession of all the books, records, and assets of the corporation, who shall proceed to convert the assets into money under the direction of a court of competent jurisdiction. And the money so realized shall be paid over to the treasury of the United States, subject to the order of the comptroller, who, after deducting, in full, whatever amount shall be due to the United States, shall distribute the balance exactly among the creditors of the bank. The claims of creditors to be proven before the comptroller, or adjudicated in a court of competent jurisdiction. "The application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. And by the 48th section, it is made unlawful for any such bank, after suffering a protest of its circulating notes, and after notice from the comptroller, to, in any manner, prosecute the business of banking, except to receive and safely keep its money and deliver its special deposits. And by the 53d section, any violation of the provisions of the currency act, done knowingly, by either a bank, or its officers, or agents, works a forfeiture of all its rights and franchises, to be adjudged by a federal court at the suit of the comptroller. The 8th section provides that said corporations, *i. e.* national banks, "*may sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.*

And by the 57th section it is declared, that "suits, actions and proceedings against any association under this act, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association be established, or in any state, county, or municipal court in the county or city, in which such association is located, having jurisdiction in similar cases." And by the amendment to this section made by the act of March 3, 1873, it is further provided that "no attachment, injunction, or execution shall issue against such association or its property before final judgment."

I am not aware that any adjudication has yet been made, determining what is an "act of insolvency" within the intent and meaning of the 52d section; but it seems to me to be an act which shows the bank to be insolvent; such as non-payment of its circulating notes, bills of exchange, or certificates of deposit; failure to make good the impairment of capital, or to keep good its surplus or reserve; in fact, any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit.

It will thus be seen that while the currency act does not specify in detail, and provide for all the specific acts of bankruptcy enumerated in the bankrupt law, it yet does furnish, through the functions of an important public officer—the comptroller of the currency—a very complete and detailed scheme or plan for administering the affairs of an insolvent national bank. It is true, there is no provision for an individual creditor's putting this machinery in motion. But the presumption is that congress deemed it wiser to leave this duty to an impartial public officer, rather than entrust it to the hasty, inconsiderate, and perhaps, selfish action of one or more creditors. It was probably thought that the necessity of maintaining the public confidence in the system, was such as would compel the comptroller to act in all cases when a bank had become derelict or discredited, and that this consideration, together with the clear obligations of duty, thrown upon the officer, would be sufficient to ensure his action in all cases when he acquired the right to do so. At all events, the law, as it was enacted, contained ample and specific provisions for creating and managing these corporations, and for administering their affairs, when they became unable or refused to perform their public functions.

The system has been in operation nearly ten years; over 2,000 banks have been organized under it. Of these, 21 have been wound up through the agency of the comptroller and a receiver.

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The greater part of them since the enactment of the bankrupt law. All the legislation of congress has looked toward the perfecting and perpetuation of the system; and ought we now to say that congress, by the enactment of the general bankrupt law, intended to place these corporations under the provisions of that law, and to repeal the elaborate plan which it had specially furnished for winding up their affairs, when they became insolvent or incapable of transacting banking business?

That it did not intend to repeal them, is conclusively evidenced by the fact that in two of the important amendatory acts, those of March 3, 1869, and March 3, 1873, especial reference is made to those winding up provisions of the original act, and they are treated as being in full force. So, too, in several cases which have been before the supreme court since the enactment of the bankrupt law, reference has been made to these winding up powers as still in force.

It being clear, then, that congress did not intend to repeal the winding up clauses of the currency act, the question arises, Did it intend that the two remedies, that is, the one given by the currency act, and the one given by the bankrupt act, should exist as co-ordinate or concurring remedies, and the affairs of an insolvent national bank be administered by that tribunal which first acquired control?

This construction might be admitted, if the two were entirely compatible with each other, or if each was equally as complete as the other. That is, if each could reach and administer upon all the assets of the debtor bank, so as to leave nothing to be done by the other.

But we find upon examination, that the important duty of paying the holders of circulating notes, and distributing the proceeds of the bonds deposited to secure them, or the surplus of those bonds, and of enforcing the liability of stock, is left with the comptroller, and can only be enforced by or through him. This latter point was fully discussed and decided by the supreme court, in Kennedy v. Gibson, 8 Wall. 498; when it was expressly held that the comptroller alone could enforce the personal liability clause. The court says: "The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide, when it is necessary to institute proceedings against stockholders to enforce their personal liability, and whether the whole or a part, and, if a part, how much shall be collected. The questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such times as he shall deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, when the personal liability of the stockholders is sought to be enforced, and must precede the institution of a suit by a receiver. * * * The claims of creditors may be proved before the comptroller, or established by suit against the association. Creditors must seek their remedy through the comptroller, in the manner prescribed by statute."

Much stress was laid by the attorneys for petitioners, upon the inadequacy of the security for creditors under the currency act, mainly because creditors could not, of their own motion, initiate winding-up proceedings; but how much more inadequate would the bankrupt law be to the same end, if it cannot reach or distribute assets, and perhaps must pay what it gets over to a government officer for distribution. I do not say that an assignee would be obliged to pay over to the treasurer, but that there is grave ground for a claim that he should do so, and that collision might grow out of such claim.

The relief which could be afforded to the creditors of a national bank, then, being so incomplete, I cannot think it was the intention of congress, to clothe bankrupt courts with jurisdiction over this class of corporations. I have already cited the evidence which shows, to my mind, that congress did not intend to repeal the winding-up provisions of the currency act, by the passage of the bankrupt law; and a comparison of the provisions of the two acts, show with equal clearness to my mind, that it did not intend to inject the provisions of the bankrupt act into the currency act, so that creditors could apply the remedies of the bankrupt act, and the comptroller the remedies of the currency act. Because such a construction would inevitably produce collision and conflicts of jurisdiction, and the remedies given by the bankrupt act would be so far unavailing in regard to important assets, as to make it evident that there was no intention to apply such a remedy. Suppose this court were to adjudge the respondent bankrupt today, and send its messenger and assignee to take possession of the assets. The officers of the court, could in no event, enforce the personal liability clause, or obtain possession of the government bonds deposited to secure the circulation, or any surplus of those bonds, after fully returning the circulation. Those assets are beyond the reach of this court or its officers, and can only be approached by the way of the comptroller and his receiver. Then why should this court take cognizance of a case it cannot administer.

Why not, rather, say congress has acted upon the subject matter of insolvent national banks and made specific provisions for administering their affairs, and inasmuch as the general bankrupt law has not expressly repealed these specific provisions, nor necessarily contradicted them, the courts will presume it is the intention of congress to except this class of corporations from the operation of the later statute. Such conclusion seems to me consistent with authority; and is, in fact, the only conclusion that will not lead to inextricable complication and conflict of authority.

But it is urged that the currency act makes these corporations liable to all suits and actions which might be brought against national banks, and that they can therefore be proceeded against in bankruptcy. A sufficient answer to this might be found in the fact, that when the currency act was passed, there was no bankrupt law in force, no bankruptcy known to the law; and therefore, the general language must be held subject to this limitation. But I take it, there is no doubt that the legislative power which creates an artificial person or corporation, can also prescribe what remedies shall be had against it, and that such remedies would be held to be exclusive, and that the provisions of the general bankrupt law would not be held to apply to corporations at all, but for the exemptions of the act. Should they then be held to apply to a class of corporations which have, as it seems, a bankrupt law of their own, original with their own constitution and part of their organic law, by the same authority which enacted the bankrupt law? I think not. Nor does it seem to me that there is any necessary hardship in denying the remedies of the bankrupt law to the creditors of this corporation. There is no evidence that either this petitioning creditor or any other creditor has applied to the comptroller to take possession and administer the assets. Additional force is also given to this consideration, from the fact that in the very latest amendment to the currency act, it is expressly provided that no attachment, injunction, or execution shall issue against a bank until judgment is obtained.

It is well known that, in many of the states, proceedings by attachment may be taken by a creditor in the first instance, and, as a matter of course, and in nearly or quite all the states, attachments can issue upon affidavits showing the existence of certain facts, while injunctions are almost universally issued before judgment or decree in equity cases, when a case is made for one. And yet these corporations are, probably for reasons of public policy, simply exempted from liability to all this class of summary proceedings. Here we have a restriction upon the powers of the bankrupt court, almost, if not wholly, incompatible with the jurisdiction. For of what use would it be to proceed in bank-

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ruptcy against a debtor, in a large number of cases, unless he could be enjoined, or his property seized by a process of attachment. Before adjudication or judgment could be obtained, the property of the debtor might be wasted or spirited away, so that the adjudication would be barren of results.

I do not say that the prohibition to enjoin or attach property, necessarily implies want of jurisdiction, but only that it goes far to show that it was never the intention of congress to clothe a bankrupt court with jurisdiction as against these corporations.

I am therefore of the opinion that the rule to show cause should be denied, and the petition dismissed for want of jurisdiction.

PETITION DISMISSED.

Supreme Court of the United States.

[We give below the proceedings had in the Supreme Court of the United States, on December 24th, in several important cases, which we take from the New York *Herald*. The court adjourned until January 5th. We expect to be able to give a summary of its proceedings from the 5th to the 10th of January, in our next issue.]

No. 477. Knowles v. Logansport Gaslight Company—Error to the circuit court for Minnesota.—This is an action by the company to recover on a judgment obtained in Indiana. The defence was want of jurisdiction of the person of Knowles in the Indiana case, and the return of the sheriff certifying service of summons, but not showing where it was served, having been admitted as evidence of service against defendant's objections, he brings the ruling here, and raises the following questions: Was the certificate of service properly received as evidence of jurisdiction, and, if so, can it be contradicted on the trial of the action? The further question is raised: If service is made in an action for $3,000, does that give jurisdiction to render judgment for more than that sum? Submitted under the twentieth rule. H. R. Bigelow, for plaintiff in error; F. R. E. Cornell, for defendant.

No. 169. Buckley v. United States—Appeal from the court of claims.—This is another suit for damages for an alleged violation of a contract made with the government for transportation of military stores. The court below found that the government having simply failed to produce the amount of stores for transportation which were contracted for, were not guilty of a violation of the entire scope of the contract, and therefore refused the claimant damages for the profits of the contract lost in consequence of such failure, but allowed him the amount of the expense he had incurred in preparing for the transportation. It was, however, held that he had not sufficiently proven the amount of such expense, and the bill was, therefore, dismissed. From this decision the claimant appeals, insisting that he should have damages for his loss of profits on the contract. The government submits that the decision below was correct. Durant and Homer, for the claimant; C. H. Hill, for the government.

No. 542. McCarty v. Mann et al.—Appeal from the circuit court for Minnesota.—This was an action to quiet title to certain vacant and unoccupied lands in St. Paul, brought by the appellant. The appellees claim, under a conveyance from the patentee, made prior to his patent; and as the appellant disputes the validity of the entry of the patentee, the question arises whether an act of congress reinstating an entry made by the patentee, which had been cancelled by the commissioner of the general land office, so that the title in said lands may inure to the benefit of his grantees, so far as he may have conveyed the same, is such a recognition and ratification of the original entry as will sustain the title of his grantees, made in pursuance of such entry, and which is in the appellees. The appellant maintains that the patentee had no title until after his entry under the special act, and that if this be so, he (appellant) has the better title, derived from the grantees, who took from him immediately thereafter, and that the act did not renew an old title in the patentee, but created a new one. Submitted under the twentieth rule. W. P. Clough, for appellant; H. I. Horn, for appellees.

No. 134. Sohn v. Waterson et al.—Error to the circuit court for the district of Kansas.—This was an action on a judgment recovered in Ohio against the defendants, in 1854. The defence was the statute of limitations of the territory of Kansas (the defendant Waterson being, when the suit was brought, and the act was passed, a resident there), passed in 1859, providing that all actions founded on contracts, notes, bonds, judgments, etc., upon which liability accrued beyond the limits of the territory, should be commenced within two years next after the cause of action accrued. The plaintiff replied that the statute did not apply to his case, because it was passed after his cause of action accrued. The court held, that, as Waterson was a resident of Kansas, when the territorial act went into operation, the limitation began to run from that period, and that, as the action was not commenced within two years after, it could not be sustained. This judgment is sustained here, the court holding that the act was prospective in its operation, and affected existing causes of action only from the time of its passage. Mr. Justice Strong delivered the opinion.

No. 576. Sawyer v. Hoag—Appeal from the circuit court for the northern district of Illinois.—In this case it is held that a debtor of an insolvent cannot purchase claims against his creditor, having full knowledge of the insolvency, and have them set off at their full value against his indebtedness to the insolvent, and the decree below enforcing the same view is affirmed. Sawyer subscribed to the capital stock of the Lumberman's Insurance company, upon an understanding that 85 per cent. would be loaned back to him upon a secured note for the amount. The insurance company becoming insolvent after the great fire in Chicago, Sawyer bought up adjusted claims against the company and sought to have them set off against his indebtedness on the note. The decision treats him as an ordinary debtor of the company, and holds that the set off cannot be allowed. Mr. Justice Miller delivered the opinion. This decision also disposes of cases 579, Jaegar v. Voeke, and 580, Meyer v. Voeke, and the decrees in those cases are affirmed.

No. 165. Solomons v. the United States—Appeal from the court of claims.—Solomons was under a contract with the government to furnish a certain quantity of corn within a certain time, and delivered about three-fourths of it within the time fixed. Subsequently, a quartermaster agreed to accept a further quantity under the contract if delivered within another limited time. The amount was delivered and a voucher given. A part of it was used and a part damaged while lying in the fort. The department, subsequently, refused to pay for the portion not used, on the ground that the contract had expired and could not be extended by verbal agreement. The voucher was accordingly reduced, and payment tendered and declined. The court below sustained the department, and its judgment is here reversed, and the cause remanded with directions to enter a judgment for the amount of the voucher, the court finding that the time was extended verbally, and that such agreement was valid. Mr. Justice Miller delivered the opinion.

No. 480. Town of Ohio v. Marcy—Error to circuit court for the northern district of Illinois.—This was an action on municipal bonds issued by the town, and the defence was that they were not issued by the road for which the subscription was made, but to a consolidated road subsequently chartered. The judgment on the facts found was for the holder of the bonds, and the case was brought here for review; but the court say that the question of law raised is not presented in the record, and the judgment is accordingly affirmed. Mr. Justice Miller delivered the opinion.

Notes of Recent Decisions.

Creditor's Bill; Burden of Proof to show Insolvency.—In an action by a creditor for the purpose of subjecting property in the hands of a donee to the payment of his claim, it being made to appear that the debt was contracted by the donor prior to the making of the gift, the burden of showing the solvency of the debtor at the time of making the gift, rests upon the defendant. Oliver v. Moore, 23 Ohio State, 473.

Legacy; Interest.—Where a bequest of a certain sum of money is made, and time of payment is fixed, the same does not bear interest until the time of payment, except where the law infers an intention to pay interest from the relation of the testator to the legatee. Page's Appeal, 71 Penn. State, (21 P. F. Smith) 402.

———; ———. This inference does not arise from the relation of god-mother and god-daughter. Ibid.

———; ———. But where a trustee or executor is put in charge of a special fund for a legatee to manage for his benefit, his right to the product of the fund may be inferred from the fact of its being so set apart for him. Ibid.

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Confusion of Materials; Cheese Factory; Interest subject to Execution.—Baxter and numerous other farmers delivered milk to a cheese factfactory; each was credited with the amount of his milk, and all was manufactured together; the company sold all the cheese; each farmer was charged with the expense, and received his share of the proceeds in proportion to the milk furnished; Baxter's interest in the cheese, etc., was sold under an execution against him. *Held*, that the sale by the factory converted his interest into a money demand, and this interest was, therefore, not the subject of a levy. The arrangement at the factory did not constitute the farmers partners nor tenants in common in the cheese; nor was there an agency or bailment as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner. Butterfield v. Lathrop, 71 Penn. State, (21 P. F. Smith) 225.

Levy upon Real Estate; Inquisition; Deputy Sheriff.—The holding of an inquisition upon real estate levied under a *fieri facias*, is a judicial act, involving an exercise of discretion. The sheriff cannot, therefore, perform it through his deputy. Haberstroh v. Toley, Com. Pleas of Luzerne county, Penn. Reported, Pittsburgh Legal Journal, Dec. 10, 1873.

Trespass for Mesne Profits; Abatement.—Under the Pennsylvania statute of Feb. 24, 1834, § 28, trespass for mesne profits does not abate by the death of the defendant in ejectment, but survives against his personal representatives. Arundel v. Springer, 71 Penn. State, (21 P. F. Smith) 398.

———; *Joint and several Liabilities.*—Where trespass for mesne profits is brought against two, and one pays a certain sum in settlement, and a *nol. pros.* is entered as to him, this does not discharge the other defendant. Ibid.

State Insolvent Laws; Bankruptcy; Discharge of Sureties.—A debtor arrested under the Pennsylvania act of July 14, 1842, gave bond pending his application to be discharged as an insolvent. He appeared, and the hearing was continued from time to time, and whilst the proceeding was pending, he was adjudged a bankrupt in the federal court. *Held*, that the condition of his bond was discharged and the sureties released. The adjudications in bankruptcy suspended the operation of the state insolvent laws. Barber v. Rogers, 71 Penn. State, (21 P. F. Smith) 362.

Landlord and Tenant; *Liability of Sureties.*—A person became bound as surety for a tenant's performance of a contract of lease for one year, the rent payable monthly, and if the tenant held over after the time, the contract to continue for another year. *Held*, that if the tenant held beyond the expiration of the first year, the surety was bound for the subsequent rent. Coe v. Vodges, 71 Penn. State, (21 P. F. Smith) 383.

———; ———. That the premises were in an untenantable condition was no defence to the surety, the tenant having continued in possession. Ibid.

———; ———. The surety being informed by the landlord that the tenant was in arrears, gave him notice that he would not be further liable, the tenant paying the arrears to that time. This did not discharge the surety. He could not, by a mere notice that he would not be liable, dissolve the contract at his pleasure. Ibid.

Sale of Land by Metes and Bounds.—A parol agreement to sell 90 acres of land at $3.50 per acre, to begin on a certain line at a point named, "and go to the creek," makes the creek one of the boundaries; and the vendee must pay for the land within the enclosure, whether there be more than 90 acres or not. Ardery v. Rowles, 71 Penn. State, (21 P. F. Smith) 359.

Insurance; "Binding Receipt;" Contract with Broker.—An insurance company had a condition in their policies, that "no insurance proposed is to be considered in force until the premium is actually paid." Marland employed an insurance broker to effect an insurance; he prepared the application which was accepted by the company, who delivered him a "binding receipt," and afterwards the policy. Marland said to the broker it was not convenient to pay then, but if he was not safe he would get the money; the broker said he would be safe for thirty days; he showed Marland the policy, who asked him to keep it; the property was burned; the policy not having been delivered to Marland, nor the premium paid by him or the broker. *Held*, that the company was not liable. By giving the policy and receipt to the broker, the company gave him no authority to deliver them without payment of the premium, and his agreeing to give Marland credit, created no contract with the company. Payment was the consideration which gave life to the contract of insurance. Marland v. The Royal Insurance Co., 71 Penn. State, (21 P. F. Smith) 393.

Insurance of Mortgage Interest; Assignment of Policy.—An insurance was made to T., who gave a mortgage to W. T. assigned his policy to W. as security to W., who assigned to E. T. afterwards conveyed the property insured to C., and assigned him the policy; the insurance company refused to approve the assignment. E. afterwards became the owner of W.'s mortgage, and the company insured his interest as mortgagee. By the policy, on payment of a loss the mortgagee was to assign the mortgage to the company. The property was burned, and E. received the amount of his insurance, and assigned the mortgage to the company. *Held*, that the assignment was properly made; that T. had no claim upon the money paid for the loss, and that the company might recover from T. the amount due on the mortgage. Thornton v. Enterprise Ins. Co., 71 Penn. State, (21 P. F. Smith) 234.

1. *Equitable Mortgage; Vendor's Lien.*—Where a person purchases land, pays part of the purchase money in cash, and executes a note for the balance, together with a paper in the nature of a mortgage, but which is not sealed and not acknowledged according to law,—*held*, that such informal mortgage amounts simply to an acknowledgement that the vendor retains a lien on the land for the payment of the unpaid purchase money. Gill v. Blair, Sup. Court Mo., Oct. Term, 1873.

———; ———; *Notice; Subsequent Purchaser.*—A subsequent purchaser from the vendee, who has notice in fact of such lien, takes the land subject to the same. Ibid.

Practice of Supreme Court of Missouri; Non-suit.—In equitable actions the plaintiff cannot bring his cause before the supreme court for revision on the merits by taking a non-suit, and then appealing from the order of the circuit court refusing to set it aside; but there must be an adjudication in the circuit court on the facts and law, in order to allow the supreme court to pass upon them on appeal or writ of error. Ibid.

Practice of Supreme Court in Equity Cases.—In equity suits, the supreme court will examine the evidence, and decide the case according to the preponderance of testimony, and the law arising thereon. Ibid.

Conflict of Laws; Right of a Legatee residing in one State to sue in the Courts of Another.—A legatee residing in Kentucky, the will having been made and probated there, may maintain an action in the courts of Missouri against a person residing here, for a sum of money had and received of his testator, the title to which passed to him by the terms of the will, provided there are no creditors of the estate here. It is not necessary that the will should be proved in this state, in order to support such an action. Morton v. Hatch, Sup. Court Mo., Oct. Term, 1873.

Liability of Sureties who Sign Conditionally.—In Ayers v. Milroy, determined in the supreme court of Missouri, November 3, 1873, the oft-recurring question of the liability of a person who signs a bond or note as surety, upon condition that the signature of a certain other person as surety shall also be obtained, was presented for consideration. In this case, the instrument in question was a non-negotiable promissory note. WAGNER, J., said: "In a case of negotiable or commercial paper, it is very clear that the defence would not be held good. In a suit upon a note of that character, it was expressly held by this court, in the Bank v. Phillips, 17 Mo. 29, that it was no defence for an endorser who was sued upon a note, that he endorsed it on the express condition that it should also be endorsed by another person, where it did not appear that the plaintiff knew of the condition. In making this line of defence, there is a clear distinction recognized between bonds or other instruments that are not negotiable, and those which are negotiable. The question here presented has often been before the courts, and the almost universal holding has been, that where a bond or other instrument for the payment of money is executed by a surety, on condition that another person shall also sign it as surety, and if not so signed, then the principal obligor shall not deliver it, and if the obligor does deliver it in pursuance of this agreement, then the surety who signed it will not be bound."

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In support of this rule the learned judge cited and reviewed the following cases: State v. Sandusky, 46 Mo. 377 Cutter v. Whittemore, 10 Mass. 442; Linn County v. Farris, 52 Mo. 75; Lovett v. Adams, 3 Wend. 380; Bronson v. Noyes, 7 Wend. 188; Leaf v. Gibbs, 4 Car. & Pay. 466; Perry v. Patterson, 5 Humph. 133; Bibb v. Reid, 3 Ala. 88; State Bank v. Evans, 3 Green (N. J.), 155; Carter v. McClintock, 29 Mo. 464; Pepper v. State, 22 Ind. 399; People v. Bostwick, 43 Barb. 9; S. C. in Court of Appeals, 32 N. Y. 445; Powling v. United States, 4 Cranch, 219; United States v. Leffler, 11 Peters, 86. And, after stating that Millet v. Parker, 2 Met. (Ky.), 608, was the only direct case he had found to the contrary, he concluded:

"The plaintiff here occupies the position of taking a security, to which the party giving it had no title. The defendant was merely a surety, and derived no benefit from the contract. If the rule of principal and agent applied, then the defendant would only be liable for such acts as he authorized. The power conferred in this case was conditional; and the condition not being performed upon which its execution depended, and, it being entirely unauthorized, the principal would not be bound. The rule is settled that an agent cannot bind a party contrary to his instructions, and a special authority must be strictly construed.

"In the case at bar, there was no delivery of the note upon which this action was brought, by the surety, who now defends. It was simply left with Jones on condition that he should not use it for the purposes intended, until after he had obtained the signature of another party. It was, therefore, incomplete, and the transaction was not consummated under such circumstances. Both upon principle and authority, the surety who signed the note is not liable until the condition is fulfilled."

The judgment below in favor of the surety was affirmed; all the judges concurring, except SHERWOOD, J., who was absent.

Suits by Corporations; Denial of Corporate Existence; Estoppel.—An important question has just been passed upon by the 5th District Court of New Orleans, CULLOM, J., in the case of the Working Men's Association Accommodation Bank v. Converse et al. We are indebted to John H. New, Esq., of counsel for defendants, for a copy of the opinion of Judge CULLOM, which, owing to its length, we regret that we are not able to publish in full. The bank brought suit on the bond of Converse, its general book-keeper, praying for judgment *in solido* against him and his sureties for certain moneys alleged to have been received by him in his character of book-keeper, and converted to his own use. The defendants filed several exceptions denying the corporate existence of the bank, or that it had any corporate existence at the date of the execution of the bond. The banking association was organized under the free banking law of Louisiana, Ray's Revised Statutes, §§ 275 *et seq.*, which provides, among other things, that the articles of association, after being executed by a notarial act, etc., shall be published for four weeks *in the official journal of the state.* The articles of association of the plaintiff were not published in the official journal, but in *another newspaper*, the New Orleans Times. There was also a slight discrepancy (probably a typographical error) between the original instrument, and the instrument as published. Section twenty-one in the authenticated instrument, appeared as section 22 in the Times newspaper. It also appeared that the articles of association, as executed and published, made no mention of the *residence of the corporators*, as required by the free banking law, above named; nor did they make any mention of a *corporate seal.*

The question thus presented was, whether, after having in the contract sued on, recognized the corporate existence of the plaintiff, the defendants were estopped from denying it in this suit. This, the learned judge decided in the negative, after reviewing and distinguishing the following cases: United States v. Amedy, 11 Wheat. 392; Steam Navigation Company v. Weed, 17 Barbour 378; Meikel v. German Savings Fund Society, 16 Ind., 181; Welland Canal Co. v. Hathaway, 8 Wend. 480; Silvernagle v. Flukle, 21 La. An., 188; Dejona v. Steamboat Osceola, 17 La. An., 277; Lewis v. Homer, 23 La. An., 254; Mutual Fire Ins. Co. v. Horner, 17 Ohio, 407; Tarbell v. Page, 24 Ill., 46; Rice v. Rock Island Railroad Company, 21 Ill., 93; Eagle Works v. Churchill, 2 Bosworth, 166; Persse & Brooks' Paper-works v. Willett, 1 Robertson, 131.

Set off; Liquidated Demand; Demand for Conversion of Indian Trust Bonds.—A demand by the United States for the proceeds of Indian trust bonds, unlawfully converted to their own use, by persons who had illegally procured and sold them, and had afterwards become wholly insolvent, is a demand arising on an implied contract, or one which may be so treated by a waiver of the alleged fraud in the conversion of the bonds. It is, therefore, the proper subject of set-off by the United States, in a suit by the general assignees in insolvency of the parties who had thus converted the bonds to their own use, for the recovery of the price of certain property which had formerly belonged to the insolvents, and which had, by their said general assignees, been sold to the United States. The amount of the proceeds of the bonds, though not determined by judicial proceedings, was sufficiently liquidated, to be at any time the subject of set-off; since it could be stated with certainty, and interest could be computed and added. And even if, prior to the passage of the act of March 3d, 1863, amending the act establishing the court of claims, objection to the set-off existed in the fact that the demand of the United States was unliquidated, (assuming it to have been the fact), none could exist subsequently; since the fifth section of the act covers this class of demands. Allen v. United States, U. S. Sup. Court, Oct. Term, 1873.

Notices of Books and Exchanges.

The American Law Record, Cincinnati: Conducted and published by Herman M. Moos, Esq.

This is a monthly, in form and character much like the American Law Register. It is made up chiefly of decisions of various American courts, reported in full. It gives its readers, in each issue, 64 pages of reading matter, printed on small type. They thus get, in the course of the year, at a cost of $5,00, about the quantity of matter that would make three ordinary volumes of law reports. It is well printed, and its selections appear to be made with discrimination.

The Saint Louis Journal of Law: Weekly: $3 per annum. Edwards & Sage, 106 Market street, St. Louis, Mo.

The Journal of Law deserves the thanks of the bar of Missouri for reporting the decisions of the supreme court of this state, very soon after their rendition. This feature alone ought to insure the Journal a good support. It otherwise contains the usual matter found in a weekly publication of this character, and under its present management is well conducted.

In acknowleding in our last issue, the exchanges sent to us, by a *lapsus pennæ*, we changed the name of the Pittsburgh Legal Journal to the Pittsburgh Legal Gazette. The Legal Gazette is published in Philadelphia. Both are weeklies, and among our most valuable exchanges.

Reports of Cases determined in the Supreme Court of California, at the January and April terms, 1872, Vol. 43; Charles A. Tuttle, reporter.

The fact that from 1850, when California was little more than a desert, to 1872, at which date its population did not, perhaps, exceed 800,000 souls, the volums of litigation in its courts has been so great as to produce an average of nearly two volumes of reports a year, argues the great activity and prosperity of that state.

The present volume contains about 730 pages of printed matter; is printed on the largest type used in law reports, and is well leaded and spaced. The same matter, printed in the style of the New Hampshire Reports, could have been included in 400 pages. The reporter's head-notes are very full; perhaps they might be reduced in length without diminishing their accuracy. Mr. Tuttle is entitled to credit for stating fully each case where it is not fully stated in the opinion, and for presenting with sufficient fullness the arguments of counsel—duties which are so generally slurred over or neglected by reporters, that it is getting to be a standing observation, that the business of law reporting is one of the lost arts. It seems to us quite unnecessary, however, to set out, as he has done, at the head of each case, the full names of all the parties. It would seem that the names of the leading plaintiff and defendant, by which the case must be known, would be sufficient.

The opinions are models of brevity. Although an unusual number of the cases are devoted to questions of practice, yet many of them determine questions of general importance; and some of them we hope to find room to notice under the head of "Notes of Recent Decisions" in our next number.

The American Law Review, January, 1874. Boston: Little, Brown & Company.

Two widely different notions exist in regard to the office of a quarterly publication. By some, it is supposed to occupy about the same posi-

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tion among the weeklies, that the *Devastation* would occupy among a fleet of "tin-clads," such as we used in our late war. This conception makes it a receptacle of heavy and exhaustive disquisitions, such as can only be read by scholarly men, who are not overburdened with the cares of business. The other notion makes of it a sort of limbo, into which are tumbled the long and tedious essays, written by men who are unable to condense their thoughts into a brief compass, and which the smaller journals cannot print, nor the busier world read. Perhaps neither of these definitions does justice to the Law Review. Whilst the present number contains the usual amount of "heavy" editorial matter, "grated down and filed away with thought," it is not destitute of lighter reading, of a more varied and more enjoyable character. The first article is a fifty-page discussion, historical and legal, of the ever-to-be-remembered Dartmouth College case. The drift of popular sentiment within the past two or three years has given to this case peculiar prominence; and now, when the accumulated interests of fifty years rest upon the principle it declared, the people are beginning to think that it settled the law of vested wrongs rather than that of vested rights—that, instead of being the shield of the weak, it has become the sword of the strong. The writer in the Review argues that the decision was wrong, and suggests a declaratory amendment of the constitution as the least objectionable mode of obviating it. It is evident that the questions which gather around that case, are questions of to-day. They present issues which are knocking at the door, and which, like the slavery question, must be met and passed in some way. And the case of Dartmouth College v. Woodward, promises to acquire a popular fame equal to that of Dred Scott.

The next article relates to the San Juan boundary question, recently settled, and is political rather than legal.

The article on the Supreme Court of Judicature Act and Law Reform, will be read, we suppose, by every person who desires to acquaint himself with the sweeping changes, which have recently been made in the English judiciary system.

The Digest of Recent Decisions we pass over. We have never had much conceit in this feature of the law periodicals; and yet some will say, that if a law periodical were composed of this and nothing else, it would attain its highest degree of usefulness. The difficulty consists in the fact that the volume of adjudicated cases is so great, that such a digest can be at best but partial, and hence its value depends to a great extent upon the rule of selection. But even a partial selection is valuable as far as it goes, and helps the practitioner to form some idea of what the courts are doing.

The book notices in this number seem conceived not so much in a spirit fault-finding, as those of former issues. The praise of Mr. Holmes' new edition of Kent's Commentaries is harped by a most friendly hand; but, we doubt not, the work deserves the full measure of approbation accorded to it.

Legal News and Notes.

—THE Tichborne case has been postponed on account of the illness of Dr. Kenealy, counsel for the defendant.

—IT is stated that the late Lord Westbury, ex-chancellor of England, made his own will and actually omitted naming executors. It is also stated that he overlooked for a long time the simple fact in English law, that his second marriage invalidated a will previously made.

—A LARGE number of merchants of St. Paul have sent a telegram to their delegation in congress, begging them to oppose a total repeal of the bankrupt law. They say, "We have no objection to the modification suggested by the president. The clauses relating to dishonest actions on the part of debtors are our only protection, and ought to be retained."

—THE board of trade of Cincinnati has passed a resolution protesting against the proposed repeal of the bankrupt law, especially the involuntary clause; but recommending amendments reducing the expenses of enforcing the law, by reducing the fees of officers, and that § 39 be so amended as to make thirty instead of fourteen days, the time which must elapse, before proceedings can be commenced after a suspension of payment of commercial paper.

—THE late Justice NELSON was twice married; first, in 1819, to Pamela Woods, daughter of his former instructor in the law, and three years after her death, which occurred in 1822, to Catherine A. Russell, of Coopers-town. At the date of this second marriage, he settled permanently at Cooperstown, where he lived for more than 50 years. Those of his family who survive him, are his wife, who was with him at the last, two daughters and two sons, one of whom is the Hon. Renssellaer R. Nelson, United States district judge for Minnesota.

—A BILL has been introduced into the National House of Representatives, by Hon. C. L. Cobb, extending the time for filing claims with the commissioner of claims, appointed under the act of March 3, 1871, to March 3, 1875. The second section construes the terms "stores and supplies" to include buildings, and other structures and grounds used or occupied by the army or navy of the United States, in the states proclaimed as in insurrection, for barracks, quarters, hospitals, etc., for periods not less than thirty-five consecutive days; but does not allow any claim for damage or destruction incident to a state of war. The fourth section requires an itemized statement by the claimant. The sixth section authorizes the employment of five agents, in lieu of the three agents, now provided for by law.

—IN the United States district court at Jefferson City on the 17th ult., before Judge KREKEL, a question of some interest was determined in the case of Kappner, assignee of the St. Louis and St. Joseph Railroad company v. Ingles. The defendant and twelve others constituted the original corporators and directors of the road. These directors paid a small portion of their stock in cash, and then by a resolution of the board, declared the balance of the subscription paid in services. For the amount due for stock, which they thus voted themselves exempt from paying, the receiver brought suit against each. The instructions were such, as, under the evidence, required a verdict for the plaintiff. Verdict and judgment that the plaintiff recover $4,370.

—THE supreme court of Iowa decided on the 17th ult., at Des Moines, an important case respecting the law for restraining stock from running at large in the night time. The act provides that stock taken in the act of doing damage between sunset and sunrise, may be detained by the person whose property is injured, whether the fences surrounding such property were lawful or otherwise. The last section of the act provides that the law shall be submitted to a vote of the people of the counties, and shall not be in force in any county unless a majority, of the votes be cast in favor of its adoption. The court decides the last section unconstitutional—that no law can be passed to go into effect at a time to be fixed by somebody else; and also, that (except the last section) the law is in full force as a general law without regard to a vote of the people.

—ON November 19, at the sittings in Banco of the court of common pleas, before Justices Keating, Brett and Grove, the new lord chief justice, Sir John Coleridge, took his seat on the bench.

For some time before the usual hour for commencing business the court was crowded by gentlemen of the bar and other persons, who had got to know that the new lord chief justice was likely this morning to take his seat upon the bench, and that the preliminary process of investing him with the coif would be gone through in open court. The audience were kept waiting, for it was not until near close upon 11 o'clock that the judges took their seats upon the bench.

Sir John Coleridge almost at the same time made his appearance at the back of the bar, and advanced along a passage opened in the centre of it, until he got close upon the front row, where he halted, while the ancient form of "counting" in dower was gone through. Mr. Sergeant Parry and Mr. Sergeant Ballantine, the two senior sergeants, and Master Bennett, officiated in this proceeding.

Mr. Justice Keating, as soon as the "counting" was completed, said, Brother Coleridge, will you take your seat inside the bar?

Brother Coleridge accordingly stepped into the front row of the bar, and bowed right and left to the Queen's counsel, sergeants and other barristers present.

Mr. Justice Keating then said: Brother Coleridge, will you move anything?

Brother Coleridge, having nothing to "move," simply bowed to their lordships, shook hands with his professional brethren near him, and took his farewell of the bar.

Mr. Justice Keating observed that the court would adjourn for a few minutes in order to give time for the lord chief justice to take his seat.

On the reassembling of the court the lord chief justice appeared upon

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the bench robed in a judge's robe, and wearing his S. S. gold chain. Master Bennett administered to him the oath of allegiance to "Her Majesty Queen Victoria, her heirs and successors, according to law," and also the oath that he would "well and truly serve our sovereign lady, Queen Victoria, in the office of chief justice in the court of common pleas," and that he would "do right to all manner of people after the laws and usages of this realm, without fear or favor, affection or good will." His lordship afterward subscribed these oaths upon the roll on which they had been engrossed, and this brought the proceedings to a close, and the ordinary business of the court was gone on with.—[*London Daily News.*

Salaries of United States Collectors—Decision by Judge Treat.

Judge TREAT, of the United States district court for the eastern district of Missouri, has rendered an important decision in the case of the United States v. Donovan, in reference to the salaries of United States collectors. The case is stated by the Saint Louis Democrat, as follows: Donovan is administrator of his father, Daniel H. Donovan, who was collector and surveyor of the port of St. Louis at the beginning of the war. Following the precedent of many years, the late Mr. Donovan had charged $6,000 a year for his services, and the government contended that he was entitled to only $5,000. The suit was to settle the disputed question, which had remained undecided for a period of fifteen years.

The collector and surveyor of the port had always withheld $6,000 as his annual compensation, and the treasury department had credited him with $5,000, leaving a balance on the books against the officer. Bingham, Sanderson, and others, to whom the matter had been referred, had given the opinion that the collectors of St. Louis and other large cities were entitled to the same compensation as those of New York, Boston, etc. Judge TREAT, in his opinion, held that the ninth section of the act of 1822 gave the collectors of seven named ports $4,000 a year as compensation, such officers being classified as collectors of enumerated ports; that the same section gave to all other collectors $3,000; that the fifth section of the act of 1841, as expounded by the court in United States v. Walker, 22 How. 299, and in United States v. McDonald, 5 Wall. 347, gave to collectors of all ports $2,000 a year, when derived from storage on goods in bond, which was additional to the allowance on the ninth and tenth sections of the act of 1822. That the act of 1841 had no other effect than to give to collectors of enumerated and unenumerated ports the same compensation for storage. That the act of 1857, providing that surveyors of certain ports doing duty as collectors, should receive the same compensation for like services, made no discrimination between the different classes of collectors; so that the same construction applied to that act, as in the case of Walker under the act of 1841, namely: that the act of 1857 and that of 1841 related to two classes of collectors—one receiving $5,000 and the other $6,000, and accordingly as to whether he did duty as collector, represented one or the other of the two classes, so was he to be compensated.

That the act of 1822, perhaps, was intended by those who introduced it, to increase the compensation of surveyors and collectors, but its provisions were about the same as the act of 1857, and that the same construction has been given to both, and, in the opinion of the court, Mr. Donovan, as collector of St. Louis, was entitled to only $5,000 compensation, instead of $6,000. Judgment was accordingly rendered in favor of the United States for $1,287.03.

The principle involved in this case applies to the cases of Howard, Breckinridge, Fox, and several other collectors who preceded them, and against whom, balances stand on the books of the treasury department for sums varying from $1,000 or $2,000 to $3,000 to $6,000. The same rule will apply to collectors of Cincinnati, Chicago, and all other ports, except the seven enumerated in the act of 1822.

The Bankrupt Law—A Suggestion as to its Modification.

[Charles C. Whittelsey, Esq., in the National Bankruptcy Register.]

The consolidated English bankrupt act, adopted in 1869, two years after the passage of our statute, with its improvements upon the old methods, was printed in Vol. IV. of the Register, but does not seem to have excited the attention of any one, not even that of the members of the bar, until in this present crisis in the commercial community, the necessity of doing something for commercial men, so as to enable them to come to some other terms than an actual breaking up of their whole business, is fully seen and realized.

We, members of the bar, often see what amendments are needed to our laws; but as we are not legislators ourselves, we fail to bring to public attention the reforms which our experience has suggested.

The English statute of 1869 has a provision by which a debtor, who finds himself unable to proceed with his business in its ordinary course, can call a meeting of his creditors, and, with the assent of a majority in number, excluding those under ten pounds, and the assent of a majority of three-fourths in value, effect a compromise upon such terms as he and the majority may agree to, and thus force the minority to accept the same terms, whether for payment in full on time, or for compounding at so much per cent. on the dollar, in cash or on time. The majority determine the terms for the compromise, and its resolution can be enforced by the court. The methods of procedure are pointed out by the act; the creditors are summoned by the debtor to attend a meeting in person or by proxy, to consider and vote upon the terms proposed by the debtor; the meeting appoints its own officers, keeps its own record, accepts or rejects the overtures for compromise, and reports its proceedings to the court, and if all is found in form, the entry of record is made, and the matters are all settled in the manner proposed by the creditors, and the anxiety, annoyance, and waste of a proceeding in bankruptcy is saved.

Had such a proceeding been recognized by our statute, how many of the embarrassed business men could have effected a compromise with their creditors, so as to carry on their business, a saving both to creditors and debtors. If many prominent banking houses could have effected an arrangement, much might have been saved which must now be lost, because one creditor persists in pushing his petition in bankruptcy, and thereby prevents any arrangement for composition, or an indulgence for time of payment.

A provision for compromise, similar to that of the English bankrupt act, should be immediately passed by congress, so as to give present relief from the danger threatening every suspended house.

The Dred Scott Decision—Nelson, Story, Taney, Stowell.

[From the New York Express.]

Here and there, lingers a strong prejudice against Judge Taney for his decision in the Dred Scott case, and especially in New England, some of whose citizens object to the proposed portrait of the chief justice alongside that of Chase in the supreme court room; but Judge Nelson, upon whose memory so many honors are being bestowed, would have decided the same way. This same Judge Nelson, in the United States Supreme Court, on the Dred Scott case, quoted a very remarkable letter written by Judge Story in 1828, relating to a case analogous to that of Dred Scott. Judge Story was accustomed to write at least once a year to Lord Stowell, sending him a copy of his judicial decisions, which the latter reciprocated. At length a case arose in the English court, (of which Lord Stowell was chief justice), where an Antigua slave was carried by his master to England, for temporary residence, and was subsequently taken back to Antigua. He brought suit for his freedom, and the inferior court decided against his right to freedom. In the appellate court, Lord Stowell, in behalf of a majority of the court, affirmed the judgment below. Lord Stowell sent the decision to Judge Story, who delayed replying so long, that Lord S. again wrote to him, expressing regret at not receiving a reply, and the hope that their pleasant correspondence, of so many years' standing, would not cease. To these letters, Judge Story replied as follows:

"SALEM, NEAR BOSTON, September 2, 1828.

"*To Rt. Hon. Wm. Lord Stowell:*

"MY LORD—I have the honor to acknowledge the receipt of your letters of January and May last, the former of which reached me in the latter part of spring, and the latter quite recently. * * * I have read, with great attention, your judgment in the slave case from the vice-admiralty court of Antigua. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called to pronounce judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which led to it in such a striking and convincing manner. It appears to me that the decision is impregnable.

"In my native state (Massachusetts), the state of slavery is not recognized as legal, and yet, if a slave should come hither and afterward return to his own home, we should certainly think that the local law would reattach upon him, and that his servile character would be reintegrated. I have had occasion to know that your judgment has been extensively read in America (where questions of this nature are not of unfrequent discussion), and I never have heard any other opinion but that of approbation of it, expressed among the profession of the law. I cannot but think that upon questions of this sort, as well as general maritime law, it were well if the common lawyers had studied a little more extensively the principles of public and civil law, and had looked beyond their own municipal jurisprudence.

"I remain, with the highest respect, your most obedient servant,

JOSEPH STORY."

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, JANUARY 15, 1874.

SUBSCRIPTION: $8 PER ANNUM, In Advance.

Removal of Suits from State to Federal Court.

The judiciary act, and the subsequent acts of congress, of July 27, 1866, and March 2, 1867, authorize the removal, from the state courts to the federal courts by the non-resident party, of "*suits*" commenced in the state courts, where the amount exceeds $500, when applied for by the party entitled, and in the mode prescribed. And the acts named also provide that upon the removal, the cause "shall proceed" in the federal court "in the same manner as if it had been brought there by original process."

It is obvious that it is important to know what judicial proceedings are embraced in the word *suit;* for it is "suits" alone which these enactments authorize to be transferred. This question has been several times before the supreme court, and its latest decision is the case of the First National Bank v. Turnbull, 16 Wall. 190. The court here decides that a proceeding in a state court, under state enactments, to try in a summary and informal manner, the right of an execution plaintiff and a third person, to personal property levied upon by the sheriff, where no process is issued and no pleadings are filed, cannot be removed from the state to the federal courts, under the act of March 2, 1867. In giving the judgment of the court, Mr. Justice SWAYNE said: "it may well be doubted, whether so informal a proceeding is a 'suit,' within the meaning of the act of congress." The court did not decide the point, but placed its judgment upon the ground that the special proceeding to try the right of property provided by the statute, was "merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation." Mr. Justice STRONG dissented; but his opinion, if any was written, is not published. We should have been glad to have seen his views; for the point decided, viz., that the proceeding was not an independent litigation, although settled by the judgment of the court, does not seem to us as entirely "too clear to require discussion."

What is a "*suit*" under the 25th section of the judiciary act, was decided in Weston v. Charleston, 2 Pet. 449, in which it was held that a writ of prohibition to restrain the levy of an illegal tax was a suit within the meaning of that section. Chief Justice MARSHALL, defining the word "suit," says: "The term is certainly a comprehensive one, and is understood to apply, to any proceeding in a court of justice by which an individual pursues that remedy, in a court of justice which the law affords him. The modes of proceeding may be various, but if the right is litigated between parties in a court of justice, the proceeding by which the decision is sought, is a suit."

In West v. Aurora City, 6 Wall. 139, it was held, under the 12th section of the judiciary act, that a non-resident *plaintiff* in the state court, cannot, upon the discontinuance of his original suit, remove to the federal court a *cross-action* to which he has become liable under the state laws; for the reason that the only removal authorized by the above mentioned section, is by the *defendant*, who must avail himself of his right at the *time of entering his appearance*, to a *suit* regularly commenced against him in the state court by a citizen of the state in which the suit is brought. In Beecher v. Gillett, 1 Dillon C. C. R. 308, it was decided that non-resident attaching creditors, substituted by order of the state court as sole defendants in replevin, in lieu of the sheriff who levied the attachment, may, under the act of March 2, 1867, remove the replevin suit from the state to the federal court.

What is an original suit or action, and what is an auxiliary or supplemental proceeding, has been frequently considered in cases which did not arise under the acts relating to the removal of causes from the state tribunals to the federal. Thus, Gwin v. Breedlove, 2 How. 29, decides that a proceeding in the federal court, *by motion*, under a state law for judgment against the marshal to compel him to pay over moneys collected under execution, is not a new or original suit, but an incident of the suit between the plaintiff and defendant; and hence, the circuit court has jurisdiction, without reference to the citizenship of the execution plaintiff and the marshal. The case just referred to, as well as Dunn v. Clarke, 8 Pet. 1; Huff v. Hutchinson, 14 How. 586; Freeman v. Howe, 24 How. 450, 460, and Williams v. Byrne, Hempst. 472, turn upon the question as to what are original, and what are supplementary or auxiliary suits; and "the principle is," says Judge NELSON, in the case last cited, "that a bill filed on the equity side of the [federal] court, to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but auxiliary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties." 24 How. 460. See, also, Railroad Companies v. Chamberlain, 6 Wall. 748; and Christmas v. Russell, 14 Wall. 69, where the previous cases are reviewed and commented on.

Power of Common Carriers to Limit their Liabilities.

An important decision has recently been rendered by the Supreme Court of the United States, involving the question of the power of a railway company to limit its liability as a carrier of goods. The facts were that the plaintiff in this case was a drover, injured while travelling on a stock train of the defendants, proceeding from Buffalo to Albany, and the suit was brought to recover damages for the injury. He had cattle on the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of his cattle, and to take all risk of injury to them and of personal injury to himself, or whoever went with the cattle; and received what is called a drover's pass—certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial that these rates were about three times the ordinary rates charged, and that no drover had cattle carried

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on those terms; but all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial, tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants; and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendants caused the injury, they must find for the plaintiff, which they did.

Upon the question of law thus presented, Mr. Justice BRADLEY delivered an elaborate and exhaustive opinion (reported in full, 5 Legal Gazette, 413), in which the following points are ruled:

1. That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law.

2. That it is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

3. That these rules apply both to common carriers of goods and common carriers of passengers, and with especial force to the latter.

4. That they apply to the case of a drover travelling on a stock train to look after his cattle, and having a free pass for that purpose.

Law of Homicide — Character for Violence of the Person Slain.

The case of Fields v. The State, 47 Ala. 603, is a singular contribution to the law of criminal evidence. Doubtless there is in store for it a history much like the celebrated case of Grainger, (5 Yerg. 459). It will be constantly quoted and relied on by defendants in capital cases, and as constantly overruled or put aside by the courts. We have read and re-read it several times, and as nearly as we can comprehend it, it affirms distinctly that, in Alabama, it is not as much of a crime to kill a man whose general character for turbulence, violence and bloodshed, is bad, as to kill one whose general character in these particulars is good.

The facts were briefly these: The defendant had exasperated the deceased by sueing out an attachment against his sister. On the day of the killing, at about midday, they met at the house of a neighbor; where deceased, who was a powerful man, cursed and abused the defendant; slapped him in the face with his hat, collared him, pulled him off the steps where he was sitting, and by the use of the most opprobrious epithets and endeavored to provoke a difficulty with him. During a part of this time, a nephew of the deceased stood by with a pistol in his hand. The defendant made no resistance—said he did not want to fight. After this interview the defendant went home, got his gun, discharged the old loads, and reloaded both barrels with buck-shot, remarking that he would kill the d—d rascal before morning. About sun-set, the deceased, riding past the defendant's house on his way home, was intercepted in the road by the defendant, who deliberately shot him. There was no combat, no threatening actions on the part of the deceased, and no evidence that he was armed. Six hours had elapsed since the provocation the defendant had received from the deceased. This in contemplation of law, was ample time for the blood to cool and for reason to resume her sway. It thus appears to have been a case of deliberate and premeditated killing, characterized by express malice, done with a weapon prepared for the occasion, and possessing all the proper ingredients of murder in the first degree.

The point we are considering is raised by the refusal of the circuit judge to permit the defendant to prove "the general character of the deceased for turbulence, violence, bloodshed, and recklessness of human life." This the supreme court held to be error; and the ground upon which they arrived at this conclusion is, that, under the Alabama statute, Revised Code, § 3654, the *jury* have *a discretion* within certain limits, in cases of murder in either of its degrees, in fixing the *quantum* of punishment; whereas, at common law, they had no such discretion. They hence conclude that the evidence excluded should have gone to the jury as an ingredient to be considered in determining the *quantum* of punishment to be inflicted—determining, in other words, that it may not be so heinous a crime, nor deserving of so severe a punishment to kill a bad man as to kill a good one.

In pronouncing the judgment of the court, Chief Justice PECK uses the following remarkable language—the italics being ours:

"Here, we see that the degree of the crime must be determined by the verdict of a jury, upon an examination of testimony, and the punishment to be inflicted upon the defendant rests in the discretion of the jury. If the crime be murder in the first degree, the jury must determine whether the punishment shall be death or imprisonment in the penitentiary for life. If in the second degree, the defendant must be imprisoned in the penitentiary or be sentenced to hard labor for the county, for not less than ten years, *at the discretion of the jury*. Testimony is as necessary and important, to enable the jury to exercise this discretion prudently and properly, as to enable them to determine the guilt or innocence of the defendant. The jury have two important duties to perform, and both are to be governed and controlled by the evidence, and neither can be wisely or rightly discharged without evidence. As these duties are different, the evidence must necessarily be different. After the guilt of the defendant is settled, the proper evidence to determine *the degree of his crime*, and what should be the *extent and severity of his punishment*, must, in a great measure, depend upon a careful examination of the circumstances, not those only immediately attending the killing, but those also, which may reasonably be supposed to have led to it; *and these circumstances should be considered in connection with the good or bad character, both of the defendant and the deceased. Who is prepared to say that the punishment should be the same where a turbulent, revengeful, bloodthirsty, dangerous man, reckless of human life, has been slain, who had recently, only a few hours before, violated and outraged the person of his slayer, as though the party slain had been a man of good character, and peaceable disposition? For myself, I cannot conscientiously say so.* Although the violence and outrage committed upon the person of the defendant, in this case, might not have been sufficient to reduce the offence from murder to manslaughter, yet, we hold it was clearly proper

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for the consideration of the jury in determining the turpitude of the crime, and what should be the measure of the punishment to be inflicted. If the evidence of the general bad character of the deceased was proper only in the latter case, it should have been received, and not excluded by the court?"

It has been hitherto supposed, in countries governed by the common law, that it is as much a crime to kill a bad man as a good one. It has been supposed that the law throws its protecting arm around every person being in the peace of the king or of the state, "man, woman, child, subject born or alien; persons outlawed or otherwise attainted of treason, felony or premunire; Christian, Jew, heathen, Turk, or other infidel;" 3 Inst. 50; and whether he be a citizen or an alien enemy; State v. Gut. 13 Minn. 341, 357; or a member of a hostile tribe of Indians, Ibid.; Robertson's case, Addison, 246; or a free negro; for the law makes no distinction in its principles in respect of color; Campbell v. the People, 16 Ill., 20. Our Declaration of Independence declares that all men are created equal, and endowed by their Creator with certain inalienable rights, among which are *life*, liberty and the pursuit of happiness; which must clearly be understood to mean that all men are created with the equal right to *live*, to enjoy liberty and to pursue happiness. And it is probable that no book on the criminal law has ever been written since the time of Lord Coke, either in England or in the United States, which does not distinctly lay down the principle, that all men, not actually engaged in hostilities against the state, stand on an equal footing in the eyes of the law, in respect to the right to live; and that, except in the actual exercise of war, it is as much murder deliberately to kill one man as another. This principle is brought out in nearly every one of the reported cases, where the propriety of admitting evidence of the character of the deceased is considered.

Nor do we perceive any force in the conclusion of the learned judge, that evidence which would be irrelevant and impertinent at common law, is proper under the Alabama code, because this statute lodges with the jury the discretionary power to determine the *quantum* of punishment, which is lodged with the judge at common law. Because, whether this discretion be lodged with the jury or the judge, it is equally necessary that proper evidence should be heard to guide and direct its wise and conscientious exercise; and evidence that would be proper to be heard by the jury in the one case, would be equally proper to be heard by the judge in the other.

No one, it is conceived, can read the following cases and doubt that cases frequently arise, in trials for homicide, where evidence of the violent and turbulent character of the defendant ought to be heard: Robertson's case, Addison, 246; Quesenberry's case, 3 Stew. & Port. 308; Rippy's case, 2 Head, 217; Little's case, Sup. Court Tenn. 1873; Keener's case, 18 Ga. 194; Tackett's case, 1 Hawks, 210; Pritchett's case, 22 Ala. 39; Franklin's case, 29 Ala. 14; Lamb's case, 41 N. Y. 360; Hick's case, 27 Mo. 588; Keene's case, 50 Mo. 357; Murray's case, 10 Cal. 309; Payne's case, 1 Met. (Ky.) 370; Dumphey's case, 4 Minn. 438; Seibert's case, Wharton on Homicide, 227; Smith's case, 12 Richardson, (Law) 430, 440; Hurd's case, 25 Mich. 405.

The circumstances which are proper for the admission of this sort of evidence are pretty clearly defined:

1. Where the evidence is wholly circumstantial, and the character of the transaction in doubt; as in Tackett's case, *supra*.

2. Where there is evidence tending to show that the homicide may have been committed from a principle of self-preservation. In such a case the danger to be apprehended from an assault, and the degree of force necessary in repelling it, would depend greatly upon the *known* character of the assailant for recklessness and cruelty. This is the usual ground upon which the admission of such evidence is put by the cases.

3. Where it is proper to admit threats, either communicated or uncommunicated, made by the deceased or prosecutor against the defendant. In such a case the danger to be apprehended from the threats is to be determined, in a great measure, by the character of the person making them. In Texas, this principle has been declared by statute. Paschal's Dig. Statutes, Art. 2270; Pridgen's case, 31 Tex. 420.

But we do not recollect any instance where it has been contended that such evidence ought to be heard in every case, except in the dissenting opinion of BATTLE, J., in Barfield's case, 8 Ired. 355. But, according to the case under consideration, such evidence is admissible in all cases, without reference to the other facts in evidence; although (as in the particular case itself) the killing may have been upon an occasion produced by the slayer, or, although it may have been upon a lying in wait, or by poison; for the principle once admitted that it is less a crime to kill a bad man than a good one, there can be no logical exception made to it, growing out of the circumstances of the killing; nor does this decision undertake to make any. We conceive that such a doctrine can never obtain a foothold in a country where the principles of the common law exist. The ruling in this case becomes less intelligible when it is seen that the jury assessed the defendant's punishment at the lowest term allowed by law for murder in the second degree, and the proposed evidence, if admitted, could not possibly, in connection with the other facts proved, have reduced the homicide to manslaughter.

Law of Homicide—Can the Character of the defendant be put in evidence by the State?

The language of Chief Justice PECK in the case above considered, Fields v. The State, 47 Ala. 603, that the circumstances attending the killing should be viewed "in connection with the good or bad character both of the *defendant* and the deceased," must certainly, so far as it relates to the character of the defendant, have been inadvertently written. If there is any thing thoroughly imbedded in the criminal law, it is that the character of the person accused of crime, can never be called in question, unless he himself puts it in issue. There may be a few exceptions to this principle, as in case of a common barrator, etc., but certainly none in trials for homicide. Since Com. v. Hardy, 2 Mass. 317, the authorities to this point have become so numerous, and the principle itself is so elementary and familiar, that it is unnecessary to cite cases in support of it.

In the celebrated case of Laura Fair, 43 Cal. 137, a vigorous attempt was made on the part of the prosecution to put in evidence the character of the defendant for chastity, and with some show of reason; for in that case the defendant had been permitted to give evidence tending to show that she had been

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lured into a marriage with the deceased, supposing him to be a single man, and that the killing was hence done under the mental excitement and infirmity produced by a knowledge of the fact that he had deceived and deserted her. In order to rebut the conclusion raised by this evidence, the prosecution was permitted to show that the general character for chastity of the defendant was bad. This the supreme court very properly held to be error. WALLACE, J., said:

"Supposing that an investigation upon that point or upon any other given point of the character of the prisoner, had been pertinent in itself, it is, nevertheless, settled by an overwhelming current of judicial decisions, that it is not competent to the prosecution to initiate the enquiry, and that it is only after the prisoner has elected to put his character in issue, by calling witnesses and adducing evidence *in its distinctive support*, that the prosecution is permitted to follow and disprove the evidence so offered, if it can. Nor is the prisoner thus held to have led the way, and opened up her character to the attack of the prosecution, merely because the case made and attempted in the defence is more formidable when considered in connection with the good character—good in the sense of not being bad—which the law assumes the prisoner to possess in cases in which no evidence upon the subject of general character is offered. The presumption of a character of ordinary fairness, with which the law clothed her for the purposes of the case, was one to the benefit of which she was entitled, and which could not be put in peril, unless, discarding the presumption thus afforded her, she had elected to put it thus distinctly in issue, and so constitute it a fact to be determined by the jury, as other facts in issue were to be determined."

CROCKETT, J., delivered a concurring opinion, in which he expressed substantially the same views.

Railway Aid Bonds.

WILLIAM J. LEWIS v COMMISSIONERS OF BOURBON COUNTY.

Supreme Court of Kansas, Nov. 15, 1873.

[CONCLUDED FROM OUR LAST.]

We have thus far considered this question on the assumption that the statute designated the commissioners as the canvassing officers, and fixed the time and place of the canvass. The contrary is the fact. No canvassing officers are named. No time or place for the canvass indicated. The only general election law then in force, in its first section declares what elections are to be governed by its provisions, and they are "all elections hereafter to be held for state, district, and county officers." Comp. Laws, p. 490, § 1. Under that law the county commissioners are made the canvassers, and the Friday succeeding the election the day for the canvass. § 27, p. 497. Section 4 of "an act providing for the election of township officers," (Comp. Laws, p. 504, as amended in 1864, Laws 1864, p. 100, § 1), makes the commissioners canvassers for such elections, and names the first Monday of April for the canvass. There are also many special elections provided for in the statutes, and as a general rule the several acts in terms declare that such elections shall be conducted in the manner prescribed by the general election law. But the acts under which these bonds are claimed to have been voted, contain no such provision. Laws 1865, p. 41; Laws 1866, p. 792. They provide that "no such bonds shall be issued until the question shall be first submitted to a vote of the qualified electors of the county, at some general election, or at some special election to be called by the board of county commissioners, by first giving twenty days' notice in some newspaper published and having general circulation in the county, or in case there be no paper in the county, then by written or printed notices posted up in each election precinct twenty days previous to the day of such election; and in submitting said question, said board of commissioners shall direct in what manner the ballots shall be cast." The express authority given is to order a special election and to direct in what manner the ballots shall be cast. If they have any further power in the matter, it is either because of their general authority to represent the county, and manage its business and concerns where no other provision is made, (Comp. Laws, p. 412, § 15, clause 5), or because power to order an election carries with it the power to prescribe the manner of conducting it and determining its results. An examination of the orders of the commissioners show that they omitted to prescribe the manner of conducting the election, the time or place of the canvass, or the canvassing officers. Notwithstanding the silence of the statute and the omission of the order, an election would doubtless be valid where the people generally acquiesced in the manner and took part in the election. Here, the evidence shows that all but one township took part in the election, and fails to show the relative population of that township, or that the voters in the others did not generally participate in the election. But while the election may be valid—for it is a maxim that the will of the people shall not be defeated by the omissions and irregularities of their officers and agents—can it be that the commissioners can, without statutory authority, in the absence of notice to the voters, and before the returns are received from all the voting precincts, come together and by canvassing only a portion of the vote, create in themselves an authority which the majority of the voters have refused to grant to them? Can such unauthorized and partial canvass be even *prima facie* evidence of the authority? It seems to us doubtful. At any rate when it carries on its face information that returns of the election have not been received from some townships, it is sufficient notice to put any one on enquiry as to the actual facts of the election, and the returns filed with the county clerk.

It is claimed that the curative act of 1868, (Gen. Stat. p. 892), applies and makes valid this election. This cannot be; for that applies only to cases in which "a majority of the persons voting" have voted in favor of the subscription, and here, as we have seen, a majority voted against the subscription. It was an act to cure irregularities and sustain the will of the majority, and not an act to make form more than substance, and the canvass of the county commissioners more potent than the votes of the people.

No authority having been granted by the proceedings in 1867, was any conferred by those in 1869? The objections raised to the former do not apply to the latter. A corporation was named as the recipient of the aid, and a majority of the votes cast were in favor of the proposition. But an equally fatal objection exists to these. The question submitted in 1869 was that of extending aid to a road west from Fort Scott. It was upon that, the people voted, and to that gave their assent. The commissioners, it is true, by their order declared that if the people authorized aid to a road running west, they should consider themselves also authorized to subscribe to a road running east. Yet submitting only one question, they cannot by construction enlarge the authority actually given. That the question submitted was also a railroad proposition, does not make any difference. They might with equal propriety and legal warrant have submitted a question of issuing bonds for a court-house, and then by construction made an affirmative vote a delegation of authority to issue these bonds. Can an agent thus by construction create authority? But it may be said that while this is the form of these proceedings, it was practically and substantially a submission of both questions to be determined by a single vote. Conceding this to be the fact, and

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the difficulty, though lessened, is not avoided. The two questions were to be settled by a single vote. A vote for railroad bonds was a vote in favor of both propositions, and so of a vote against. There was no opportunity of voting for one and against the other. Such a submission was not warranted by the statute. It may be conceded that two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined, and the real will of the people overslaughed by this combination. An unpopular measure may be tacked on to one that is popular, and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of a few. Things odious and wrong in themselves may receive the popular approval, because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular elections. That aims to secure freedom of choice not merely between parties, but also in respect to every office to be filled and every measure to be determined. A voter at a state election would be shocked to be told, that because he voted for a person named for governor on one ticket, he must vote for all the other persons named thereon, or that voting for one person, he was to be understood as voting for all. He would feel that his freedom of choice was infringed upon. None the less so, is it by such a submission as this. This question is not a new one to the courts. In Supervisors of Fulton county v. M. & W. R. R. Co., 21 Ill. 373, such a mode of submission was pronounced void in the following vigorous language: "The truth is," says BREESE, J., "the voters of Fulton have never had an opportunity to vote, and never have voted this subscription; for the question was, at no time distinctly before them. The question before them was, will you vote for a subscription to two roads? Neither road has received the approving vote of the people and until that is done —until the naked single question shall be fairly presented to those voters, they ought not to be bound or injuriously affected by any such jockeying management and log-rolling. This system, condemned as it has always been by the moral sense, as well as the sense of justice of the whole country, should at this day find no favor in the courts. We do not hesitate to say this proposition to vote on two roads at the same time, was not authorized by the law, and is a fraud on the people." The same ruling was made in The People ex rel. v. Tazewell county, 22 Ill. 147; Clarke v. Supervisors of Hancock county, 27 Ill. 310. The same question was before the Iowa courts and determined in the same way. McMillan v. Lee county, 3 Clark, Iowa, 31. In giving the opinion of the court, Mr. Justice STOCKTON says: "The law according to the view that we have taken of its provisions, evidently contemplates distinctness and unity in each question or proposition submitted for adoption or rejection by a vote of the people. Each proposition submitted to such vote, should be complete in itself, and should contain every requisite prescribed by the statute as necessary to give validity and effect to the borrowing or expenditure of money, the subscription of stock, or the issue of county bonds." A mode of submission which is so obviously unjust, so contrary to the spirit of elections, and has received such condemnation from the courts, will not be imputed to the intention of the legislature, unless necessarily demanded by the language used. The statute in force at the time of this election was that of 1869, (Laws 1869, p. 108). So far as this question is concerned, however, it is not dissimilar to the acts of previous years. It authorizes the county commissioners to subscribe for and take stock or loan credit "to any railway company," "upon such terms and conditions as may be prescribed, provided a majority of the voters shall first assent to such subscription." Upon making the subscription, the county becomes, like other subscribers to such stock, entitled to the privileges granted, and subject to the same liabilities imposed by this act, or by the charter of the company in which such stock is taken. The singular number is used all the way through. It contemplates a separate transaction with each corporation; provides for a subscription to be made upon "terms and conditions;" and in the nature of things these terms and conditions would vary with different roads. No one can read the sections without being impressed with the fact that each county was to make a separate subscription; each corporation to receive a separate subscription, and each subscription to be authorized by a separate vote. The curative statute of 1868 impliedly recognizes this fact. It provides that if a majority of the persons voting at any election prior to January 21, 1868, have voted in favor of subscribing stock and issuing bonds, the county commissioners may make the subscription, "whether such orders and elections or either of them have been in compliance with the statute in such case made and provided, or not, or whether the proposition submitted at the election had, was for the subscription of stock and the issuance of bonds to one or more railroad companies." Two things are thus aimed at: first, to cure all mere irregularities in the proceedings, and second to make valid elections wholly unauthorized by the statute. It seems, therefore, that the statute requires a separate vote on the question of extending aid to each corporation; and if these proceedings are to be continued as a submission of two questions to a single vote, they were, in the language of Judge BREESE, "not authorized by the law and a fraud on the people." It seems, therefore, clear that neither by the election of 1867, nor that of 1869, was any authority given to the commissioners to subscribe stock to the Tebo and Neosho railroad, or to issue these bonds.

A graver question is now presented. Can this want of authority be shown as a defence by the county to this action of the plaintiff, who claims to be a *bona fide* holder for value without notice. Without express provision of statute, the commissioners would have no authority to subscribe stock and issue bonds to a railroad corporation. Every one dealing with the commissioners or purchasing such securities must take notice of the law under which they act. The act under which the commissioners assumed to issue the bonds, required, as a condition precedent to the vesting in them of any authority to issue, an affirmative vote of a majority of the voters, given upon a single proposition, and naming the proposed recipient of the subscription and bonds. Of this, every one purchasing bonds like these must take notice. He knows that unless these conditions exist—these steps have been taken—the commissioners have no more power than the sheriff or the county attorney to bind the county. He knows that the commissioners cannot create the authority which the statute says the voters alone can give; that they are but agents, and agents not with general powers to act for their principal in matters of this kind, but requiring a specific and express authority for every single act of subscription. Charged with notice of all this, how can he assume that because they have acted, they must have been authorized? That these bonds are negotiable paper, does not alter the case. The law merchant does not make the act of an agent proof of his authority. Where power exists which may be exercised under circumstances peculiarly within the knowledge of the agent, the exercise of the power may bind the principal, as an affirmance by the agent of the existence of those circumstances. But this pre-supposes the existence of the power. Here no power ever passed to the commissioners. The silence of the principal, when the agent is acting, often works an estoppel as implying an acquiescence. But where the principal can do nothing else than be silent, where the individual tax-payers are powerless to restrain the act, (Craft v. Commissioners Jackson county, 5 Kan. 518,) the enforced silence can hardly be construed as an acquiescence. It may be conceded that the language

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of Mr. Justice NELSON is broad enough to cover a case of this kind, and to make the act of the board in declaring their authority and issuing the bonds, conclusive evidence of the grant of power by the people. Equally broad is the language of Mr. Justice SWAYNE in Gelpcke v. City of Dubuque, 1 Wall. 175, where he says: "When a corporation has power under any circumstances to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which gave the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder, than any other commercial paper." That such a construction was not intended to be given to the language of these citations, is evident from subsequent decisions of that court. In Marsh v. Fulton county, 10 Wall. 676, the bonds of the county were issued and in the hands of a *bona fide* holder, and the county commissioners were by statute authorized to issue bonds, upon a previous affirmative vote of the electors of the county. Yet as such vote had not been had, the court unanimously held the bonds void, even in the hands of the *bona fide* holder. The *bona fide* holder had no right to presume they were issued under the circumstances which gave the requisite authority. He was bound to take notice of the county records, and they showing no authority, none existed. We cannot do better than quote the language of Mr. Justice FIELD: "It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder. This is the law, even as respects commercial paper alleged to have been issued under a delegated authority, and is stated in the case of the Floyd Acceptances, 7 Wall. 676. In speaking of notes and bills issued or accepted by an agent acting under a general or special power, the court says: 'In each, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies, comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued." And in another place replying to the claim that because some interest had been subsequently paid, the original proceedings were made valid and good, he says: "The supervisors possessed no authority to make the subscription or issue the bonds in the first instance, without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not therefore ratify a subscription without a vote of the county; because they could not make a subscription in the first instance without such authorization."

It may be remarked—that the bonds in that case contained no recitals of proceedings by the county board, or a vote of the people, but were simply naked promises to pay. The same is true of the bonds in this suit. The effect of this on the question may be considered hereafter. Pendleton county v. Amy, 13 Wall. 297, is a still later case in that court. In that case, Mr. Justice STRONG for the court, after alleging that it was the duty of the county officers to determine whether a vote had been had according to law, and what the result was, uses this language. "To issue bonds without the fulfilment of the precedent conditions, would be a misdemeanor; and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases; but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. 21 How. 539; 24 How. 287; 2 Black, 722; 1 Wall. 384, 291; 5 Wall. 772. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds."

In one of the early cases, Bissell et al. v. City of Jeffersonville, 24 How. 287, Mr. Justice CLIFFORD says: "whether we look to the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful authority; and we hold that the company and their assignees under the circumstances of this case, had a right to assume that they imparted verity." It appeared that copies of the proceedings of the county board were shown to the plaintiffs in that case, at the time they received the bonds, etc. It seems a fair inference from these citations, that all the Supreme Court of the United States have decided is, that when either the board or the records of the county contain a recital of an election, and all other conditions precedent, as prescribed by the statute, the county is concluded by that recital, and may not show that as a matter of fact no election took place, or that some other condition precedent never existed. With such a construction of the law, we have in this case no occasion to differ. The bonds sued on contain no recital, and the records show a non-compliance with the statute. An examination of the opinions of other state courts show a disposition to place the construction we have given, upon this general language of the United States Supreme Court, or else to disagree with the views expressed by that tribunal. We have had occasion to notice the decision of the supreme court of Ohio, (11 Ohio State 183), cited *supra*. See also Hopple v. Brown township, 13 Ohio State, 311; State ex rel. Beckel v. Union township, 15 Ohio State, 437. The supreme court of Iowa, in Clark v. The City of Des Moines, 19 Iowa, 199, had occasion to notice these rulings, and after citing the language heretofore quoted from Judge SWAYNE, says: "Suppose a city charter expressly authorized the common council to issue negotiable securities for corporate debts, and that the mayor and recorder without an order of the council, fabricate—manufacture—such securities, and that they find their way into the hands of innocent purchasers. It cannot be that Judge SWAYNE means that the '*bona fide* holder has a right to presume that they were issued under the circumstances which gave the requisite authority'; and yet he says so. The true rule is, that the want of corporate power, or the want of authority in the municipal officers cannot be supplied by their unauthorized acts or representations." And in accordance with that rule, the case was decided, all the justices concurring. To the same effect is the case of Veeder v. The Town of Luna, 19 Wis. 280, in which the court, Mr. Justice COLE dissenting, held that the recitals in the bond were not conclusive, and dissented squarely from the United States Supreme Court as to the effect of those recitals. The cases of Starin v. The Town of Genoa, and Gould v. The Town of Sterling, 23 N. Y. 439 and 456, are strongly in point. The legislature of that state authorized, by separate acts, these towns to issue their bonds in aid of railroads, provided the written assent of two-thirds of the resident tax payers was first obtained and filed in the clerk's office. The court of appeals held, reversing the judgment of the lower courts, that the bondholder, sueing on bonds issued by these towns by virtue of these acts, must prove affirmatively that the written assent of the requisite number of tax-payers was in point of fact obtained and filed, and that the town was not bound by the representations of its officers upon the face of the bonds, that such assent had been obtained and filed. In the latter case, Judge SELDEN, replying to the claim that the recitals in the bond created an estoppel, says: "The agents here were designated not by the town, but by the legislature; and no power whatever, was conferred by the town, unless the assent of the tax-payers was obtained. Any representation, therefore, by the supervisors and commissioners in respect to such assent, would be a representation as to the very existence of their power. Such representations, as we have seen, are never binding upon the principal."

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The same doctrine was sustained by the subsequent cases of The People v. Mead, 24 N. Y. 114; The People v. Mead, 36 N. Y. 224.

In his work on Constitutional Limitations, Judge COOLEY, commenting upon the doctrine of Gould v. Sterling, says: "This doctrine appears to be sound, that wherever a want of power exists, a purchaser of securities is chargeable with notice of it, if the defect is disclosed by the corporate records, or, as in that case, by other records where the power is required to be shown." Page 217. For a further discussion of this question, and other authorities, see the note at the foot of page 216, of that work. The difference between the federal and state courts is this: the former hold the county concluded by the recitals of the bond; the latter, that the bondholder is chargeable with notice of whatever appears upon the county records. Both agree that where there are no recitals on the face of the bond, and the want of authority appears on the county records, the bonds are void even in the hands of a *bona fide* holder.

These bonds contain no recitals of an election or other proceedings of the county board, but are naked promises to pay. At the close of the obligatory words, they read: "By order of the board of commissioners of the county of Bourbon, Kansas, dated March 8, 1867." The purchaser, therefore, is notified on the face of the instrument, of the particular order under which the bonds were issued. Claiming under one instrument which recites the existence of another, and refers to it as the authority for its own existence, is he not charged with notice of the contents of the latter? Story, Eq. Jur., § 400. We have given this case and the questions involved in it, full and careful and patient consideration, both on account of the amount in controversy here, and because of the many which may be affected by the decision of these questions. The conclusions we have reached are, that the proceedings of March 8, 1867, were void, because no railroad corporation was named as the recipient of the proposed subscription and bonds; that the election of May 7, 1867, conferred no authority, because a majority of the votes cast were against the granting of authority; that, for a like reason, the curative act of 1868 did not apply to that election; that the proceedings in 1869 conferred no authority, because no question of issuing these bonds was submitted to the voters of Bourbon county; and because an attempt to submit two questions to a single vote is unauthorized by the statute and a fraud upon the people; that there being no recitals on the face of the bond, the county is not concluded by the mere fact that the commissioners issued them, even in favor of a *bona fide* holder; that the want of authority to issue appears on the records of the county, and that the purchaser is referred to those records by the bond itself, and is chargeable with notice of their contents. It follows therefore that judgment must be entered in favor of the defendants.

All the Justices concurring.

Bankruptcy—Counter Claim Against Petitioner.

IN RE OSAGE VALLEY AND SOUTHERN KANSAS RAILROAD COMPANY.

District Court of the United States, Western District of Missouri, 1873.

Hon. ARNOLD KREKEL, District Judge.

1. **Bankruptcy—Counter-Claim against petitioner—Unliquidated damages.**—A debtor against whom a petition in bankruptcy is filed, may set up in his answer, an order to show cause, any set-offs or counter claims which he may have for the purpose of showing that he is not indebted to the petitioner, and such counter claims may be for *unliquidated damages*.

2. **Counter claim reducing petitioner's debt below $250 defeats proceeding.**—If a debtor can show that he has just set-offs or counter claims to overcome petitioner's debt, or to reduce the same below two hundred and fifty dollars, he thereby defeats the proceeding; for, unless petitioner has a debt of that amount, after allowing all just set-offs and counter claims, he is not entitled to raise any question in regard to the solvency of, or acts of bankruptcy committed by, the debtor.

The facts of the case and the nature of the pleadings on which the opinion was pronounced are sufficiently stated therein.

I. N. Litton and *Ewing & Smith*, for petitioner.

Johnson & Botsford and *McMillan Bros.*, for debtor:

1. In suits and proceedings instituted in, or transferred to, the federal courts, the same defences, set-offs and counter claims may be interposed as could be if they were brought and tried in the state tribunals. West v. Aurora City, 6 Wall. 139; Partridge v. The Insurance Co. 15 Wall. 573.

2. Petitioner must have a debt, provable under the bankrupt law, of two hundred and fifty dollars after allowing all just credits, set-offs and counter claims. In re Ouimotte, 1 Sawyer 47; in re Cornwall, 9 Blatchf. C. C., 114; Bump on Bank, (6 edition) 47–48.

3. Unliquidated damages are a proper subject of counter claim under the laws of the state of Missouri, where the suit is on contract, and the damages also arise from the breach of contract. Hay v. Short, 49 Mo. 139; Gordon v. Bruner, 49 Mo. 570; Davidson v. Remington, 7 How. Pr. 310; Gage v. Angell, 8 How. Pr. 335; Lemon v. Trull, 13 How. Pr. 248; Jones v. Moore, 42 Mo. 413.

KREKEL, J.

The Pacific railroad files its petition to have the Osage Valley and Southern Kansas railroad declared bankrupt, and after setting out formal requirements, alleges that its demand originates in the violations of the conditions of a lease made by the Osage Valley and Southern Kansas railroad on the 10th day of September, 1868, for thirty years, of its Boonville and Tipton road, to the petitioner; that by a provision of said lease, it was to have the use and possession of its Boonville depot and grounds, of which it has been deprived by judgment in favor of an adverse claimant, and had damages and costs to pay; that by another provision of said lease, the Osage Valley and Southern Kansas railroad was to fence the one-half of said railroad in two, and the whole thereof within five years from the date of the lease, which it failed to do, and for which failure damages are also claimed.

The acts of bankruptcy are charged to be the suffering and procuring of its property to be taken on legal process with intent to give a preference, and with intent to defeat and delay the operation of the bankrupt law.

To this petition, the Osage Valley and Southern Kansas railroad files an answer denying the acts of bankruptcy; and further, that the Pacific railroad is a creditor, or has a demand against it. As a defence to the claim of petitioner, the Osage Valley and Southern Kansas railroad sets up and claims damages growing out of a violation of obligations assumed and undertaken on the part of the Pacific company in the lease aforesaid, and asks that such damages may be allowed as a set-off and counter claim, averring that on a settlement of their demands, the Pacific railroad will be indebted to the Osage Valley and Southern Kansas railroad.

The attorneys for the Pacific railroad file their motion to strike out so much of defendant's answer as refers to unliquidated damages. This motion raises the question: is the claim for unliquidated damages available as a set-off or counter claim? This question must be solved by the provisions of the bankrupt act; for whatever force may be given to the act of congress of June 1, 1872, providing for the assimilating of the practice and pleadings of federal courts to that of the state courts, neither that act nor the bankrupt law has done away with the distinction between law and equity, although the bankrupt act, as we shall presently see, seems in some of its enactments to disregard it. Authority for this may be found in the constitutional grant of power to congress "to establish uniform laws on the subject of bankruptcy throughout the United States."

This grant, so far as limitations are concerned, leaves it for the national legislature to enact whatever provisions of law it may

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deem best to accomplish the constitutional object. The first section of the bankrupt act constitutes the districts courts of the United States, courts of bankruptcy, and confers on them original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are thereby authorized "to hear and adjudicate upon the same according to the provisions of this act, providing that the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy."

These jurisdictional grants, however ample, need not come in conflict with the maintaining of the distinction between law and equity; yet when we come to the provisions of the second section of the act, giving the circuit courts of the United States a general superintendence and jurisdiction of all cases and questions arising under it, and providing that they "may, upon bill, petition or other proper process of any party aggrieved, hear and determine the cases as a court of equity," it would appear that congress, by these provisions, sought to meet a peculiar class of cases, having their origin in the bankrupt act, in which law and equity were blended.

But the jurisdiction to hear and determine the matters in controversy does not exclusively depend on the construction given to the provision in the sections cited. The last clause of the 19th section of the act under consideration, provides that "if any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, * * * * the court may cause such damages to be assessed in such a mode as it may deem best; and the sum so assessed may be proven against the estate." Thus it is seen that, by direct provision, unliquidated damages, growing out of any contract or promise, when assessed, are provable debts, and, being provable debts, under the view of the court, may be set up by way of defence to show that no debt or demand is due to petitioner entitling it to have defendant declared a bankrupt.

It is said that the damages must be assessed before they become a provable debt, and before they can be made available as a counter claim. While this is true, the mode of assessing is left to the court, "as it may deem best." In the settlement of a bankrupt's estate, the court would undoubtedly direct the assessment of unliquidated damages before allowing it to be proven; but this practically amounts to nothing more or less than an enquiry as to the amount.

As this court may, by allowing the answer to stand, make this its mode for assessing defendant's damages consistent with the provisions of law, it will not order the defendant out of court with its claims, which, if sustained, may dispose of the case. While this view of the law would allow petitions in bankruptcy to be brought on claims for unliquidated damages growing out of contracts or promises, it must be left for the courts to determine whether they will, in the first instance, deem an assessment by way of enquiry, on creditor's petition, a mode deemed best to assess unliquidated damages.

Of this the court entertains serious doubts, and declares itself free to act when a case shall be presented. The question on the motion under consideration is, shall a claim for unliquidated damages be made available as a defence, to show that defendants are not indebted to petitioners, and hence that the latter have no standing in court? Petitioner must have a claim, after all just credits exceeding the amount of two hundred and fifty dollars, to entitle it to raise the enquiry as to the facts of bankruptcy and solvency of the defendant. That the *prima facie* case made by the petition, proofs and exhibits upon which the order to show cause issued, may be rebutted, is well settled by the almost daily practice of this court, as well as adjudicated cases.

That part of the motion to strike out defendant's answer covered by this opinion, is overruled.

Validity of a Trust Sale of a Portion of a Debtor's Estate, Pending Proceedings in Bankruptcy.

McGREADY v. HARRIS.

Supreme Court of Missouri, October Term, 1873.

WASH ADAMS,
DAVID WAGNER,
WM. B. NAPTON, } Judges.
H. M. VORIES,
T. A. SHERWOOD,

Bankruptcy—Sale by Trustee, Pending Proceedings, of Property Conveyed in Trust by Bankrupt to secure Creditors.—A trustee under a power in a deed of trust, sold and conveyed to the defendant the property in question, subsequent to the commencement of proceedings in bankruptcy against the debtor, who was the grantor in the deed of trust. There was no order from the United States district court restraining or otherwise interfering with the sale, nor had the proceedings therein terminated in any adjudication at that time; but the trustee, when about making the sale, was informed by the debtor of the pending proceeding in bankruptcy. In an action of ejectment by the purchaser, *it was held*, that the pendency of such proceedings in bankruptcy did not render the sale invalid.

The case is stated in the opinion.

John L. Thomas & Bro., for plaintiff in error; *Reynolds & Relfe, and M. Kinealy*, for defendant in error.

NAPTON, J., delivered the opinion of the court.

This was an action of ejectment. The plaintiff was the purchaser of the lands sued for, at a sale made in August, 1872, by the trustee under a deed of trust made in 1868. In April, 1872, (Apr. 8th), proceedings in bankruptcy had been instituted in the district court of the United States, against the debtor and grantor in the deed of trust, but the trustee, although apprised of such proceedings by the grantor on the day of sale, proceeded with the sale, and the plaintiff became the purchaser, and the only question is, whether the institution of the proceedings in the United States district court rendered the sale void. There was no order from the district court restraining or otherwise interfering with the sale, nor had the proceedings therein terminated in any adjudication whatever. It was an attempt on the part of defendant's creditors to have him declared a bankrupt.

The circuit court before which this case was tried, declared the sale null, and that the plaintiff had no title. We do not so understand the decisions of the federal courts interpreting the bankrupt act. That law was not designed to invalidate or destroy *bona fide* liens on the estate of the bankrupt, nor does it reserve exclusively to the district court, the power to have them enforced in all cases, and under all circumstances.

They may be enforced in [the] mode provided for by the contract of the parties, or by the action of state courts or state officers. Doubtless the district court might have interfered in this case; but it did not, and therefore, we cannot see that the mere fact of a proceeding being instituted would destroy the legal title of plaintiff, as he received it from the trustee. So far as the rights of an assignee in bankruptcy are concerned, it may well be that the whole transaction could be, on presentation to the court, examined and declared fraudulent or void, if the facts warranted. But no assignee has been appointed in this case, nor, so far as the record shows, has there been any adjudication whatever in the proceedings in the district court. Should such an adjudication occur and an assignee be appointed, we are unable to perceive why the assignee cannot deal with the purchaser as well as the mortgagor, if he seeks to question the validity of the deed or of the sale thereunder. With these questions, however, we have no concern. In this action of ejectment, the simple question is, Who has the legal title, the purchaser at the sale, or the defendant? The deed gave the trustee a power to sell and convey the legal title.

Whether this sale was made under such circumstances as to authorize a court of equity to set it aside in a direct proceeding for that purpose, is another question, which is not presented by this case. The court below simply declared the sale a nullity. It

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may be that the land was sacrificed, and that the trustee should have deferred the sale under the circumstances; but the court below did not pass on that point, and it is not, therefore, before this court.

The judgment is reversed and the cause remanded.

The other judges concur.

REVERSED.

NOTE.—Undoubtedly there are decisions in a number of the district courts sitting in bankruptcy, which are opposed to the view taken in the above case, and which go upon the ground that it was the intention of the bankruptcy act that *all* debts, including those secured by mortgage, should, after a petition in bankruptcy is filed, be presented to, or be enforced, under the superintendence of the bankruptcy tribunals. Without now entering into a discussion of this question, it may be remarked, that the principal case, as to the rights and remedies of creditors, seems to accord with views of the United States Supreme Court in its most recent judgments. Marshall v. Knox, 16 Wall. 551; Wilson v. City Bank of St. Paul, decided December 22, 1873. These cases did not, however, involve the direct question as to the right of a mortgage creditor to proceed *after* a petition in bankruptcy is filed, to foreclose his mortgage by sale under a power or by bill in the state court, without the assent of the bankruptcy court.

Mode of Declaring Upon Coupons.

JAMES KENNARD v. CASS COUNTY.

United States Circuit Court for the Western District of Missouri
November Term, 1873.

Before DILLON and KREKEL, JJ.

1. **Suits upon Coupons—Profert of Bonds Unnecessary.**—The holder of coupons, payable to bearer, may sue thereon, without producing or being interested in the bonds to which they were originally attached. [Acc. Smith & Hall v. Clark county, 1 CENT. LAW JOUR. 6.]

2. **Declaring upon Coupons—Averment of authority to execute.**—Where there is no general authority in a public corporation to make negotiable paper, the special authority should be stated in the declaration, or by alleging the recital of the bonds in that respect.

3. ————. **Recital of numbers, dates, etc.**—In declaring on coupons, the instruments in suit should be identified on the face of the declaration by the number of the bond, date, sum and time of payment.

On demurrer to the petition. The petition seeks to recover on a large number of coupons. Each count is as follows:

Plaintiff states that the defendant herein, on the 11th day of July, 1870, made its certain instrument in writing commonly called a coupon, herewith filed, whereby defendant promised to pay to the bearer, on the 11th day of January, 1873, at, etc., the sum of $25, the same being the interest due on the date last aforesaid on a certain bond issued by the defendant, which said bond is therein mentioned. Plaintiff states that he is the owner, holder and bearer of said coupon; that defendant has failed to pay said coupon when due, although the same was duly presented for payment on the said 11th day of January, 1873, etc., and payment thereof refused; that said coupon remains due and unpaid, wherefore plaintiff demands judgment against defendant, etc.

The defendant demurs for that—

1. No cause of action is stated.

2. It is not stated that the bonds and coupons were made and issued by the county court of Cass county.

3. It is not stated that they were made in pursuance of any law of the state authorizing their issue; and

4. No facts are stated showing that the county or its officers were authorized to issue said bonds and coupons.

John D. Stevenson and *Ewing & Smith*, for the plaintiff; *W. P. Hall, Gage & Ladd* and *Robert Adams, Jr.*, for the county.

DILLON, Circuit Judge.

The holder of coupons like those in suit may sue thereon, although he be not the owner of the bonds from which they were detached; and under a declaration, properly framed, may recover without producing or being interested in the bonds. Thomson v. Lee county, 3 Wall. 327; The City v. Lamson, 9 Wall. 477; McCoy v. Washington county, 7 Am. Law Reg. (O. S.) 193, per Mr. Justice GRIER, S. C., 3 Wallace, Jr. 381.

But where the maker is a county or other corporate body which has no inherent or general power to make such instruments, but can make them only by virtue of special authority, the principles of pleading require that such authority should appear, either by distinct averment of the special act conferring it, or by stating the recital of the bond in that respect.

The coupons, though detached, are related to the bonds to which they originally belonged, and by way of inducement or recital, this relation ought to appear on the face of the declaration or petition. The City v. Lamson, *supra*.

These views are not inconsistent with the case of The Railroad Company v. Otoe county, 1 Dillon C. C. 338, which was, in some respects peculiar, and where it was insisted that the pleader should state the *facts* showing that the county officers had the authority to issue the bonds, that is, should allege the election or other facts showing compliance with the preliminary steps on which the issue of the bonds was authorized; but this was held not to be necessary.

Experience in this class of litigation in other states has shown that it is also well that the coupons should be identified by the number of the bonds as well as by the date, amount, time of payment, etc., of the coupons themselves, as thereby the danger of the same instrument being more than once put in suit is much diminished.

For the reason that the authority of the county of Cass to issue the coupons ought to appear in the manner above stated, the demurrer is sustained, but the plaintiff may amend.

KREKEL, J., concurs. JUDGMENT ACCORDINGLY.

NOTE.—Mode of declaring on coupons. Ring v. Johnson county, 6 Iowa 265; Wiley v. Board etc., 11 Minn. 371; Thomson v. Lee county 3 Wall. 327; The City v. Lamson, 9 Wall. 477; McCoy v. Washington county, 7 Am. Law Reg. (O. S.) 193.

Limitation of actions on coupons: The City v. Lamson, 9 Wall. 478; Lexington v. Butler, 14 Wall. 282. S. C., 3 Wallace Jr. 381.

Coupons draw interest from the time they become due and payable. Aurora v. West, 7 Wall. 105; Gelpcke v. Dubuque, 1 Wall. 206; Burroughs v. Richmond county, 65 North Car. 234.

Effect of the Rebellion on Powers of Sale in Deeds of Trust.

The Supreme Court of the United States, on the 7th inst., pronounced a very important opinion in the case of Washington University v. Finch et al., on appeal from the circuit court for the district of Missouri. Before the war, a debt had been contracted by a citizen of Virginia, to Washington University, secured by a deed of trust on property in Missouri, with the usual power to the trustee to sell on default of payment. During the rebellion the debtor, who was the grantor in the deed of trust, resided in the insurrectionary portion of Virginia, and the debt not being paid, and the creditor residing in Missouri, the trustee advertised and sold the property in pursuance of the terms of the deed of trust, the war being at the time of the sale, flagrant, and the non-intercourse act between the inhabitants of the two sections in full force. The question was as to the validity of such sale. The supreme court, Mr. Justice MILLER delivering the opinion, holds, reversing the decree below, that the property of citizens residing in an insurrectionary district, found in a loyal state is liable to seizure and sale for debts contracted before the war, even though such property be seized and sold while the war is pending. And in the case before it, the court decided that the sale by the trustee, pursuant to the power in the trust deed, conferred a good title. This case settles a point of great moment, which the previous decisions of the supreme court as to the effect of the war upon contracts had left in much uncertainty.

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Supreme Court of the United States—Abstract of Decisions.

[From the New York Herald.]

Shipping; Collision.—Sapphire v. Napoleon III., Jan. 5, 1874. In the United States Supreme Court to-day, in the case of the ship Sapphire v. Napoleon III., Emperor of the French, from the California circuit court, recently argued on a question of construction of the decree formerly made in the case, the court held that where in the case of collision, the decree finds both vessels in fault and divides the damages between them, if one vessel has shown no damages, it is nevertheless liable for half the damages and costs of the other, although that vessel was also at fault. Under this decision the Sapphire, the libelled ship, which, as claimant could show, received no damage below, is held for half the damages of the Euryale, the French ship, and any damages actually suffered by her are regarded as not having been contemplated by the court and as foreign to the case. The collision occurred in the harbor of San Francisco, in December 1870, while the Euryale was moored and the Sapphire at anchor, the latter dragging her anchor and colliding with the former during a gale. Mr. Justice STRONG delivered the opinion.

Negligence; Fellow Servants in Common Employment.—Union Pacific R. R. Co. v. Fort, Jan. 5, 1874. In the case of the Union Pacific railroad company against Fort, from the circuit court for Nebraska, the plaintiff engaged his son to work for the company, as helper at a moulding machine or as a common workman; but subsequently, without his consent, an agent or superintendent sent the lad aloft upon the ladder to adjust machinery. In obeying the order the boy lost an arm, which was torn off by a belt. On these facts the court hold that the plaintiff could recover for the damage sustained by his child, as the employment at which he was put, when hurt, was not within his contract of service; also, that if such a company is not the insurer of the lives and limbs of its employes, it does impliedly engage not to expose them to such hazard when it is not reasonable or necessary to do so. Mr. Justice DAVIS delivered the opinion. Mr. Justice BRADLEY dissented, holding that both the superintendent and the lad were fellow-servants in a common employment, and that it is well settled there could be no recovery in such a case against the employer.

Ejectment; United States Patent.—Henshaw v. Bissel, Jan. 5, 1874. In the case of Henshaw et al. v. Bissel, from the circuit court for California, on an action of ejectment brought by Bissel for the possession of certain lands in Butte county, of that state, in which both parties claimed under patents from the United States, the court affirm the judgment below, finding the title to be in Bissel. Mr. Justice FIELD delivered the opinion.

Sale under Deed of Trust, Debtor residing in insurrectionary State.—Jan. 7, 1874. Washington University of Missouri v. Finch et al.—Appeal from the circuit court for Missouri.—In this case the court below held that parties living in insurrectionary districts during the war, and who prior thereto had given deeds of trust on certain lands in Missouri, with authority to the trustee to sell in default of payment of the debt which the deeds were given to secure, were entitled to a suspension of their contracts pending the war, and would after its close be entitled to perform their contracts and redeem their lands, notwithstanding a sale in their absence by virtue of the provisions of the deeds. This decision is here reversed, the court holding that a sale of real estate made in pursuance of such provisions in a deed of trust, is valid, notwithstanding the grantors in the deed were citizens and residents of states in insurrection at the time of the sale, made while the war was flagrant. The property of such citizens found in a loyal state is liable to seizure and sale for debts contracted before the war, as in the case of other non-residents. Mr. Justice MILLER delivered the opinion.

False Imprisonment; Military Arrests in Districts not under Martial Law; Indemnifying Act of 1867.—Bean v. Beckwith.—Jan. 7, 1874. Certificate of division from the circuit court for Vermont.—The questions for decision in this case were, first, whether the plea of a military officer, who had arrested and imprisoned a private citizen without warrant or other authority, except that given to the president by the act of 1865, that the act was done in obedience to executive and military orders, was a bar to an action for false imprisonment; and, second, whether the action ought to be dismissed by force of the provisions of an act to declare valid and conclusive, certain proclamations of the president and acts done in pursuance thereof or of his orders in the suppression of the late rebellion, approved March 2, 1867. The court answers both questions in the negative, holding, in substance, that such military authority did not exist in the absence of martial law in the district where the arrest was made, where there were no military operations and the party arrested was in no way connected with the military service, and the courts were in unobstructed exercise of their jurisdiction, and that it was not enough to bring the act within the act of 1867, that the party doing it was generally employed in the executive department of the government, to come within the indemnity of the statute. The act must be done in pursuance of express orders or proclamation issued by the president or under his immediate authority. Mr. Justice FIELD delivered the opinion.

Admiralty Jurisdiction; Attachment against property of Non-resident; Waiver by appearance.—Atkins et al. v. Fibre Disintegrating company—Jan. 7, 1874.—Appeal from the circuit court for the eastern district of New York.—This was a libel for freight due on a cargo brought from Kingston and Port Morant, Jam., for demurrage while getting a cargo and for damages to the ship by being stranded at Port Morant. The decree of the district court was for the libellants, except as to the damages for getting ashore, and they appealed to the circuit court from so much of the decree as disallowed the damages, and the respondents from entire decree. The circuit court reversed the decree on a question of practice raised, holding that the district court, as a court of admiralty, had no authority to attach the property of a non-resident of the district, under the prohibition contained in the eleventh section of the Judiciary act of 1789. The libellants here claimed that by a voluntary appearance made on the part of the company, it had waived the benefit of this objection, and on the merits of the question of the right of attachment in such cases, they contended that it exists, and that without it there is no remedy, whatever the right of action. The court sustained this theory and reversed and remanded the cause. The case has been several times reported. Mr. Justice SWAYNE delivered the opinion.

———; ———.New England Mutual Insurance Company v. Detroit and Cleveland Navigation Company—Jan. 7, 1874. Appeal from the circuit court for Ohio.—This cause involved the same question decided in the last case of the right of attachment in admiralty suits in personam brought against non-residents of the district where the action is brought, and the decision made in that case disposes of the question. Reversed and remanded. Mr. Justice SWAYNE delivered the opinion.

Claims against United States; Indian Depredations.—Guttman & Stuart v. United States—Jan. 7, 1874. Appeal from the court of claims.—This action was brought under the act of 1849 to recover for cattle lost by Indian depredations while they were in government service in the transportation of supplies. The court below held that it was not sufficiently shown that the Indians were a public enemy, to enable the claimant to recover, and that the service was not military, and the petition was dismissed. This court affirms the judgment, saying that it does not appear whether the Indians were hostile to the government or only desired the cattle of the claimant, and that such a service, remote from the operations of war, were not contemplated by the act providing for reimbursing losses in the service. Mr. Justice HUNT delivered the opinion.

———; *Violation of public Contract by purchasing of another.*—Shrewsbury v. United States—Jan. 7, 1874. Appeal from the court of claims.—This was a suit to recover on a contract made with the government for transportation, the claimant alleging that subsequently the contract was violated, and his interests destroyed by a contract made with and performed by other parties. These parties sold to the government and delivered grain over the same route covered by the contract of claimant. The court held that the contract with the other parties was not for transportation, but purely one of purchase, with an agreement for delivery, which it was competent for the government to make, and that, therefore, the petition was properly dismissed. Mr. Justice HUNT delivered the opinion.

Infringement; Invention not patentable.— Hicks v. Kelsey—Jan. 7, 1874. Appea lfrom the circuit court for the northern district of Illinois.—This is an affirmance of a decree dismissing a bill brought against Kelsey for an alleged infringement of the plaintiff's patent for an improved truck and wagon reach, the court holding that the invention claimed is not patentable. Mr. Justice BRADLEY delivered the opinion.

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Mandamus against Secretary of Treasury.—United States ex rel. Lewis et al. v. Boutwell, secretary of the treasury—Jan. 7, 1874.—Error to the supreme court of the District of Columbia. This was a proceeding in mandamus to compel the secretary of the treasury to pay a claim of the Choctaw nation to its agents, but having abated, it was now dismissed. Mr. Justice CLIFFORD delivered the opinion.

Marine Insurance; Policy to take effect before its Date; Loss happening before Date of Policy.—Merchants' Mutual Insurance Company v. Folsom, Jan. 7, 1874—Error to the circuit court for the eastern district of New York. This was the affirmance of a decree, sustaining the validity of a policy of marine insurance which was dated on the first of March, 1869, but which, by its terms, was to commence on the first of January of that year, and run for twelve months. The ship insured having been lost at sea within the time covered by the policy and before its date, and the fact appearing on the company's disaster book, the court holding that under such circumstances the insurers' neglect to state the report of her loss, which had been publicly printed and circulated, did not affect or avoid the policy. Mr. Justice CLIFFORD delivered the opinion.

Consideration of Note; Release of Dower.—Sykes v. Chadwick—Jan. 7, 1874—Error to the supreme court of the District of Columbia. This was an affirmance of a judgment for Mrs. Chadwick on a note executed to her by her husband and Sykes jointly, the consideration of which was her consent to release her right of dower in property owned by them and which they wished to sell. The court held that the contract of the note was valid, and that under the laws of the district, the suit could be maintained in the name of Mrs. Chadwick. Mr. Justice BRADLEY delivered the opinion. Mr. Justice MILLER dissented.

Notices of Books and Exchanges.

Reports of cases argued and determined in the supreme court of Tennessee for the middle and western divisions, for the year 1871. Joseph B. Heiskell, Reporter. Volume 4. Nashville: Wheeler, Marshall & Bruce, 20 North Cherry street.

The latest date to which these reports bring us, is May 17, 1871. This volume is thus nearly three years behind time. We feel sure, however, that no blame is to be imputed to the reporter on this account. In Tennessee, the offices of attorney-general and reporter are united in the same person; and the present incumbent, in addition to the duty of reporting the decisions of a court composed of six judges actively at work, is obliged to argue every case in the supreme court in which the state is interested or a party, including the criminal cases appealed from the different circuits, and also to represent the state in civil suits in other courts. We presume there is no official in Tennessee that does a greater amount of work, and does it well, than Mr. Heiskell.

The present volume is not different from its predecessors. We find the same brief and pointed but clear head-notes, such as we have grown familiar with in using Mr. Heiskell's Digest of Decisions. In his power of condensing into a brief compass, statements of legal doctrine without throwing away any of the substance, we have always regarded Mr. Heiskell as a model. The paragraphs of his digest read like the terse sentences of old Comyn. Nor do we miss in this volume the same patient collection of cases cited, placed in each case under the paragraph of the syllabus to which they relate. The index displays the same attention to details and careful workmanship.

This volume, like all the later Tennessee Reports, is double-leaded, and widely spaced. Printed like the Pennsylvania State Reports, which we think a fair model of the manner in which a volume of reports should be printed, this volume would be reduced to one-half its present size. The reporter, however, is not responsible for this, as the printing is a matter of public contract; and the secrets of how money is made at public printing, would, if written, no doubt make a large book. It is to be said, however in its favor, that in those points which go to make up a well manufactured book—good paper, good press-work and good binding—no American reports can be produced which surpass this.

In glancing hurriedly over the cases reported in this volume, we do not see any that strike us as possessing peculiar importance.

Merriman v. Lacefield, p. 209, holds that a sale by a father to a child will not be treated as an *advancement*, merely because the price paid was inadequate.

In Riggs v. White, p. 503, the court say that they will not, after the term of the court at which it was rendered, set aside their own judgment, to allow a plea of bankruptcy of the defendant before the judgment was rendered, but since the judgment in the inferior court, on the ground that the judgment in the supreme court was obtained by surprise, and before the cause was reached. Nor will they, according to Langley v. Swayne, note, p. 506, entertain a plea in abatement, setting up a discharge in bankruptcy, although the discharge may have been granted before the filing of the record for writ of error.

Moss v. Bettis, p. 661, holds that a person who undertakes, although it may be for the particular occasion only, to carry by river, for hire, without special contract, incurs the responsibility of a common carrier.

Elrod v. Alexander, p. 342, holds that what is contraband of war is a question of law for the court, and that it is error to leave it to the jury. We should think so.

Garder v. Barger, p. 668, holds that a contract for a horse, showing on its face that it was intended for service in the Confederate cavalry, if made within the Confederate lines, is not void for illegality.

Hill v. Bowers, p. 272, holds that a conveyance of a register in bankruptcy of the real estate of the bankrupt to the assignee, divests the title of the bankrupt, so that if he dies afterwards, and before the sale by the assignee, his widow will not be entitled to dower. To make this decision intelligible, it must be understood that in Tennessee, the widow is entitled to dower in those lands only of which her husband died seized.

State v. McAuley, p. 424, holds that the widow of a deceased trustee, is not a competent witness to prove that her husband in his life time received a certain sum of trust money, part of which he loaned, and the remainder she paid over after his death to the administrators of her husband. Quite correct; but is it not time that the legislatures should begin to consider the propriety of changing rules of evidence of this character?

Barker v. Wilson, p. 268, lays down the rule that a bargain and sale made by an *infant husband* jointly with his wife of full age, of real estate of the wife, is voidable at the election of the husband—illustrating another barbarism of the ancient law, which it should seem the legislature might well look to. In all common sense, and fairness to third persons, it would seem that when a young man has got far enough along in the world so that the law must regard him as the head of a family, it ought to cease to regard him as an infant.

Dodd v. Benthal, p. 601, reverses this picture, and informs us that, on a similar principle, an infant who is a married woman, has the option to dissent from her deed, within a reasonable time after her discoverture, though her coverture may continue for more than twenty years.

Greenwald v. Roberts, p. 494: A purchase made pending an injunction inhibiting a sale, is void as against the interest of the complainant in the bill, but valid as to the vendor.

Mills v. Allison, p. 385, and Bond v. Greenwald, p. 453: A contract payable in gold is to be discharged by the payment of as many dollars in legal tender notes as the gold was worth on the day the payment should have been made under the contract, and judgment is to be rendered in dollars for that sum.

We may, perhaps, find room to notice other interesting cases in this volume in our "Notes of Recent Decisions," next week.

We observe that Mr. Heiskell adheres to his previous plan of publishing the criminal cases separately; consequently we find no criminal cases in this volume.

The Daily Register, New York City, law journal of the city and county of New York, reports the proceedings and decisions of the local courts of New York City.

The Lower Canada Jurist. Montreal: Printed and published by John Lowell.

We have received, through the courtesy of the publisher, the numbers of this valuable publication from January to September, 1873. We hope to find time to give it a more extended notice hereafter.

—THE supreme court of Illinois met at Springfield on the 6th instant. All the judges present except Judge MCALLISTER.

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The New Pennsylvania Constitution—A Summary of its Leading Features.

[From the Financier.]

The new constitution of Pennsylvania, recently ratified by popular vote of two to one, contains some noteworthy provisions of reform. The terms of state officers are extended by it. The governor is to serve four years; senators, four years; representatives, two years; secretary of state, four years; auditor general, three years; treasurer, two years; supreme court judges, (hereafter to be seven in number instead of five,) twenty-one years instead of fifteen, and not to be again eligible. The governor, treasurer, and auditor are prohibited from serving two consecutive terms. The legislature is prohibited from passing "any local or special law" for regulating the affairs of counties, cities, and the like; authorizing laying-out, opening, or maintaining roads, highways, or streets; altering or locating county-seats; incorporating cities, towns, or villages, or changing their charters; creating or extending corporations; and from doing a number of other things specified. No obligation or liability of any corporation to the state shall be in any way changed or lightened, or affected by the legislature. Unless changed by a law receiving a two-thirds vote, the state election shall be on the Tuesday next after the first Monday in November. Each ballot, as cast, shall be numbered in the order of its receipt, and the number entered on the list of voters opposite the name of the voter; any voter may also write his own name on his ballot; all laws in respect to the manner of voting shall be uniform throughout the state, but no voter shall be deprived of his vote by not being registered.

Article nine, in respect to taxation and finance, provides that the power to tax corporations and their property shall not be surrendered or suspended by any contract to which the state shall be a party; that no state debt shall be created except to repel invasion, repress insurrection, defend the state in war, pay existing debt, or supply casual deficiencies of revenue, and the limit of debt for the last named purpose shall be $1,000,000; that all laws authorizing borrowing on behalf of the state shall specify the purpose for which it is wanted, and it shall be used for that purpose solely; that the state shall not assume all or any part of the debt of any municipality, "unless such debt shall have been contracted to enable the state to repel invasion, suppress domestic insurrection, defend itself in time of war, or to assist the state in the discharge of any portion of its present indebtedness;" that the state sinking fund shall be maintained, sufficient to pay interest on the state debt and at least $250,000 of principal annually; that all the money, over the necessary reserve, shall be used in paying the debt, and the sinking fund shall not be invested in or loaned upon anything but bonds of the state or of the United States; that monthly statements about the reserve shall be published; and that making any profit out of state funds, or using them in an unauthorized way, shall be punishable as a misdemeanor. The following important sections of this article we give entire:

"SEC. 6. The credit of the commonwealth shall not be pledged or loaned to any individual, company, corporation or association, nor shall the commonwealth become a joint owner or stockholder in any company, association or corporation.

"SEC. 7. The general assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for or to loan its credit to any corporation, association, institution or individual.

"SEC. 8. The debt of any county, city, borough, township, school district, or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon assessed value of the taxable property therein, nor shall any municipality or district incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors thereof, at a public election, in such manner as shall be provided by law; but any city, the debt of which now exceeds seven per centum of such assessed valuation, may be authorized by law to increase the same three per centum (in the aggregate at any one time) upon such valuation.

"SEC. 10. Any county, township, school district, or other municipaltiy in incurring any indebtedness, shall at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years."

No debt shall be contracted, and no liability incurred, by any municipal commission, except according to an appropriation previously made; and every city shall create a sinking fund for the payment of its debt. All corporate charters now existing and not already used or in organization are made void; all existing corporations can have their charters altered, or any law passed for their benefit, only on condition of becoming subject to the new constitution. No corporation shall do any business not expressly authorized in its charter, or take or hold any real estate except what is necessary for its legitimate business. "No corporation shall issue stocks or bonds except for money, labor done, or money for property actually received; and all fictitious increase of stock or indebtedness shall be void; the stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice given in pursuance of law."

Article seventeen relates to railroads. It provides that all railroads and canals shall be public highways, and all companies common carriers; that any company organized for the purpose, may construct and operate a road between any two points in the state and connect at the state line with other roads; that every company may intersect with any other, and receive and transfer business without discrimination. Every company shall maintain a transfer office, with its books open to inspection by stockholders or creditors; the right to transportation is declared uniform and equal to all; transportation charges shall not exceed the charges for carrying the same class of persons or property in the same direction to a more distant station, but excursion and commutation tickets are allowed. No company owning, or leasing, or managing a railroad or canal, shall consolidate with, or lease or buy the property of, or in any way control, any competing or parallel line, nor shall any officer act as officer in such line; the question of the parallelism or competition shall be decided by jury. No officer or employe shall be interested in furnishing material or supplies to the road, or in the business of transportation over it; no discrimination in charges or motive power shall be made; no free passes shall be granted, nor shall passes be granted at a discount except to officers and employes.

The above is a sketch of the most noteworthy provisions of the new constitution, which took effect on Thursday of this week. All attempts to improve the organic law of both state and nation are of great interest, and these provisions should receive attention. One of them, which is of national importance, is that which simply makes the state election come on the same day of the year with the presidential election; this puts an end to the corrupt efforts regularly made, in each presidential year, to "carry Pennsylvania" in October. The change should be followed by other states, and if it proves the forerunner of the abolition of the electoral system altogether—about the most clumsy and mischievous provision in the federal constitution—Pennsylvania will have done almost as much to improve politics as she has done heretofore to corrupt it.

Legal News and Notes.

—A GOOD notion of the granges of Iowa is that which binds the members to settle their disputes by arbitration. It is said to reduce the lawyers almost to starvation in some quarters. Well, if arbitration is good in the big quarrels between nations, why not in the smaller ones that produce so much petty war and crime? But we suspect we shall have use for Blackstone and Cooley some time yet, and that even when the "swords are beaten into ploughshares and the spears into pruning-hooks," the lawyers will manage to live by the hooks.—[*Missouri Democrat.*

— Ex-Sheriff Brennan of New York city, and his deputy, Shields, were on the 9th instant, committed to Ludlow street jail for thirty days, and to pay a fine of $250 each, by Judge Daniels of the court of oyer and terminer, for contempt of court in permitting Henry W. Genet, placed in his custody under sentence of imprisonment, to escape. The penalty imposed is the extreme limit of the law applicable to such cases.

— It is reported that Judge Busteed of Alabama, and Judge Durell of Louisiana, becoming somewhat alarmed at the investigation which is to be made into their official conduct, and fearing impeachment, propose sending in their resignations to the president at once.

—The Supreme court of Iowa has decided that a sale of property for taxes to any one of a ring or combination of tax-buyers is void, and that the title does not pass thereby, nor can the penalty be enforced.

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, JANUARY 22, 1874.

SUBSCRIPTION:
$3 PER ANNUM, in Advance.

Bankrupt Act—Illegal Preferences.

We lay before our readers in this issue, the recent opinion of the Supreme Court of the United States as to the effect of the bankrupt act on the right of creditors to resort to state process to acquire liens on the property of insolvent debtors, and as to the elements essential to constitute an illegal preference, or an intent on the debtor's part to defeat the operation of the bankrupt act. Practically viewed, the opinion is one of unequalled importance. It is not, perhaps, too much to say that it *revolutionizes* all current notions on the subject; but it is strongly reasoned and embodies the deliberate judgment of the entire bench.

Statute Revision in New York.

We learn from the Albany Law Journal that the revision of the statute of law of New York, is progressing as rapidly as is consistent with a thorough execution of the work, and in a satisfactory manner. Among the features of the new code, we note the following: The word "ejectment" is formally recognized, and the word "replevy" restored, in place of the awkward phrase, "claim the immediate delivery," which had supplanted it in the Code of Procedure. The statute against purchasing lands held adversely, is very sensibly expunged. Another sensible provision is that in an action for partition, if the title is in dispute, the parties shall not be remitted to a separate suit, but the question of title shall be tried and settled in the same action in which the partition is sought. Another provision allows reversioners and remainder-men to maintain an action for partition; but this allowance is wisely confined to cases where an actual partition can be had, and does not extend to permitting sales for partition. The reason assigned for this is that sales of land encumbered by an intermediate estate, generally result in a sacrifice of the property sold; and as the co-tenants in such cases are generally infant heirs, a proceeding ought not to be permitted which might, in many cases, work irreparable injury to them. One remedy by action has been provided for the recovery of dower; and to accomplish this, it is recommended that the surrogate, as such, be deprived of his present jurisdiction over this subject; and jurisdiction of proceedings for the recovery, as well as for the admeasurement of dower, is vested in the county courts.

Discretionary Power of Fixing Punishment in Criminal Cases.

The message of Governor Noyes to the Ohio Legislature contains the following suggestions of a reform in the laws with reference to the *quantum* of punishment in criminal cases:

"Another year's experience in the matter of hearing and deciding applications for pardon, has confirmed me in the opinion that the law should be so modified, as to leave less discretion with the courts in passing sentence for criminal offences. It often happens that two prisoners work side by side in the penitentiary, both sent there for precisely the same crime, one for one year and the other for ten. In such case, it is impossble to convince the convict incarcerated for the longer time that he has been fairly dealt with. And so long as he is stung with a sense of this injustice, he is not likely to reform. There is nothing approaching uniformity in the length of sentences pronounced by different judges for similar offences. I earnestly recommend that the criminal law be so changed as to secure more exact justice; so amended as to leave results affecting the lives and liberties of men less dependent upon the judgment, the temperament or the caprice of those who administer the law."

Undoubtedly, there must in most cases be a discretion reposed somewhere, and within certain prescribed limits, as to the *quantum* of punishment which a given offence shall carry with it. In some states, as at common law, this discretion resides in the judge; in others it is reposed in the jury. Evidently the policy of the law should be to limit this discretion as much as possible. It would seem worth while to consider, whether in larceny, embezzlement, false pretences, and other like offences affecting property, the punishment might not be gauged more nearly by the *value* of the property affected by the crime. This might to some extent do away with what is now a reproach to the administration of justice, that the small thieves are punished more severely than the great ones. But in cases of homicide, and assaults to kill, wound or beat, where the defendant frequently acts upon strong provocation or from a principle of self-preservation, and where no two cases stand on the same footing with reference to the quality of the act committed, a provision of law which leaves a large discretion in the court or jury with reference to the *quantum* of the punishment, would seem to be conceived in a spirit of justice and mercy. At all events, the question deserves of more extended investigation and patient thought, than the average legislator will find time to bestow upon it; and the wise course would seem to be to submit it to a commission, to report to another session.

Liability of Master to Servant—Fellow Servants in Common Service.

The Supreme Court of the United States on the 5th inst., decided an interesting case as to the liability of masters to servants, where the main defence was that the servant injured, and the servant by whose fault he was injured, were fellow-servants in a common employment. We refer to the case of Fort v. Union Pacific Railroad Co. A full report of the case below is given in 2 Dillon, C. C. R. 259. The following is a brief statement of it:

The action was brought by plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm while in the employ of the defendant.

The defendant, in its works at Omaha had a car department, of which Mr. Gamble was the superintendent; under him, and having immediate control of the shop, was a foreman, Mr. Ballou; under the foreman there were various sets, or, as a witness called them, "gangs," of men, under the immediate direction and control of some employe or "boss." Among those having control of a set or gang of men working in the shop was a Mr. Collett, whose duty it was to run and superintend the running of a certain machine, or certain machinery, in the shop. From the time the plaintiff's son was employed, he had been working under Collett, obeying his orders and directions; and the chief employment of the son had been at a moulding machine, receiving and putting away mouldings as they came from the machine. After the son had been

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thus engaged for some months, on the day the accident in question happened, a belt or band connected with a shaft, some fourteen or sixteen feet high, was off the drum, or pulley, and needed lacing. It did not very clearly appear whether the belt thus out of order belonged to the moulding machine or some other machine near by; but it was within the scope of Collett's duty to see that it was repaired. At the time of the accident, Collett, wishing to lace the band at the end near the floor, ordered the plaintiff's son, about sixteen years of age, to ascend a ladder resting on the shaft at the upper end, which shaft was in motion at the rate of one hundred and seventy-five or two hundred revolutions per minute, and hold or keep the band or belt away from the shaft, while he (Collett) laced or sewed it together at or near the floor; and the right arm of plaintiff's son, while thus engaged, pursuant to the orders of Collett, was caught, or in some way became entangled, in the belt, or drawn between it and the shaft, and was instantly crushed to pieces and torn from his body.

The jury made the following *special finding* in regard to the nature of the employment of Collett and of the plaintiff's son, and the cause of the injury, to-wit:

"We find that the car department of the defendant was under the management of a general superintendent, who employed and dismissed the hands; that the shop, as to practical operations therein conducted, was under a foreman; that the employes were divided, according to their work, into sets, with an under or immediate foreman; that one of these underforemen was Mr. Collett, named in the petition, under whom plaintiff's son was to and did serve, as a workman or helper, and whose orders he was to and did obey; that Collett had charge of running and superintending certain machinery in the shop. We find that the plaintiff's son was injured in executing or carrying out an order of Collett, as described in the petition; that this order related to a matter within the scope of Collett's duty and employment. We find that the order to the plaintiff's son (in carrying out which he lost his arm) was one which was not within the scope of the son's duty and employment. We find that it was not a reasonable order, and that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it."

There was no statute of the state touching the case.

The judgment of the circuit court for the plaintiff was affirmed. Mr. Justice DAVIS delivered the opinion. The ground of liability was that, although an employer may not be an insurer of the lives and limbs of his servants, he is impliedly bound not to expose them to such hazard when not reasonable or necessary to do so, and the extra-hazardous service at which the plaintiff's son was put when he was injured, was not within the scope of his employment or the contract of service. Mr. Justice BRADLEY dissented on the ground that the boy and the superior servant were fellow servants in the same common employment, and hence the employer was not liable.

—GOVERNOR BEVERIDGE, in his message to the Illinois legislature, urges the completion of the revision of the laws by the present general assembly, and the publication of the laws in a compact form, for the use of the various officers throughout the state. He says: "The state has no copies of the session laws for distribution. If it had, the laws in that form are inconvenient, especially to a large number of persons, not versed in law, who exercise official duties for the public good, to the sacrifice of their own private interests."

Bankrupt Act—Illegal Preference—Judgment in State Court.

WILSON, ASSIGNEE OF VANDERHOOF BROS. v. CITY BANK OF ST. PAUL.

Supreme Court of the United States, October Term, 1873.

Bankrupt Act—Illegal preference—Judgment in State Court.—Section 39 of the bankrupt act as respects an insolvent debtor, *suffering* his property to be taken on legal process, with *intent* to give a preference to a creditor, or to defeat or delay the operation of the act, construed, and the following propositions ruled:

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

2. That the fact that the debtor under such circumstances does not file a petition in bankruptcy, is not a sufficient evidence of such preference, or of intent to defeat the operation of the act.

3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.

4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

The facts are stated in the opinion of the court, delivered by Mr. Justice MILLER, as follows:

This case comes before us on a certificate of division in opinion between the circuit and district judge for the district of Minnesota.

The statement of facts and the questions certified are as follows:

The complainant is the assignee in bankruptcy of the firm of Vanderhoof Bros., lately merchants in the city of Saint Paul. The defendant is the City Bank of St. Paul. The bill is filed to determine which of the parties is entitled to the stock of goods, of the bankrupts, or the proceeds thereof. The assignee claims the goods, or the proceeds thereof, as assets of the bankrupts' estate. The bank claims the same by virtue of a judgment, execution, and levy thereunder. The facts are as follows:

On the 26th of February, 1870, judgment by default was rendered by one of the district courts of the State of Minnesota in favor of the bank against Vanderhoof Bros. for the sum of $2,130. On the same day execution was issued, and the sheriff immediately made a levy upon the whole stock of goods of the debtors, which was sold by him for $2,385, which is now in the hands of the bankrupt court to await the determination of this suit. The suit by the bank was brought on promissory notes, commercial paper made by the debtors, Vanderhoof Bros., to the City Bank of St. Paul, one of which notes was more than fourteen days past due when suit was brought thereon by the bank.

After the levy of the said execution, and before the sale by the sheriff, Vanderhoof Bros. were adjudicated bankrupts on the petition of creditors filed against them after judgment had been obtained, and levy made under the execution. The Vanderhoofs had no defence to the notes upon which the bank had sued them, and put in no defence. They had no property except their said stock in trade, which, at cost prices, was about equal to the amount of their liabilities.

The debtors, Vanderhoof Bros., were insolvent when said suit was brought against them by the bank, and the bank had then reasonable cause to believe it, and knew that they had committed an act of bankruptcy, and that they had no property but their said stock in trade. The Vanderhoofs gave no notice to any of their creditors of the suit commenced against them by the bank, and, having no defence, did not defend it nor go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment being obtained or the levy of the execution.

On the trial the following questions arose, in relation to which the judges were opposed in opinion:

I. Whether or not an intent on the part of said debtors, Vanderhoof Bros., to suffer their property to be taken on legal

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process, to-wit, the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the bankrupt act, can be inferred from the foregoing facts.

II. Whether, under said facts, the said bank, in obtaining said judgment and making the said levy had reasonable cause to believe that a fraud on the bankrupt act was intended.

III. Whether, under said facts, the bank obtained by the levy of the execution a valid lien on the said goods as against the assignee in bankruptcy.

The questions thus presented to this court require, for a satisfactory answer, a careful consideration and construction of sections thirty-five and thirty-nine of the bankrupt law, with reference to the general spirit and purpose of that law. In looking to these, the first and most important consideration which demands our attention is the discrimination made by the act between the cases of voluntary and involuntary bankruptcy. In both classes of cases, undoubtedly, the primary object is to secure a just distribution of the bankrupt's property among his creditors, and in both the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors.

But in case of voluntary bankruptcy, the aid of the law is invoked by the bankrupt himself, with the purpose of being discharged from his debts as his principal motive, and in the other, the movement is made by his creditors with the purpose of securing the appropriation of his property to their payment, the discharge being with them a matter of no weight and often contested.

There is a corresponding difference in the facts on which the action of the court can be invoked in these different classes of bankruptcy. When the party himself seeks the aid of the court, the averment he is required to make is a very simple one, namely, that "he is unable to pay all his debts in full, and is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act," that is, to be discharged from the claims of his creditors. On filing a petition containing this request, he is declared by the court a bankrupt. The allegation cannot be traversed, nor is any issue or enquiry as to its truth permitted. The administration of his effects proceeds thereafter under the direction of the court, and may end in paying all his debts with a surplus to be returned to the bankrupt, or the result may be nothing for the creditors, and the unconditional release of the bankrupt.

But while the debtor may, on this broad basis, call on the court to administer his estate, the creditor who desires to do the same thing is limited to a few facts or circumstances, the existance of which are essential to his right to appeal to the court. And when any one of these facts is set forth in a petition to the court by the creditor, the truth of the allegation may be denied by the debtor, and on the issue thus found, he may demand the verdict of a jury.

The reason for this wide difference in the proceedings in the two cases is obvious enough. When a man is himself willing to refer his embarrassed condition to the proper court with a full surrender of all his property, no harm can come to any one but himself, and there can be no solid objection to the course he pursues. But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man; in short, to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this, should not only be well defined in the law, but clearly established in the court.

It is the thirty-ninth section of the bankrupt act which lays down, in nine or ten sub-divisions, the facts and circumstances which give a man's creditors the right to have him declared a bankrupt, and his property administered in a bankruptcy court. One of them is the case of a person, who being a bankrupt or insolvent, or in contemplation of insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or *suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors*, or to any person or persons, who may be liable for him as endorsers, bail, sureties, or otherwise, *or* with intent by such disposition of his property *to defeat or delay the operation of the act.* And the same section declares that if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred, contrary to the act; provided, the person receiving such payment or conveyance, had reasonable cause to believe that a fraud on the bankrupt act was intended, or that the debtor was insolvent.

The case before us is one of involuntary bankruptcy, but there is no question here whether the party was rightfully declared a bankrupt. The statement of facts shows that the debtors were insolvent when the bank commenced its proceedings in the state court, and that the bank had then reasonable cause to believe they were insolvent, and knew that they had committed an act of bankruptcy, to-wit, had permitted one of their notes to go unpaid more than fourteen days after it was due.

It is maintained that under these circumstances the bankrupt "suffered his property to be taken on legal process with intent to give a preference to the bank, and to defeat or delay the operation of the act." Undoubtedly, the facts stated bring the bank within the proviso, as to knowledge of the debtor's insolvency; and if the debtor suffered his property to be taken, within the meaning of the statute, with intent to defeat or delay the operation of the act, then the assignee shall recover the property; so that this sufferance and this intent on the part of the bankrupt are the matters to be decided. The first and principal question on which the judges became divided is, whether such intent is to be inferred from the facts stated.

The thirty-fifth section of the act, which is designed to prevent fraudulent preferences of a person in contemplation of insolvency or bankruptcy, declares that any attachment or seizure under execution of such person's property, *procured by him* with *a view* to give such a preference, shall be void if the act be done within four months preceding the filing of the petition in bankruptcy by or against him. Though the main purpose of the thirty-ninth section is to define acts of the trader which make him a bankrupt, and that of the thirty-fifth is to prevent preferences by an insolvent debtor in view of bankruptcy, both of them have the common purpose of making such preferences void, and enabling the assignee of the bankrupt to recover the property; and both of them make this to depend on the intent with which the act was done by the bankrupt, and the knowledge of the bankrupt's insolvent condition, by the other party to the transaction. Both of them describe, substantially, the same acts of payment, transfer, or seizure of property so declared void. It is, therefore, very strongly to be inferred that the act of *suffering* the debtor's property to be taken on legal process in section thirty-nine, is precisely the same as procuring it to be attached or seized on execution in section thirty-five. Indeed the words *procure* and *suffer* are both used in section thirty-nine.

What, then, is the true meaning of that phrase in the act? In both cases it must be accompanied with an intent. In section thirty-five it is to give a preference to a creditor; in section thirty-nine it must be to give a preference to a creditor, or to defeat or delay the operation of the bankrupt act. In both there must be the positive purpose of doing an act forbidden by that statute, and the thing described must be done in the promotion of this unlawful purpose.

The facts of the case before us do not show any positive or affirmative act of the debtors, from which such intent may be in-

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ferred. Through the whole of the legal proceedings against them they remained perfectly passive. They owed a debt which they were unable to pay when it became due. The creditor sued them and recovered judgment, and levied execution on their property. They afforded him no facilities to do this, and they interposed no hindrance. It is not pretended that any positive evidence exists of a wish or design on their part to give this creditor a preference, or oppose or delay the operation of the bankrupt act.

There is nothing morally wrong in their course in this matter. They were sued for a just debt. They had no defence to it, and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the state court would have been a moral wrong, and a fraud upon the due administration of the law. There was no obligation on them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any of them could have instituted compulsory bankruptcy proceedings. The debtor neither hindered nor facilitated any one of them. How is it possible from this to infer, logically, an actual purpose to prefer one creditor to another, or to hinder or delay the operation of the bankrupt act?

It is said, however, that such an intent is a legal inference from such inaction by the debtor, necessary to the successful operation of the bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency; and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is one to be inferred from the spirit of the law, and is essential to its successful operation.

The argument is not without force, and has received the assent of a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided. We are, nevertheless, not satisfied of its soundness. We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only, because it is duty imposed by the law. It is equally clear that there is no such duty imposed by that act, in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all cases* of insolvency, and to make the argument complete, it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it in effect forbid all proceedings to collect debts in cases of insolvency, in other courts, and in all other modes than by bankruptcy [proceedings?] We do not think that its purpose of securing equality of distribution is designed to be carried so far.

As before remarked, the voluntary clause is wholly voluntary. No intimation is given that the bankrupt *must* file a petition under any circumstances. While his *right* to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome, and often, ruinous duty.

It is, in its essence, involuntary bankruptcy. But the initiation in this kind of bankruptcy is, by the statute, given to the creditor, and is not imposed on the debtor. And it is only given to the creditor in a limited class of cases. The argument we are combatting goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt, and fails to do it. We do not see the soundness of this implication from anything in the statute.

We do not construe the act as intended to cover *all* cases of insolvency, to the exclusion of other judicial proceedings. It is very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent, to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy.

Many find themselves with ample means, good credit, large business, technically insolvent; that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankruptcy court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business, is not, of itself, to be construed into an act of bankruptcy, or a fraud upon the act.

It is also argued, that inasmuch as to lay by and permit one creditor to obtain judgment and levy on property, necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow.

The general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one under consideration, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such a preference as the law forbids?

The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to, and can only be sustained by imputing to the general scope of the bankrupt act, a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment.

Undoubtedly, very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the bankrupt act, would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances. But the case before us is destitute of any evidence of the existence of such a motive, unless it is to be imputed as a conclusion of law from facts which we do not think raise such an implication.

These latter considerations serve to distinguish the present case from that of Buchanan v. Smith, (16 Wall. 277,) decided at last term, and which may seem to conflict, in some of the expressions used in that opinion, with those found in this. That was a bill in chancery involving several distinct issues of fact, on which much and conflicting testimony was given, and the contention was mainly as to what was established by the evidence. There was satisfactory proof that the creditor, before pursuing his remedy in the state court, had urgently sought to secure a preference by obtaining from the debtor a transfer of certain policies of insurance on which a loss was due. The case was also complicated by an assignment made by the debtor, under which the assignee took

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possession before the creditor procured his judgment in the state court. That case was well decided on the evidence before the court. But in the case now before us, the questions we have discussed are presented nakedly and without confusion, by facts found by the court and undisputed, and we have been compelled, on careful consideration of the bankrupt act, to the following conclusions:

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

2. That the fact that the debtor under such circumstances does not file a petition in bankruptcy, is not sufficient evidence of such preference, or of intent to defeat the operation of the act.

3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.

4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

These propositions require the questions certified to us to be answered as follows: The first and second in the negative, and the third in the affirmative.

NOTE.—The case in the court below is reported in 1 Dillon C. C. R. 476, where the facts are more fully stated than they were in the record before the supreme court. The essential features of the case, however, appear in the foregoing opinion, which will attract attention, as perhaps, the most important adjudication under the bankrupt act, yet made by the supreme court.

The opinion is without any reported dissent, and it is plain that it was carefully prepared and the subject thoroughly considered. We do not now recall an opinion of any district or circuit court in which precisely the same view has been taken of the subject: certain, it is, that the almost uniform judgment of these tribunals has been otherwise, and in accord with the general tone of Buchanan v. Smith, 16 Wall. 277. But by referenoe to the case of Wright v. Filley, 1 Dillon C. C. R. 171 (1871), it will be seen that the same distinguished judge who delivered the opinion printed above, entertained at that time the views now sanctioned by the supreme court.

The principal case is said in the opinion to be distinguishable from Buchanan v. Smith; but as this latter case is reported, it would seem to be more correct to say that it is overruled. Much of its reasoning, certainly, is overthrown.

The bankrupt act prohibits an insolvent from suffering his property to be seized on legal process with intent to give a preference, or to defeat or delay the operation of the act. In the principal case, the local creditor, the bank, knowing that its debtor, a merchant, had committed an act of bankruptcy, and also, having reason to know his insolvency, commenced suit in the state court and obtaining a judgment by default, immediately levied upon his *entire* stock in trade, his only property, the debtor all the time remaining passive, neither informing his other creditors of the suit of the bank, nor himself going into bankruptcy, nor otherwise making any effort to prevent the judgment or the levy of the execution; and the supreme court hold that these circumstances do not authorize the conclusion that the debtor suffered this to be done with *intent* to defeat the bankrupt act. Speaking of this point, the court says: "There must be the positive purpose of doing the act forbidden by the statute, and the thing described must be done in the promotion of this unlawful purpose," and "the facts of the case before us do not show any positive or affirmative act of the debtor from which such intent can be inferred." One circumstance not particularly dwelt upon by the supreme court, but which had weight with the circuit court in deducing the inference that the debtors intended to delay or defeat the operation of the bankrupt act, was that, under the state practice, a judgment by default could be obtained in a few days, and that the debtors gave no notice or information to other creditors that the suit of the bank was pending.

The great practical significance of the principal case is, that it authoritatively establishes, under the act as it now stands, that a creditor, knowing his debtor to be insolvent, and therefore, not able to pay all his debts, may use the remedies and process given him by state laws, and hold liens acquired by levies thereunder, made before proceedings in bankruptcy commenced, provided there is no collusion with the debtor, and no actual, positive intent, manifested by some affirmative act on the part of the latter to give the former a preference, or to defeat the operation of the bankrupt enactment.

Agreement Between Corporation and Stockholder to Convert Indebtedness for Stock into a Loan —Set-off under the Bankrupt Law.

SAWYER v. HOAG, ASSIGNEE OF LUMBERMAN'S INSURANCE COMPANY.

Supreme Court of the United States, October Term, 1873.

1. **Corporations—Capital Stock Trust Fund for Creditors.**—It is well settled that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation.

2. **Agreement to Convert Stock into Loan void as to creditors.**—It results from this doctrine, that any agreement between a corporation and one of its stockholders who is in debt to the corporation for stock, by which his indebtedness or stock is converted into a loan from the corporation to him, is fraudulent and void as to the creditors of the corporation, although it may be good between the parties to the transaction.

3. **Suit against Stockholders by Assignee in Bankruptcy of Corporation—Set-off.**—It follows that a stockholder of an insolvent corporation, who is sued by the assignee in bankruptcy of the corporation, for money due for stock, will not be permitted to set off against such suit, a demand against the corporation purchased from a creditor; because the money due for unpaid stock, being a trust fund for all the creditors, cannot be applied exclusively to the payment of one claim; and it makes no difference whether the claim was acquired before or after the act of bankruptcy.

4. **Statute Construed—Bankrupt Act, § 20—Set-off.**—Section 20 of the bankrupt act does not enlarge the doctrine of set-off, nor enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorise it. The debts must be mutual, and in the same right.

5. **Assignee in Bankruptcy, Representative of creditors.**—An assignee in bankruptcy is the representative of the creditors, as well as of the bankrupt. Therefore, in a case like the present, the assignee in bankruptcy of an insolvent corporation may assert the rights of the creditors, against a stockholder of the corporation who is indebted to the corporation for stock.

Appeal from the circuit court of the United States for the northern district of Illinois. The case is fully stated in the opinion.

Mr. Justice MILLER delivered the opinion of the court.

The Lumberman's Insurance company, of Chicago, like most the other local insurance companies of that city, was found to be insolvent after the disastrous fire of October, 1871; and in June, 1872, a petition was filed, under which it was declared bankrupt, and the appellee appointed assignee. The appellant was a stockholder in the company to the extent of fifty shares of one hundred dollars each. Among the effects of the company which came to the hands of the assignee, was a note of appellant for $4,250, and when payment was demanded of him, he produced and offered to set off against this demand the certificate of an adjusted loss given by the company to one Hayes for $5,000, which had been assigned by Hayes to appellant. This certificate was given to Hayes and purchased by appellant at thirty-three per per cent. of its par value, on the same day, namely, January 25, 1872, after the insolvency of the company was well known, but before any proceedings in bankruptcy had been commenced. Upon the refusal of the assignee to consent to this set-off, the appellant filed the present bill in the district court to enforce the set-off, in which he alleged, among other things, that the note given by him to the insurance company was for money loaned.

The assignee, in his answer denies that the note was for money loaned, and avers that it was, in fact, for a balance due by appellant for his stock subscription, which had never been paid, and insists that such balances constitute a trust fund for the benefit of all creditors of the insolvent corporation, which cannot be made the subject of a set-off against an ordinary debt due by the company to one of its creditors. After the general replication, the case was submitted to the district court on an agreed statement of facts. The district court decreed against the complainant, from which he appealed to the circuit court, which affirmed the decree below, and from that decree it is brought by appeal to this court.

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The first and most important question to be decided is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized, authorized it to commence business upon a capital stock of $100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, $5,000. He took the check of the company for $4,250, being the amount of his subscription, less the fifteen per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at seven per cent. per annum. Appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant, payment in full of his stock, and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than seven per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock, into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other, if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant, we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration, one of the main arguments on which appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction, by which appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern; for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely: Burke v. Smith, 16 Wallace, 390, and in Burke v. New Albany, 11 Wallace, 96. Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad company, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further enquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate enquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released, was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.—(See, also, Curran v. State of Arkansas, 15 How. 504; Wood v. Dummer, 3 Mason, 305; See v. Bloom, 19 Johnson, 456, and numerous other cases cited in the brief for the appellees in this case and in Meyer v. Vocke, assignee, decided with this.)

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to enquire into this conventional payment of his stock by one of the shareholders of the company; and on that enquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly, when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred installments properly secured.

It is said by appellant's counsel that conceding this, it is still a debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under section 20 of the bankrupt act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance

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only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt, of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual, must be in the same right.

The case before us is not of that character. The debt which appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claims.

It is unnecessary to go into the enquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity, which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, loan to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just, that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subbject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him. (Lawrence v. Nelson, 21 New York R. 158.)

These principles require the affirmation of the decree in the present case, and it is accordingly so ordered.

The cases of Meyer, appellant, v. Vocke, assignee, and of Jaeger, plaintiff in error, v. Vocke assignee, from the same court, though differing in some of the facts, the latter especially, being a suit at law brought by the assignee of the bankrupt corporation, in which a set-off was pleaded, the principles which govern the cases are the same.—The case at law was submitted to the court without a jury, and the facts found by the court bring it within the doctrines we have just declared to be applicable to such cases.

The decree in the case of Meyer v. Vocke, (580,) assignee, and the judgment in the case of Jaeger v. Vocke, assignee, (579,) are, therefore, affirmed.

Mr. Justice HUNT dissented, holding that the transaction was a loan by the company to the appellant.

Power of one Railroad Company to condemn the Lands of Another.

PEORIA, PEKIN AND JACKSONVILLE RAILROAD COMPANY v. PEORIA AND SPRINGFIELD RAILROAD COMPANY.

Supreme Court of Illinois, November 6, 1873.

[For this opinion we are indebted to the courtesy of Ingersoll and Puterbaugh, counselors at law, Peoria, Ills.]

1. Eminent Domain—When one Railroad may condemn lands of another. One railroad company may acquire, by condemnation, the right to use the lands of another company, which such company holds by lease, if it appear that such lands are not eligible or necessary for any purpose of the latter company, but are indispensable to the former; and especially if it appear that the latter company had acquired a lease of the lands to obstruct the former company in the enjoyment of its franchises.

2. Condemnation of land—Form of the Decree—Illinois statute.—Where land is condemned to the use of a railroad company, it is error, under the Illinois statute of 1872, after determining the amount of compensation to be paid, to award execution against the petitioner for the same. The proper decree is that, after payment of the sum fixed as compensation, the petitioner have possession of the land.

Opinion of the court by BREESE, chief justice.

This was a proceeding in the Peoria circuit court, by appellee, a railroad corporation created by an act of the general assembly of this state, against appellant, another like corporation, to condemn certain lands of the latter for the railroad purposes of the former. It appears appellees had condemned lands for the purposes of their railroad, but to obtain access to them it was necessary to pass over the lands claimed by appellants, and of which they had obtained a lease subsequent to the time appellees had acquired their lands. The court granted the prayer of the petition against the objection of appellants, who bring the record here.

The principal point raised and argued at great length by appellants is, that lands once appropriated by a railroad cannot be interfered with in any manner by a rival road. In other words, that a railroad corporation, to whom has been granted the usual powers conferred upon such companies, cannot exercise the right of eminent domain by the legislative grant, in case such exercise would interfere with the property of another railroad corporation, to whom like powers have been granted, and which they have exercised. The argument, when reduced to its proper measure, is, that whilst the lands of all other persons and corporations lying on the route of a railroad are subject to the power of eminent domain, that belonging to a railroad company is not thus subject; that such land must remain intact. We cannot assent to this proposition.

It appears from the record, that the land in question was not acquired by the appellants' company by condemnation for railroad purposes, but that after appellees had, by that proceeding obtained their land for their purposes, appellants obtained a lease of the land in controversy, with a view, it would seem, of obstructing appellees in the enjoyment of their franchises. The proof shows that this land is neither eligible nor necessary for any purpose to appellants' company, whilst it is indispensable to appellees—that whilst it is in the power of appellants to obtain land more suitable for their purposes, it is not in the power of appellees to obtain any land but the piece in question for their purposes. The acts of the general assembly creating these corporations nowhere exempt their lands, not in actual use for railroad purposes, from condemnation. This is a plain case, where one company, to thwart the views and embarrass, or wholly obstruct the operation of a rival company, procures a lease of land necessary to the enjoyment of one company, and not necessary for the other, and thus provided, insists upon an immunity which no other lessee can claim, and no property-owners can assert, against the claim of a railroad corporation, to subject it to condemnation. It does not appear by the testimony in the cause, that appellants will be deprived by this proceeding on the part of appellees of any of their franchises, or embarrassed in any degree in their exercise.

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On what ground, then, can this claim of appellants rest? We fail to perceive any plausible, much less any substantial ground. The lands of railroad corporations, not actually in use by such company, or absolutely necessary for the enjoyment of their franchise, must be upon the same footing as the land of an individual, though that may be taken from the actual and profitable use of the owner. We perceive no reason why in this respect railroad companies should claim, and be allowed, immunities not accorded to individual proprietors. The legislature has made no exception in their favor, and none in reason can be made.

Appellees have assigned cross errors on this record, principally as to the form of the entry of the judgment, and awarding execution. The statute provides that the judge or court shall, upon the report of the jury, proceed to adjudge and make such order as to right and justice shall appertain, ordering that petitioner enter upon such property, and the use of the same, upon payment of full compensation as ascertained as aforesaid, and such order, with evidence of such payment, shall constitute complete justification of the taking of such property.—Laws of 1872, § 10, p. 404.

It would seem from this, that the jury must find a gross sum as compensation, which is entered on the judgment of the court, but no execution can issue therefor, for it is optional with the petitioner to take or refuse the land. The statute is explicit, the judgment of the court must be an order authorizing the petitioners to enter upon the land and use the same upon his paying the compensation found by the jury; until that is done, the petitioners have no rights in the land, and cannot enter upon it. This statute evidently contemplates cases where possession has not been taken by the railroad company of the land.

We are of opinion the circuit court properly held this strip of land was subject to condemnation under the proceedings instituted; but there was error in the entry of the judgment and awarding an execution thereon. The statute should be substantially pursued. The judgment is reversed on the cross errors assigned, and the cause remanded to the circuit court, with directions to enter judgment in accordance with section 10 of the act of 1872, above cited.

Foreign Judgment—Notice—Jurisdiction.

KUHN, NETTER & CO. v. J. W. McMILLAN.

Circuit Court of the United States, District of Kansas, Nov. Term, 1873.

Before DILLON, Circuit Judge.

1. **Delivery Bonds in Attachment Cases—Summary Judgments without Notice to Sureties.**—Where the laws of a state provide that bonds, given to release property from attachment, and conditioned for its redelivery to the officer, shall form part of the record, and that judgment thereon, in the event of the plaintiffs' recovery, shall be entered against the principal and surety of such bond without *scire facias* or notice, a judgment thus entered is not void as to the surety for want of notice, although such surety may at the time be a non-resident of the state.

2. **Appearance—Judgment Entry.**—Record of a judgment entry held to show an appearance by the party praying an appeal from such judgment, as to proceedings subsequent thereto.

In 1866 the present plaintiffs commenced in the courts of Tennessee an attachment suit against Fessenden & Co., and the sheriff levied the writ of attachment upon property worth twice the amount of their claim against Fessenden & Co. Under the statute of that state, Fessenden & Co., as principals, and the present defendant as *surety*, executed to the plaintiffs a delivery bond in the sum of $1800, reciting the plaintiffs' suit, the levy of the attachment, etc., and conditioned that "if the attached property should be brought forward and delivered to the sheriff when ordered by the court, or said debt and costs shall be paid and satisfied before that time to the said sheriff, then this obligation to be void; otherwise to be in full force." Fessenden & Co. contested the plaintiffs' claim, but in 1867 the plaintiffs recovered judgment against them, and the record of that recovery, after reciting the execution of the said delivery bond, also shows judgment against the present defendant, McMillan, as the surety, jointly with his principals, from which judgment "*the defendants*" prayed an appeal to the supreme court of the state. In 1869 the supreme court affirmed the judgment against Fessenden & Co., but reversed the judgment as to McMillan, on the ground that when judgment was entered against McMillan, "no breach of the bond had occurred;" but remanded the cause to the court of original jurisdiction, "with directions to order McMillan to deliver the property attached to the sheriff in 60 days from the date of such order, or pay the debt, and upon his failure to do so, the court may enter up a judgment against him and Fessenden & Co. upon said bond, for the amount of the plaintiff's judgment against Fessenden & Co., with interest and costs." The court below, July 19, 1869, made the order as directed, and afterwards, on March 29, 1872, the court, after reciting the amount of the judgment against Fessenden & Co., adjudged "that unless the said McMillan pay said judgment, within 60 days from the date hereof, execution shall issue against the said McMillan and Fessenden & Co."

The present action is brought in this court by the plaintiffs against McMillan on the said judgment of March 29, 1872.

The defence is, that the defendant never appeared in person or attorney, to the suit in Tennessee, nor was he served with summons or process in said action; and in support of this defence it is stipulated "that in March, 1866, McMillan was, and ever since has been a non-resident of Tennessee, and has not been in that state since June, 1866." This is the only proof in the case for the defendant. It is agreed that the statute of Tennessee in force when the proceedings in that state took place, contains a provision by which delivery bonds, such as the one signed by the defendant, are required "to be returned into court and constitute part of the record." Code, sec. 3513. Also the provision that the "court may enter up judgment on the bond against the defendant *and his sureties*, in the event of a recovery by the plaintiff." (Ib. sec. 3514.) Also the provision that "All bonds * * taken in the progress of a cause, form part of the record, and judgment may be rendered thereon, to the extent of the respective liabilities of the parties, upon motion, *without scire facias or notice*." (Ib. § 3109.)

Barker & Summerfield, for the plaintiffs; *Hutchings & Brotherton*, for the defendant.

DILLON, Circuit Judge.

There must be a judgment for the plaintiffs. The stipulation as to the non-residence of the defendant, which is his only proof, does not overcome the record entry to the effect that after a joint judgment had been entered against Fessenden & Co. and McMillan, that "the *defendants*" prayed an appeal, on which appeal the judgment against McMillan was reversed.

The appellate court regarded the present defendant as being before it on that appeal, and reversed the judgment against him.

But without resting my judgment upon this view, I am of opinion that under the laws of Tennessee, the judgment against the defendant as surety on the delivery bond was authorized, and is not, as the defendant's counsel contends, void for want of notice.

Property had been attached and was in the custody of the court. The defendant signed a bond to release the property, and conditioned that he would be liable for any debt the plaintiffs might recover, unless the property released should be re-delivered to the sheriff when ordered by the court. The bond takes the place of the property for which it is substituted, and the statute requires it to be returned and filed in court. By the statute in force at the time the defendant signed the bond, it was provided that the bond should constitute part of the record, and that judgment might be entered thereon against the principal, and surety, in the event of a recovery against the principal, without *scire facias* or notice.

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The defendant, therefore, by the execution of the bond in the course of a pending cause, connected his fortunes with the fortunes of his principal, so far at least, as to authorize the court to enter judgment against them thereon.

By the execution of the bond under the statute, the defendant places himself in court, and agrees that judgment may be entered against him, without further process, if judgment is entered against the principal obligors. It is obvious that such is the view taken of the statute by the supreme court of the State, since that court directed the entry of the very judgment which is the basis of the present action. Under the constitution and legislation of congress, that judgment is entitled to the same faith and credit that are due to it in the state from which it came.

Our conclusion is well sustained by authority. Pratt v. Donovan, 10 Wis., 378; McRae v. Mattoon, 13 Pick., 53; Bigelow on Estoppel, 226, and cases cited.

And, under the statutory provisions of the State of Tennessee the conclusion reached can perhaps be reconciled with cases, which as respects the right of special bail to notice, differ from those above referred to. Robinson v. Ward, 8 Johns. 86; Holt v. Alloway, 2 Blabkf. 108.

JUDGMENT FOR THE PLAINTIFFS.

Supreme Court of the United States—Abstract of Decisions of last week.

[Compiled from the New York Herald.]

Writ of Error from Supreme Court to inferior state court.—In the case of Millar v. Moses et al., from the supreme court of appeals of Virginia, the Supreme Court of the United States, on the 12th instant, held that a writ of error from this court to review the judgment of a state court must be issued to the highest court of the state, in which a decision of the case could be had, even if that court be an inferior court of the state. Accordingly, where a circuit court of Virginia had jurisdiction to decide a case finally, the court of appeals of that state, not having jurisdiction to review the decision, by reason of the amount in controversy being under $500, a writ of error from this court issued to the court of appeals was dismissed. If allowable at all, the writ should have been issued to the circuit court. Mr. Justice FIELD delivered the opinion.

Shipping; Collision.—No. 140. Steamship Favorita v. The Union Ferry Company—Jan. 12, 1874.—Appeal from the circuit court for the eastern district of New York.—This was a libel filed by the ferry company, to recover damages suffered by the ferryboat Manhasset by reason of a collision with the Favorita, a boat of the Pacific Mail Steam Navigation Company's line, occasioned, as alleged, by the fault of the colliding ship. The defence was that the Manhasset was guilty of keeping no proper lookout, and of deviating from her course when the peril was imminent.

The court below found the steamer at fault, and the decree was for the ferry company. That decree is here sustained, the court saying that if there was error at all on the part of the Manhasset, it was such a mistake of judgment as would likely be committed by any one in similar peril. Mr. Justice DAVIS delivered the opinion.

Mechanic's Lien—Waiver of.—No. 170. Grant v. Strong—Jan. 12, 1874.—Appeal from the supreme court of the District of Columbia.—The court in this case hold that where a builder proceeds with the erection of buildings upon a contract to receive at a certain point in the work a negotiable note, payable at three months, for such work, and thereafter accepts such note, his mechanic's lien does not attach; that the reliance in such a case is upon the note and not upon the lien; and this, although the note is not paid at maturity.

Decree reversed. Mr. Justice MILLER delivered the opinion. Mr. Justice SWAYNE dissented.

Bankruptcy—Fraudulent Conveyance.—No. 113. Glenn et al. v. Johnson et al.—Jan. 13, 1874.—Appeal from the district court for the northern district of Georgia,—This was a proceeding to set aside a conveyance of real estate made by Johnson, a bankrupt, to his wife shortly before his bankruptcy, on the ground that it was a fraud upon his creditors. The court affirm the decision below, sustaining the conveyance as having been made when Johnson was solvent. Mr. Justice FIELD delivered the opinion.

Bankruptcy—New promise to pay.—No. 177. Allen et al. v. Ferguson—Jan. 13, 1874.—Error to the circuit court for the eastern district of Arkansas.—This was a suit on a promissory note made by Ferguson. The defence was his discharge in bankruptcy. The replication was that, pending the proceedings in bankruptcy, the holders received a new promise, in writing, to pay the note from Ferguson, and that relying upon that, they took no steps to collect the amount. This new promise was contained in letters from Ferguson, in which he said, at different times, "The debt shall be adjusted." "The debt will be settled," "The matter shall be arranged," &c., &c. The court sustained a demurrer to the replication, and the decision is here affirmed; this court holding that the words in the letters did not amount to evidence of a new promise to pay. Mr. Justice HUNT delivered the opinion.

Land Law—Act of Congress reinstating Entry.—No. 542. McCarty v. Mann et al.—Jan. 13, 1874—Appeal from the circuit court for the district of Michigan.—This was a contest to determine the title to certain lands in Ramsey county, Minnesota. The appellants relied upon a decision of the department denying the validity of the entry of the appellee's grantor, and the appellees, upon an act of congress, reinstating it. This court affirm the decree below, sustaining the decision that the act of congress reinstating the entry, vested the title in the pre-emptor, remarking that the law and equity are with the appellees. Mr. Justice SWAYNE delivered the opinion.

Shipping—Collision.—No. 123. Fraser v. The Propeller Winona—Jan. 13, 1874.—Appeal from the circuit court for the northern district of New York.—This was a case of collision between the schooner Fremont and the propeller on Lake Erie, in December, 1869. The district court found the propeller, to have occasioned the collision, and the decree was accordingly. The circuit court reversed the decree, holding that the schooner was at fault in having bad signal lights, and by changing her course contrary to the rules of navigation. This court reverse the decree of the circuit, and sustain the decree of the district court, holding the propeller at fault. Mr. Justice CLIFFORD delivered the opinion.

Notes and Queries.

EDITORS CENTRAL LAW JOURNAL: In the light of the recent bond decisions all over the country, you will greatly oblige me by giving me your opinion (or refer to authority) on the following: The general statute provides: "They [county commissioners] shall, at the first meeting after their election, and after every general electi n, choose one of their number chairman, who shall preside at such meeting and all other meetings during the year, if present; but in case of his absence from any meeting, the members present shall choose one of their number as temporary chairman."

Subsequently an act is passed to enable municipal townships to subscribe stock in any railroad, etc., which, among other things, contains this provision: "They [county commissioners] shall cause such bonds as may be required by the terms of said vote and subscription, to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk, etc., under seal of the county."

Now, will it relieve the township from paying the bonds now in the hands of an innocent holder for value, by a showing to the court that as a matter of fact the chairman was not only present, but entered his protest of record, against the signing of them; that, because the chairman refused to sign them, the other two members organized themselves into a board, electing one of themselves chairman, and proceeded regularly to order their issuance; and that the temporary chairman signed them as chairman? During the signing of the bonds, and before they were removed from the county, ample time and opportunity was given to the authorities to enjoin their issuance or removal.

Does the doctrine of estoppel operate in favor of the holder?

Or, is the plea of *non est factum* good against him?

ANSWER.—We are aware of no decisions touching the exact points here mentioned. The answer must be derived from a consideration of the statute and its purposes and the principles of law established by the courts in

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reference to this class of securities. The course of decision in the federal Supreme Court is well known. As bearing on questions asked, see Lynde v. Winnebago county, 16 Wall. 6; Kennicott v. Supervisors, 16 Wall. 452, 465, and cases cited; McKee v. Vernon county U. S. Cir. Ct. for West. Dist. Mo., which will hereafter appear in the JOURNAL. But in Kansas, see *Lewis v. Bourbon Co.* 1 CENT. LAW JOUR. 16.

To S. H. P.—Your question seems to relate to a local controversy, or to a question not of much general interest. We would incline to an affirmative answer on the facts as you state them.

EDITORS CENTRAL LAW JOURNAL: Under a statute authorizing our late county court to subscribe for stock in a railway and issue bonds, the stock was subscribed before the *abolition* of the county court by our new constitution; but the bonds were not issued until *after* the abolition of the county courts, and were then issued by the persons who were chairman and clerk respectively of the county court while it was in existence.

Are such instruments valid in the hands of *bona fide* purchasers?

J. M. M.

ANSWER.—We recall no decision in point, and will be obliged to any of our readers if they will refer to such.

EDITORS CENTRAL LAW JOURNAL: During a contest between A. and B., the former as vendee, and latter as judgment creditor of C., for title to a house and lot, the house is burnt, and A., tenant in possession, having insurance upon it, collects the amount of the policy. The court decides against A.'s title as fraudulent, and decrees that the lot be sold to satisfy B.'s judgment. Can B. recover from A., under decree to account for rents and profits, the amount receivd by him under his insurance policy for the burnt house? I am unable to find any ruling upon this point, though I suppose it has been passed upon. ——— ———.

ANSWER.—We do not recall any decision on the exact point. In Lerow v. Williams, 9 Allen, (Mass.) 382, it was decided that a person holding property by a conveyance fraudulent against creditors has, nevertheless, an insurable interest; and it is familiar doctrine that insurance contracts are personal, reaching only to the interest of the assured in the subject-matter of the insurance, and not running with the subject-matter insured, except by force of express contract. See May on Insurance, sec. 6, and cases cited.

*** Several important queries stand over to be answered in our next.

Notices of Books and Exchanges.

THE LAW OF INSURANCE, AS APPLIED TO FIRE, LIFE, ACCIDENT, GUARANTEE AND OTHER NON-MARITIME RISKS. By John Wilder May. Boston: Little, Brown & Co., 1873, pp. 777.

This treatise, just published by Little, Brown & Co., is intended to cover the entire field of the Law of Insurance, with the exception of maritime risks. The author is a well-known member of the Suffolk bar, and has brought to the preparation of this work not only unwearied diligence, but a mind disciplined by many years of study and active practice. We do not purpose to review the work at length, but a somewhat familiar acquaintance with the modern decisions upon the important subject of which it treats, enables us, after examination, to say to the profession that the results of those decisions are here clearly stated, and that the work is, in our judgment, one of decided and unusual merit. Whatever other works a practising attorney may have on Insurance, he will still need this, for the decisions down to the very latest period are here carefully collected and methodically arranged. Many important judgments upon Insurance, and particularly upon those branches of it not yet fully settled, have been pronounced within the past two years, and with a notably few exceptions, we find these cases all referred to, and in many instances, given with all needed fulness.

After this favorable estimate of the general merits and value of the work, we may be allowed to state that it seems in some minor respects open to criticism. At places the author makes up his text too freely by extracts unnecessary long, from opinions within the reach of every lawyer who would have occasion to use the book; but we are glad to note that this seems principally confined to instances where important topics are illustrated by very recent decisions. There is also less of critical discussion of doctrines arising out of conflicting decisions, than we would have been glad to have seen from so competent a person as the author. He gives, in some instances, in the same or succeeding sections, barely the points decided in the cases cited, without noticing that the cases themselves are not harmonious in principle. The important chapter on the subject of "Insurance Agents, their Powers and Duties," though valuable, and giving the recent cases, including the Union Mutual Ins. Co. v. Wilkenson, 13 Wall. 222; S. C., 2 Dillon, C. C. R. 570, (which will, perhaps, settle the law on the main point it decides, in all courts in which the question is an open one), would, in our judgment, have been improved if the author had more fully called attention to the conflict in the cases and classified and arranged them, thereby to some extent, doing the thinking which his mode of treatment puts upon the reader.

These are our views; but others think differently, and insist that an author best discharges his duty when he presents in logical order the adjudications just-as they are, leaving to counsel and the courts the task of reconciling differences and of selecting between conflicting cases and doctrines.

We consider Mr. May's book a very useful and excellent work, and commend it to the profession.

THE WASHINGTON LAW REPORTER: weekly; $5 per year: Washington, D. C.; Powell & Ginck, 633 F. Street: Hugh T. Taggart, Editor.

We have received the first number of this publication, and take pleasure in placing it upon our exchange list. We are informed by the editor that since the publication of Cranch's Circuit Court Reports, the last volume of which brings us down to the year 1840, the decisions of what is known to Washington lawyers as the "Old Circuit Court," now represented by the supreme court of the District of Columbia, have not been reported; and that the members of the legal profession who practice at the capital, have hence been deprived of the benefit of a ready reference to local precedents which their brethren elsewhere have enjoyed. To supply this want is one of the leading objects for which the Reporter is founded. It is supposed that the fact that the supreme court of the District has jurisdiction to hear appeals from the commissioner of patents, as well as to issue writs of *mandamus* to the executive officers of the federal government, will give the journal a general, as well as a local importance. We note elsewhere an important decision in the first number, sustaining the validity of contracts between attorneys who prosecute claims against the departments of the government, and their clients, for "contingent fees." We regret that we are not informed whether this case was taken to the Supreme Court of the United States, and trust that the editor, in publishing decisions of the supreme court of the District, which are of general importance, will find it practicable to note, in future instances, whether the decision is final.

We see no reason why a good law weekly, published at the federal capital, should not meet with a general support at the hands of the profession throughout the country. We trust the editor of the Reporter will find it to the advantage of his paper to give it a more general interest, by noting from time to time the proceedings of the Supreme Court of the United States. We wish the Reporter abundant success.

THE SOUTHERN LAW REVIEW; Nashville: Frank T. Reid & Co.: Frank T. Reid, editor: $5 per annum.

We have received the January number of this publication. It contains much valuable reading matter. We note an interesting reminiscence of the bench of England in 1807, being extracts from the diary of Chief Justice Taylor of North Carolina, written during a visit to England in that year; also a gossipy and entertaining article by Walter B. Hill of Macon, Georgia, showing what a poor opinion literary men have entertained of lawyers in all ages and countries; a brief but clear essay by Edmond S. Mallory, on the rule in Shelley's case, examining its reason and policy and enquiring whether it ought not to be restored in those states that have abolished it; a scholarly article by Chancellor Cooper, (the first of a series) on Modern Theories of Government; and again, an essay by Mr. Mallory, on the Rebellion, arguing the question from the standpoint of the states-rights school, and combating the views of a previous contributor. The remaining pages are filled with a digest of recent decisions, and the usual matter found in such a publication. The Southern Law Review has achieved a deserved popularity since its establishment two years ago. We take pleasure in numbering it among our exchanges.

THE IRISH LAW TIMES AND SOLICITOR'S JOURNAL; Dublin, 53 Upper Sackville street: weekly: subscription price, 30 shillings per annum.

Through the courtesy of the editor, Mr. John Falconer, LL.D., bar-

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rister, we have been favored with the advantage of exchanging with this ably conducted journal. This is the only legal publication in Ireland. In size and appearance it somewhat resembles the Albany Law Journal. In addition to the usual matter found in such a publication, it furnishes its readers with full reports of the decisions of the Irish courts. These reports, known as the Irish Law Times Reports, are recognized as authority by the Irish judges, and the same respect is accorded to them as to the authorized series. We gladly place this publication on our exchange list, and shall avail ourselves of the privilege of extracting from its columns, anything which may seem of interest to our readers.

THE GENERAL RAILROAD LAWS of the State of Ohio, in force January 1, 1874, with the Constitutional provisions applicable to Railroad Corporations, and notes of decisions of the Supreme Court of Ohio, relating thereto. By James A. Wilcox. Robert Clarke & Co., Cin., 1874: pp. 380. Price $5.

The scope of this work is indicated by its title. The book presents, in a connected and convenient form, the *general* legislation of Ohio, and constitutional provisions now in force applicable to railroad corporations; also the acts of congress respecting bridges over the Ohio river, and the transportation of mails and animals. The editorial work seems to have been well performed, and all of the decisions of the supreme court construing the statutory and constitutional provisions collected and their substance carefully stated. The index is full, and a lawyer can ascertain, from this work, in a few moments, the exact state of the law of Ohio on the subject of railways, so far as it depends upon the constitution or statutes of the state.

THE CHICAGO LEGAL NEWS. Published every Saturday by the Chicago Legal News Company, 161 and 163, La Salle street, Chicago: Myra Bradwell, editor: $2 per annum.

We like to say something of each one of our exchanges on the occasion of their first visit; but we hardly know what to say of the News. We presume that nearly every lawyer of any considerable standing in the west takes it and is acquainted with its merits. The News may, perhaps, without exaggeration, say to each member of the western bar, "Not to know me, argues yourself unknown."

Its great excellence consists in the fact that it furnishes its readers with an unusual amount of reading matter in the shape of the latest decisions of important courts, judiciously selected, and with carefully prepared head-notes. In her able conduct of this paper, we think that Mrs. Bradwell has, perhaps, done more for the cause of woman than any of her sex.

Legal News and Notes.

—JUDGE DURELL, of Louisiana, has placed his resignation at the disposal of the president. No disposition has yet been made of it, nor any successor designated.

—GOVERNOR BEVERIDGE, in his message, recommends severe penalties for placing obstructions upon, or tearing up railroad tracks, and for injury to persons through the carelessness or negligence of railway officials.

—GOV. DIX, in his message to the New York legislature, takes strong ground against legislation authorizing the condemnation of lands by towns for public cemeteries, urging that there is no reason why the government should interpose, or why the matter should not be left to private acquirement between the parties.

—THE HON. ANDREW G. MILLER, Judge of the United States court for the eastern district of Wisconsin, has resigned, after thirty-five years of judicial service on the federal bench. He was the oldest federal judge in commission, and is the sole survivor of the judges who administered the bankrupt act of 1841.

—THE supreme court of Texas, after several days' discussion on a test case, has just decided that the law under which the recent general election was held, is unconstitutional. The constitution of Texas provides that the polls shall be kept open four days, and the election act, under which the recent election was held, provides that the polls be kept open for one day only.

—THERE seems to be a conviction abroad that Dr. Kenealy will be disbarred after the conclusion of the Tichborne case, the defence of which he has conducted with a pertinacity and impudence never equalled in a British court of justice. His frequent violent controversies with the bench, and the angry demeanor of the lord chief justice are not very creditable to any of the professional gentlemen concerned.

—THE judges of the supreme court of New York, for New York city, in general term, have made a rule that "press copies," that is, copies of papers made on manifold paper, will not be received by the court, nor be deemed good service between the parties or their attorneys if [not?] returned within twenty-four hours. A writer in the Daily Register criticises this rule severely; urges that manifold copies are more accurate than manual ones and easier to handle and preserve; and questions the authority of the judges to make the rule.

—MR. WELLS, of Missouri, introduced in the national house of representatives, a bill changing the time of holding the sessions of the Supreme Court of the United States, providing for one session annually, on the second Monday in June, at Washington, D. C., and one annually in the city of St. Louis on the first Monday in October; the session at Washington to hear and determine all cases arising in the 1st, 2d, 3d, and 4th circuits, and that at St. Louis all in the 5th, 6th, 7th, 8th, and 9th circuits. The bill provides for a special clerk for the "central department," with seal, marshal's office, etc., to be located at St. Louis.

—THE suits for the condemnation of property in Cincinnati by the general government for the proposed new post office building, have been concluded. They were commenced in the circuit court of the United States, Judge SWING presiding, and the question of jurisdiction was raised by the counsel for the owners of the property. The arguments upon this question were commenced on the 7th day of October, and occupied about two weeks, being of a most exhaustive character. The Cincinnati Enquirer says: "The questions involved were new in the practice of the court, and the counsel engaged exhausted the learning on the subject, the argument of Mr. Bateman being especially able and thorough. Judge SWING, in a very careful and elaborate opinion, overruled the demurrers and motion to dismiss, in which he held that the circuit court had jurisdiction of the case.

—GOV. DIX has made the following appointments to the bench: Alexander S. Johnson, of Utica, to be judge of the court of appeals in place of Rufus W. Peckham, deceased; Theodore W. Dwight, of New York, to be commissioner of appeals in the place of Judge Johnson transferred to the court of appeals; and Edwin Countryman, of Cooperstown, to be justice of the supreme court of the sixth judicial district in place of John M. Parker, deceased. These appointments are, without exception, good. Judge Johnson was a member of the court of appeals from 1851 to 1859, and won a deservedly high reputation as a judge. A year ago he was appointed to the commission of appeals in place of Judge Ward Hunt, resigned. Judge Dwight is widely known as a legist. He has long been professor in the Columbia law school and a constant advocate of legal and political reform. From his long devotion to the law as a science, we should suppose him to be somewhat deficient in the technics or practice, but this will very likely prove no drawback in the court to which he has been nominated. Mr. Countryman is very highly spoken of by those who know him, not only as regards personal character, but also as to his attainments and ability as a lawyer. We understand that he was strongly recommended by the judges of the court of appeals—an endorsement of the very highest character.—*Albany Law Journal.*

—IT is announced that the publication of Barbour's Reports will end with Volume 65. We doubt whether this announcement will cause much regret. It is doubtful whether the jurisprudence of the country has been much benefitted, as a whole, by the publication of this series. The fact that the court whose decisions they embrace is not one of last resort, diminishes their value to some extent; but this objection would not be a very serious one, if pains had been taken to indicate what decisions were final, and what had been taken to the higher tribunal. Some of the judges whose opinions are reported in Barbour were men of ability; some others were not; and the good and bad work of these courts has been given us without any apparent attempt at discrimination. Consequently, these books embrace perhaps the most discordant series of decisions that have been published in this country. It would, of course, be an exaggeration to repeat what has been sometimes said of them, that it is possible to find in them every sort of law, on every side of every question; but it is doubtless true that they

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have had a bad influence in fostering case law and case lawyers wherever they have been used.

This series is to be supplanted by a new series to be issued by John D. Parsons, Jr., of Albany, in monthly parts, at $15 a year. The name of the new reporter is not given; although the first part is ready for distribution.

—THE withdrawal of the nomination of Attorney General Williams, and the nomination of Caleb Cushing for chief justice, and the subsequent withdrawal of the name of that gentleman, have ceased to be news to our readers. On the 19th instant the President sent to the Senate the name of Morrison R. Waite of Ohio, as chief justice, and it is thought there will be no considerable opposition to his confirmation. Mr. Waite has long been known to the bar of Ohio as a lawyer of ability and great purity of character. It is said that he has twice declined the nomination of judge of the supreme court of his state. His name first became prominent throughout the country in connection with the Geneva tribunal, before which he appeared as counsel for our government, associated with Mr. Cushing and Mr. Evarts—acquitting himself with great credit. Mr. Waite is said to be 58 years of age. He was admitted to the bar in 1839, at Cadiz, Ohio. It is mentioned as a curious circumstance, that his name first appeared on the roll of the Supreme Court of the United States, over which he is now to preside as chief justice, about a year ago, at which time he was introduced by Mr. Cushing. Mr. Waite is a member of the law firm of M. R. & R. Waite, of Toledo, Ohio, and is a member and the presiding officer of the constitutional convention of that state, now in session.

The first announcement of his nomination came to him while in his seat, conducting the deliberations of the convention. A member arose to a question of privilege and read a telegram, conveying the news. It is said that for the time the members forgot their dignity, and the applause was deafening. A member then moved that a committee be appointed to draft resolutions expressive of the sense of the convention with reference to the nomination; but the chairman ruled the motion out of order, and business proceeded as usual.

Validity of "future" Cotton Contracts.

The case of Lehman Bros. v. Strasburger, which was tried before Judge BUSTEED last spring, was heard on a writ of error by Judge WOODS of the United States circuit court, at Mobile, on the second and third of the present month. Lehman Bros. filed a petition to put Strasburger into involuntary bankruptcy on a note given for losses on what are commonly known as "future" cotton contracts, which were made, and the losses on which were paid, as they alleged, by Lehman Bros. as the factors and agents of Strasburger. A trial by jury was had, and Judge BUSTEED, in his instructions to the jury, held such contracts to be illegal. Lehman Bros. sued out a writ of error from the circuit court of the United States at Mobile. Judge WOODS has just delivered his opinion at Mobile, in which he decides that the contracts, as proven, are valid and binding. They were proved to have been made according to the rules of the New York cotton exchange. Judge WOODS reverses the finding of the court below, and remands the case for trial by another jury.

Udderzook's Trial—A Remarkable Case of Circumstantial Evidence.

The Legal Gazette for January 2, devotes most of its space to the charge of BUTLER, J., of the court of oyer and terminer of Chester county, Pennsylvania, in the case of Udderzook, indicted for the murder of W. S. Goss. Although no point of law is ruled in these instructions, yet as they contain a clear and able summing up of a chain of evidence wholly circumstantial, and as the facts are very peculiar, they afford most interesting reading.

Udderzook and Goss were brothers-in-law. According to the version of the commonwealth, they entered into a conspiracy to defraud certain insurance companies; and Goss having obtained a large amount of insurance on his life in different companies, they rented a small frame tenement in the suburbs of Baltimore, where they ostensibly engaged in perfecting an invention of a substitute for India rubber. The corpse of a man about the size of Goss is procured and brought to the house in a box, the contents being represented as machinery to be used in their experiments. While Udderzook is temporarily absent at the house of a neighbor, having with him a third person (who seems to have been picked up as a convenient person, to be used as a witness when needed), the frame tenement occupied by the inventors is discovered to be on fire, and after it is burned to the ground, Udderzook makes the discovery that Goss was in the house. Search is at once made for Goss' body, and, of course, the charred remains of the disinterred corpse are found, and every body thinks it is the body of Goss. These remains are sent to Goss' family, who pretend to recognize them as his; and shortly afterwards, suit is brought against the insurance companies on the policies held on Goss' life. The companies contest on the ground that Goss is not dead. Verdict is of course for the plaintiff, but the corporations appeal.

Meantime Goss, carrying out his part of the conspiracy, becomes a wanderer, first in Canada, then in Tennessee and elsewhere, under the assumed name of A. C. Wilson. Finally the sinews of war become exhausted, and, half disheartened and broken by excessive drink, he returns to Chester county, Pennsylvania, where he hides away under his assumed name.

And now mark how readily one crime enforces the commission of another. Udderzook fearing that Goss will become a witness against him, and that he will not only lose the prospective booty, but suffer the penalties of perjury and conspiracy, resolves to put him out of the way. After endeavoring, unsuccessfully, to persuade another brother-in-law named Rhoades, to become an accomplice, (without disclosing to him in a definite manner the name of the person proposed to be put out of the way) he resolved to do the deed himself. A buggy is hired, and he and Goss, *alias* Wilson, start across the country from Jennerville about nightfall. Udderzook returns about midnight with the buggy, but Wilson is no more seen alive. That night, the wife of a farmer residing near a wood in the direction of which the buggy went, heard the voices of two men hallooing, and distinctly heard one of them cry, "Oh!" The next morning a smoke was seen rising from the wood. When the buggy was returned to the owner, the iron supporting the dasher on the left side was broken; two of the bows supporting the top on the same side were broken and swinging loose; the oil-cloth that had covered the floor was torn out and gone; the blanket and sheet that accompanied the buggy were missing. Udderzook gave a satisfactory explanation of these accidents and paid the damages.

It seems that nothing was suspected until about three weeks afterwards, when persons passing by the wood where the hallooing had been heard and the smoke seen, smelled carrion and saw buzzards congregating at a particular spot. An examination discovered the body of a man, less the arms and legs, stabbed and cut in numerous places, slightly covered with dirt and limbs. Further search discovered the arms and legs buried in another place.

The details of the evidence by which this mangled and decomposed corpse was identified as that of Wilson, and by which Wilson was shown to be none other than Goss, and by which the body burned in the shop in Baltimore was shown not to be the body of Goss,—are too long to recapitulate. It is sufficient to say that it was of such a character as to leave no room for doubt in the minds of the jury, and fully to warrant their verdict of murder in the first degree.

Notes of Recent Decisions.

Bankruptcy.—A creditor, knowing his debtor to be insolvent, may prosecute his debt to judgment, issue execution, and levy on the property of his debtor, and afterwards have the debtor adjudicated bankrupt for allowing his property to be taken on the execution. Coxe v. Hale, U. S. Circuit Court, N. District N. Y., WOODRUFF, J.; 5 Legal Gazette, 416.

———; *Costs in suit by assignee.*—Where a bill is filed by an assignee without sufficient cause, yet if the circumstances surrounding the transactions complained of are not sufficiently clear, to raise an imputation on the good faith of the assignee in prosecuting the suit, the cost will be charged against the estate of the bankrupt in his hands. Ibid.

———; ———.—A wife can establish her right to individual property against the husband's creditors only by clear and satisfactory evidence that it was obtained by or through her own exclusive means. The profits were the product of added capital, and as husband and wife lived together, he giving his assistance, the absence of proof that it was her own, raises the presumption that it was furnished by her husband. [Per Agnew, Ch. J., dissenting.] Ibid.

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, JANUARY 29, 1874.

SUBSCRIPTION: $3 PER ANNUM, In Advance.

Cases in this Number.

We print elsewhere an abridgment of the opinion of Mr. Justice STRONG of the Supreme Court of the United States in the case of the Union Pacific Railroad Company v. Peniston, which relates to the power of the states to tax agencies of the federal government; also the important case of Chamberlain v. Saint Paul & Sioux City Railroad Company et al., relating to Minnesota railroad bonds, and Minnesota land grants to railroads; also an able opinion by Chief Justice BECK, of the supreme court of Iowa, upon the somewhat novel question of the right to set spring-guns for the protection of property. To this last case we have appended an editorial note, designed to show the force of the English and American cases bearing upon the question.

The New Chief Justice.

On the 19th inst., the president nominated, and subsequently the senate, without a dissenting vote, confirmed MORRISON R. WAITE, of Toledo, Ohio, to be Chief Justice of the Supreme Court of the United States. He was born in Connecticut, and graduated from Yale College. He is the son of Judge WAITE, formerly one of the supreme judges of Connecticut, and soon after leaving college, settled in Ohio, where he has ever since resided. He is in the 58th year of his age, and his life has been exclusively given to the study and practice of his profession. He is a man of elevated and spotless character, and has the reputation of a learned, upright and able lawyer. He was the president of the constitutional convention of Ohio, at the time of his appointment. He had served with distinction, the year before, as one of the counsel for the United States at the Geneva arbitration. His studies, his whole life, and his public services, give full assurance of the wisdom of the president's choice, which it cannot be doubted, will be vindicated by the manner in which he will discharge the high duties to which he has been called.

Policy of Assurance on Life of Husband for Benefit of Wife not liable to Wife's Debts.

In Brossard v. Marsouin, in the superior court at Montreal, October 21, 1873, before BEAUDRY, J., a question was ruled which appears to be novel and worthy of note, although the court is not one of last resort. The defendant, a public trader, holding her goods apart from those of her husband, effected a policy of assurance upon his life in the sum of $1500, which sum was stipulated to be paid to her in the event of his death. The husband having died, and the defendant becoming embarrassed, one of her principal creditors forced her into bankruptcy. The defendant put the assignee in possession of all her goods, but refused to surrender to him the policy of assurance. The assignee filed his petition asking that she be compelled to deliver the policy as a part of the estate of the bankruptcy belonging to the creditors. The defendant responded that the provincial statute, 29 Vict., ch. 17, which authorizes similar assurances, provides that the amount shall be paid *in the manner directed in the policy*, and cannot be subjected by any creditor or creditors whatever. The assignee contended that the creditors mentioned in the act are those *of the husband*, and not those of the wife; but the court took the same view of the statute as did the defendant, and dismissed the petition with costs.

We do not recall any case similar to the above, and after a considerable search, have not been able to find any. In the case of Murrin, bankrupt, 2 Dillon C. C. 120; S. C. 2 Ins. Law Jour. 524, a wife possessed of a separate estate secured to her by an ante-nuptial settlement, obtained in 1869, a policy of insurance *upon her own life*, payable upon her death *to her husband*. She paid the premium for a year out of her own estate. Before the year expired her husband was adjudged a bankrupt. Out of her own estate she paid the premium for the two following years, 1870 and 1871, and before the next premium fell due, she died; and it was held, in a contest between her husband and his assignee in bankruptcy, that the former was entitled to the proceeds.

Can a Father, by Contract, surrender his Rights over his infant Child?

This question has recently been canvassed with seriousness, in the courts of Lower Canada, and has been finally answered in the negative, by the queen's bench, at Montreal. We allude to the case of Barlow v. Kennedy, 17 L. C. Jurist, 253. Kennedy was a day laborer, in indigent circumstances. His wife died, leaving him a female child, the issue of their marriage, about eighteen months old. Both Kennedy and his deceased wife were Catholics, and the child had been christened in that faith. Unable to care for the child, he gave her to Barlow, a Protestant, in good circumstances, agreeing, by parol, that the latter should have her to rear, educate, and dispose of, during her minority, to all intents and purposes, as though she were his own. This contract was reduced to writing before a notary, which writing, Kennedy agreed several times to sign, but failed or neglected to do so. Finally, Kennedy re-married; and, after Barlow had had the exclusive custody of the child for more than four years, in pursuance of the agreement, and without any compensation from Kennedy, the latter demanded that she be restored to him. This being refused, he sued out a writ of *habeas corpus* to recover possession of her. The judge of the superior court having heard the case upon issues which he had caused to be made up, rendered the following judgment:

"The court, having heard the parties by their respective counsel, examined the proceedings of record and deliberated, considering that it is satisfactorily proved that petitioner, some three or four years ago, placed Mary-Ann-Margaret Kennedy, his infant child, under the care and guardianship of the respondent, William Barlow, and delegated his, said petitioner's right, authority and control over her person, under the express understanding and agreement that said respondent should bring her up and educate her as his own child; considering that said respondent then accepted the guardianship of said Mary-Ann-Margaret Kennedy, and has ever since, with great care and kindness, and at great expense, brought

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her up, according to the said understanding and agreement, and desires to continue so to do; considering that it would be more conducive to the comfort, happiness and welfare of the said Mary-Ann-Margaret Kennedy, to suffer her to remain under the care of said respondent, who and his wife have become much attached to her, and to whom she has also become attached, than to consign her to the guardianship of the said petitioner, a poor day laborer, and a stepmother, to whom she is an entire stranger, doth dismiss the petition of said petitioner with costs, and remand said Mary-Ann-Margaret Kennedy to the guardianship and custody of the said respondent."

This judgment was removed to the Court of Review and there reversed; and the respondent having appealed to the Court of Queen's Bench, the judgment of the Court of Review was affirmed.

BADGLEY, J., of the Queen's Bench, said: "It is unnecessary to enter into detail of the right of a father to have the custody of his infant child: as a matter of justice and of law, the father requires no provision of law to secure to him that right, which no one can disturb nor force from him, nor deprive him of, except on account of his own bad conduct or by his own consent. Except in the case of insanity, or some deliberate course of immorality or criminal act of his own, no father can forfeit or lose his paternal right, and even a contract by him to part with his child is so unnatural, that the law does not recognize a man's right to violate his most sacred duty, least of all to bind himself by a contract to do that which is inherently immoral and *ab initio* illegal, and in the eyes of the law null and void. Even, therefore, if a father had signed such a contract, it would not be binding, and he could still demand and have the custody of his child."

MONK, J., of the same court, said that the judgment of the court of first instance was an extraordinary one; and that it was monstrous to think that a father could divest himself of his right to his child.

The cases upon the subject of the right of a father to the custody of his infant child, and which determine under what circumstances a court of equity, or a court of law in a proceeding by *habeas corpus*, will control that right for the benefit of the child, are very numerous. Their effect is very well shown by Mr. Schouler, in his work on The Domestic Relations, pp. 334, *et seq.* Contests of this character generally arise between husband and wife, in the event of separation or divorce; and there appear to be but few cases upon the precise point involved in the case above considered, namely, whether a father may, *by contract*, surrender to another his parental rights over his infant child,

In an English case in point, the father of an infant daughter, the mother having died recently, had agreed to let it live with an uncle, who was to maintain and educate it until it should be able to provide for itself, and the father promised not to take the child away from the uncle, and to pay a certain sum monthly for its support; the agreement was acted upon for some months; but it was held that, notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle; and in a proceeding by *habeas corpus*, the child was delivered to the father. Reg. v. Smith, 16 Eng. Law and Eq. 221. But in a case in Massachusetts, where a child had been given up at its birth, the mother having then died, to its grand-parents, who kept it for thirteen years at their own expense, without any demand made by the father for its restoration, the court (SHAW, Ch. J.,) refused to restore the child to the father. In Mayne v. Baldwin, 1 Halst. Ch. 454, an infant daughter was restored to her father on *habeas corpus*, although he had committed her to the respondent, and agreed that the respondent should *be her father* until she should attain the age of twenty-one years, The same view was taken by the supreme court of New Hampshire in State v. Libbey, 44 N. H., 321, where the precise question is considered, upon a state of facts which appear from the imperfect statement in the opinion, to be very similar to the case in Canada. The court say: "In this case the child, when about two years and five months old, was placed with respondent in February, 1859, and maintained by him until December, 1861, when this application was made; and it appeared that until December, 1861, a period of nearly three years, the father gave no notice of his wish to have the child restored to him. Upon the subject of the terms upon which the child was taken by the respondent, the evidence is conflicting; but upon a careful consideration of it, we think that the relation is not impeached, but that the father placed the child in the custody of the respondent, with an agreement that it should be his, and be brought up by him. And the question now is, whether, in the exercise of a sound discretion, the custody of the child ought to be withheld. The child had been suffered to remain with the respondent nearly four years before the application, and she is now about six and a half years old; and assuming that there is nothing in the character of the father or the stepmother, that renders them unsuitable to be entrusted with the nurture of the child, we can see nothing in the other circumstances that would make the change of custody sought for, hazardous to the permanent interests and welfare of the child; certainly not to such an extent as to justify a final severing of the ties which bind the parent and child together. * * * Our opinion, therefore, is that, *upon refunding the sums of money expended by the respondent, under the agreement*, the father may revoke his consent, and thereupon, the custody of the child may be awarded to him." But it has been held, that where a father, whose wife had died, gave his female child, three years old, to her aunt, with whom she remained six years, the father during that time visiting her but once a year, and contributing nothing to her support, his right to her custody was gone. Com. v. Dougherty, 1 Pa. Legal Gazette, 63.

The principle declared in the case in Canada has been carried even further. It has been held that a husband cannot, *by agreement with his wife*, delegate to her the care and custody of their infant children. People v. Mercein, 3 Hill, (N. Y.) 399, 408; Johnson v. Tervy, 30 Conn. 259, 263; Earl of Westmeath's case, Jacob, 251, note (*c*). Although such agreement be by deed. Jac. 251.

And, excepting of course, those cases where the father, by reason of immoral habits, extreme poverty, or otherwise, is unfit to have the custody of his infant child; and excepting also, contests between husband and wife for the custody of their minor children, as well as cases governed by the laws relating to the apprenticeship of minors, the rule undoubtedly is as stated by Mr. Justice COWEN, in People v. Mercein, *supra*, that a father holds his children under a personal trust which he cannot alienate. And the supreme court of Illinois has

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recently held that the right of a father to the care, custody and nurture of his child cannot be *infringed by the state*, except for gross unfitness for the charge, or for the commission of crime by the child, exposing him to imprisonment; and hence, that a statute authorizing children to be committed to a reform school, without any charge of, or trial for crime, but merely because they appear to officers of the law to be destitute of proper parental care, and growing up in idleness, vice, etc., is unconstitutional, as involving imprisonment without due process of law; and that a child thus committed may be discharged on *habeas corpus*, on the father's petition. People v. Turner, 55 Ill. 280.

Land Grant to Railroads—Minnesota State Railroad Bonds.

SELAH CHAMBERLAIN v. SAINT PAUL & SIOUX CITY RAILROAD COMPANY et al.

United States Circuit Court for the District of Minnesota, Dec. Term, 1873.

Before DILLON, Circuit Judge.

1. **Railroads—Congressional Land Grant—Re-grant to new companies—Title.**—The present railroad companies, to which the land-grant of congress was re-granted on the failure of the old companies (upon which the benefit of the grant was first conferred) to build the roads, do not hold any of the said lands, not even the first 120 sections, subject to any trust in favor of the creditors of the state, or of the former companies.

2. ——. ——. **Power of the state** over the disposition of the railroad aid land-grant considered.

3. ——. **Minnesota state railroad aid bonds**, issued under the amendment to the state constitution of April 15th, 1858, held valid.

4. **Constitutional Amendment—Remedies.**—Construction of said constitutional amendment and the nature of the remedies by foreclosure and forfeiture considered.

On the 3d day of March, 1857, congress granted to the territory of Minnesota, lands to aid in the construction of certain lines of railroads therein. (11 Stat. at Large, 195.) By the act it is provided, *inter alia*, that "the lands hereby granted for and on account of said road and branches severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever."

Section 4 enacts: "That the land hereby granted * * * shall be disposed of by said state *only* in the manner following: that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, * * * *may be sold;* and when the governor shall certify * * * that any twenty continuous miles of any of said roads, etc., is completed, then another quantity of land not to exceed one hundred and twenty sections, * * * for each of said roads, * * * may be sold," and so on.

The territorial legislature of Minnesota passed an act, approved May 22, 1857, entitled "An act to execute the trust created by an act of congress, entitled 'An act,' etc.; and by chapter 3 of said act, the Root River Valley and Southern Minnesota R. R. Co., a corporation created and then existing under the laws of said territory (the name of which corporation was soon after changed to the 'Southern Minnesota R. R. Co.') was authorized to construct two of the lines of said road mentioned in the said act of congress, being the lines since severally constructed by the two companies, defendants in this action. That, by sections 3, 7 and 12, of said chapter 3, of said territorial act, it was provided that said railroad company, upon the construction of said lines of road, as in said act and the act of congress provided, should have the lands to aid in the construction thereof, in and by said act of congress designated.

On the 15th day of April, 1868, an amendment to the constitution of the state was adopted by the people, authorizing the issue of state bonds, not to exceed $5,000,000, to the land grant railroads, "for the purpose of expediting the construction thereof." By this amendment the provision was, that state bonds to the amount of $100,000, should be issued to each company for every ten miles of road made "ready for placing the superstructure thereon," and $100,000 for each ten miles completed with cars running thereon. "Said bonds thus issued shall be denominated 'Minnesota State Railroad bonds,' and the faith and credit of the state are hereby pledged for the payment of the interest and the redemption of the principal thereof." By this amendment also, the state bonds were to be made payable to the order of the company to which they were issued, and transferable by the indorsement of the president thereof. Then follows this provision:

"Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered to it, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose; and as security therefor, the governor shall demand and receive from each of said companies, before any of such bonds are issued, an instrument pledging the net profits of the road for the payment of said interest, and a conveyance to the state of the first 240 sections of land, free from prior incumbrances, which said company is or may be authorized to sell in trust for the better security of the treasury of the state from loss on said bonds," etc. And by the said constitutional amendment it was also provided that as a further security, each company should transfer to the state its own first mortgage bonds, corresponding in amount to the said state bonds so issued to such company; and in case of default of such company to pay the interest on the state bonds so issued to it, the governor was authorized, in such manner as should be provided by law, to sell the said first mortgage bonds of such company so transferred to the state, or require a foreclosure of the mortgage executed by said company to secure the same.

And it was further provided, that in consideration of the loan of the state credit to such companies, and as a condition thereof, each company should complete not less than fifty miles of its road on or before the 31st of December, 1861, and not less than 100 miles before the year 1864, and four-fifths of the entire line before the year 1866; *and any failure so to complete within the said several times, should forfeit to the state all the right, title and interest* of any kind whatsoever, in and to any *lands* together with the *franchises* connected with the same pertaining to the portion of the road so uncompleted.

Said proposed amendment was submitted to the people, for approval, at a special election, held April 15th, 1858, and was approved by a vote of about five to one. But said proposed amendment was not submitted to congress, or referred to in the act admitting Minnesota as a state.

The said Root River Valley and Southern Minnesota R. R. Co. accepted the provisions of said amendment.

In October, 1858, the Southern Minnesota R. R. Co.; (being the new name for the Root River Valley and Southern Minnesota R. R. Co.,) executed to the state an instrument, pledging the net profits of the road for the payment of the interest on the state bonds that should be issued to it, and also a conveyance of the first 240 sections of land which it was or might be authorized to sell, for the better security of the state against the payment of interest on the State bonds so to be issued to the said company. And, on October 1, 1868, the company made a trust deed to Pringle & Chatfield, trustees, on the road lands, franchises, and property of every description, to secure $2,000,000 of the bonds of the company.

In July, 1857, the route of the Southern Minnesota R. R. Co. was located.

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In 1858, and early in 1859, the plaintiff constructed road-bed and received therefor from the companies, state bonds indorsed by the companies, to the amount of $575,000. In 1859, the railroad company became insolvent and never completed a mile of road, nor did anything beyond the grading, and made default in the payment of interest on its bonds and on the bonds of the state.

In 1860, the constitution was amended by "expunging" the amendment of April 15, 1858, under which the state bonds were issued, "saving to the state all rights, remedies and forfeitures accruing under said amendment;" and by providing that "no law levying a tax or making other provision for the payment of interest or principal of the bonds denominated 'Minnesota State Railroad bonds,' shall take effect, or be in force, until such law shall have been submitted to a vote of the people of the state, and adopted by a majority of the electors of the state voting upon the same."

By an act of the legislature of the state, of August 12, 1858, and March 6, 1860, provision was made for the foreclosure of the mortgages, by order of the governor, of such companies as should be in default in payment of the interest on the state bonds that should be issued to it, and also in default in the payment of the interest of its own bonds, which should be held by the state as indemnity, as provided in said loan amendment, and upon such foreclosure to bid the property in, in the name and for the use of the state.

The *original* Southern Minnesota R. R. Co., having made default in the payment of interest both on its own bonds and the bonds of the state, the governor duly caused the deed of trust to the state to be foreclosed and all *lands*, etc., were sold to and purchased for and in the name of the state, and a conveyance made to the state therefor, and the state continued to hold all the lands, property and franchises, thus acquired, until the 4th day of March, 1864.

On March 4, 1864, the legislature of the state passed an act, *whereby the present railroad companies, defendants in this action, were created*, and all rights acquired by the state by virtue of said *foreclosure proceedings*, or by *any forfeiture* to the state, done or suffered by said old or original Southern Minnesota R. R. Co., were granted to the new companies thereby created, free and clear of all liens whatsoever, with further provisions that said new companies should have and receive severally, the lands pertaining to the line of the road which each was empowered to construct, upon the construction and completion of the same as provided in said act, and in said act of congress. The said railroad companies, defendants, severally went on under said act and completed their several lines of road, and received therefor, as the same were constructed, the lands from the state appertaining thereto under said congressional grant; said congressional grant having been amended so as to allow the lands to be disposed of by the state, as the lines were constructed in sections often instead of twenty miles, as originally provided. The said defendants, the railroad companies, to raise the means to construct said lines of road, issued their bonds severally, and mortgaged their roads, franchises and lands, to secure said bonds, as set forth in the answers of the trustees in this action.

That said defendants acquired no title, right or license, in regard to the right of way from, through or under, the old company, but procured the right of way from the individual land owners, over and upon which the old grading was done, so far as they used the same.

The present bill is by the plaintiff, as the holder of $500,000 state bonds, and is brought, not against the railroad companies to which they were issued, and which endorsed them, but against the *new* companies created in 1864, and to which the state re-granted the lands and property, and against the trustees in mortgages executed by the present companies to secure bonds issued to borrow money to build the roads, and as to the lands (particularly the first 240 sections granted to the said roads,) and franchises conferred upon the present companies by the legislature of 1864, seeks to charge them with a trust for the payment of the plaintiff's bonds.

The bill, in substance, prays for discovery and answer to special interrogatories; for a receiver; for an account of value of franchises and road beds at time of conveyance to defendants; for the value of all lands sold for cash; that defendants pay over all moneys by them received, and deliver all bonds, mortgages, contracts or evidences of indebtedness, for sale of lands to the receiver; convey to him all the lands remaining unsold; all to be by him converted into cash and applied to the liquidation of said state bonds and interest; and for general relief.

Gordon E. Cole and *F. R. E. Cornell*, for the complainant; *Gilman, Clough & Wilder*, *E. C. Palmer*, *Gilfillan & Williams*, and *H. J. Horn*, for defendants.

DILLON, circuit judge.—The plaintiff, who was a contractor on certain railroads, to which the state originally gave the benefit of the land grant of congress, holds bonds of the state of Minnesota, issued pursuant to the constitutional amendment of April 15, 1858, to the amount of half a million of dollars, upon which no interest has been paid since 1859, and which, by the expunging amendment to the constitution of 1860, if valid, the state legisture is disabled from paying or making provision to pay, until a law for that purpose shall be approved by a popular vote.

These bonds were endorsed by the original companies to which they were issued, and which, as between them and the state, are the principal and primary debtors. The present defendants, the St. Paul & Sioux City R. R. Co., and the Southern Minnesota R. R. Co., are not the companies with which the plaintiff contracted, and for which he did work, but are companies created by the state in 1864, and to which the state then re-granted the lands and property, which it had obtained by foreclosure or forfeiture, or both, from the old or original companies.

The bill proceeds upon the theory that the plaintiff's bonds are legal and subsisting obligations of the state: that the companies to which they were issued are the principal debtors, and the state their surety; that the lands, particularly the first 120 sections to each road, became by the act of the legislature of May 22, 1857, the property of the companies; that the only interest the state afterwards acquired in these lands, was the right to hold them to secure itself against loss by reason of its issue of state bonds; that the plaintiff, a creditor of the main debtor, has a right in equity to be subrogated to the rights of his surety (the state) in respect to all securities belonging to the principal debtor, and that the present companies not being *bona fide* purchasers of the lands for value and without notice, are open to the same trusts which might have been fastened upon them had they still remained in the hands of the state.

That the bonds held by the plaintiff are the legal obligations of the state, and binding upon it in law, honor and justice, I have no doubt. Indeed, counsel have not seriously contended that these bonds were not valid. They were issued pursuant to an amendment of the constitution of the state, adopted by a popular vote of about 35,000 for, to 8,000 against the project; and have been repeatedly recognized as valid by subsequent legislation of the state, and by the foreclosure proceedings. Under these circumstances, the fact that it does not appear that the acting governor signed the bill, providing for the submission to the people of the loan amendment to the constitution, is a matter of no consequence. In the amendment to the constitution "the faith and credit of the state are pledged for the payment of the interest and the redemption of the principal" of the bonds; they are signed by the governor and bear upon their face the seal of the state; they were issued to the plaintiff and others for grading and work actually done upon the roads at the rate specified in the constitutional amendment, and the state obtained the benefit of the secu-

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rities it took for its indemnification, and re-granted the property it acquired, free from all liens, to the present companies; under these circumstances, if the state were sueable in the courts, there can be no doubt that the bonds would be legally enforceable against it. Justice and honor, alike, require the state to recognize these bonds as binding upon it, and in the end the court cannot doubt that the people of the state will so ordain. A state with such a future before it as the state of Minnesota, cannot afford to bear the odium of repudiation, and if there are no other difficulties in the plaintiff's way, except the suggested one that his bonds are invalid, he will be entitled to the relief demanded.

The main purpose of the bill is to charge the first 120 sections of land granted by the state to the original companies, and by the act of 1864 re-granted to the present companies, with an equitable trust in favor of the plaintiff, for the payment of his state bonds indorsed by the old companies. It is admitted that the old companies, after doing a large amount of grading, became insolvent, and that they never completed any part of their line of road, and hence under the act of congress never became entitled to any lands, unless it may be the first 120 sections to each of the roads. These, the plaintiff contends, the state, under the act of congress of March 3, 1857, making the grant, had a right to *sell* in advance of construction; that the act of the territorial legislature of May 22, 1857, was a *sale* of the 120 sections to the companies, by force, whereof, they became absolutely their property by a title not subject to be divested by their subsequent failure to build the roads; that being the property of the companies, they had a right to pledge them to the state to indemnify it against liabilities it assumed for them, and that the plaintiff has the right to follow these lands into the hands of the state or its grantees, with notice, and subject them to payment of his bonds.

The lands granted to the state by congress were held by it in trust to be "exclusively applied to the construction of the road for and on account of which such lands were granted, and the same should be applied to no other purposes whatsoever." Said lands "shall be disposed of," says the act of congress, "by the state *only*, in the manner following, that is to say, that a quantity of land not exceeding 120 sections for each of said roads and branches * * may be *sold;* and when the governor shall certify that any twenty continuous miles of any of said roads, etc., is completed, then a quantity not exceeding 120 sections * * for each of said roads, may be sold," and so on. This comprised the extent of the power of the state over these lands. The state was a trustee whose powers were strictly limited by the congressional enactment. The state might, I am inclined to think, have *sold* the 120 sections in advance of construction, and conveyed a good title; but I doubt whether the act of the legislature of May 22, 1857, was a *sale* to the original companies so as to confer a title not subject to be defeated, if they failed to construct the roads as required by the act of congress; and I am clear, that under the act of congress it was not competent for the state, acting as trustee, to acquire any lien on or right in these lands, inconsistent with the unfettered execution of its trust duties under the act of congress. The state sustained to the old companies a double relation. one as trustee under the land-grant act of congress; the other as the sovereign which had created these companies, and was undertaking to aid them in their enterprise by a loan of its own credit. Now it is clear that if the state became a creditor of these companies, it could not lawfully stipulate for security out of lands which it held in trust, if this would be inconsistent with its duties under the act of congress.

In this view, I have serious doubts as to the validity of the security for its bonds which the state sought to obtain by the constitutional amendment upon the lands or any of them, which had been granted by congress, and which had never been earned by the completion of the required section of 20 (subsequently reduced to 10) miles of road. But I need not decide the point; for assuming that the 120 sections became the absolute property of the company, it was then competent for the state to take security upon it for its indemnity, and to provide for the forfeiture thereof to the state in case the roads were not completed as required by the constitutional amendment.

The companies made default in the payment of interest, and their rights were foreclosed and the property purchased by the state. The companies failed to build and complete the roads, as required by the constitutional amendment; and the legislation of 1864 shows that the state elected to take advantage of the forfeiture. Foreclosure and forfeiture were cumulative and concurrent remedies. The main object of the mortgage was pecuniary indemnity to the state. The principal purpose of the provisions for forfeiture was to secure the completion of the roads by the stipulated time.

By foreclosure or forfeiture or both, the rights of the old companies in those lands became vested in the state. It need not be denied in this case, that if these bonds were still in the hands of the state, or a voluntary grantee or a purchaser with notice, that the plaintiff, as the holder of unpaid state bonds (to indemnify the state against which the companies had conveyed to it the lands) might fasten an equitable trust upon them. Undoubtedly, he could do this, if these lands were in the hands of the state, discharged of any trusts under the act of congress. But upon the failure of the old companies, the state, in 1864, in order to secure the completion of the roads, created the present companies, and granted to them all the lands and franchises which had been granted to the old companies, "free of all claims or liens," and on the faith of this legislation, the new companies have built, completed the lines of road, the one at a cost of $5,000,000, and the other at a cost of $3,000,000. The money to accomplish this was raised upon deeds of trust and mortgages yet outstanding, made by the present companies to secure issues of bonds, preferred stock and land certificates. After all this is done, the present bill is filed, and it would, in my judgment, be inequitable as against the present companies and their creditors, to hold that the plaintiff could subject to the payment of his bonds the land or other property which the defendant companies acquired from the state by the legislation of 1864.

A decree will, therefore, be entered, dismissing the bill with costs.

NELSON, J., did not sit in the cause.

DECREE ACCORDINGLY.

NOTE.—Construction of acts of congress granting public lands to states to aid in building railroads: Schulenburg v. Harriman, 2 Dillon, C. C. R. 398. Rice v. Railroad Co. 1 Black, 358: State v. Southern Minn. Railroad Co., 18 Minn. 50.

To Union Pacific Railroad Co.: Union Pacific Railroad Co. v. Watts, 2 Dillon C. C. R. 310.

Taxation of such lands by the states. Railway Co. (Kansas Pacific) v. Prescott, 16 Wall. 603.

Lien of state to secure state bonds issued to the companies. Murdock v Woodson, 2 Dillon, C. C. R. 188; Wilson v. Boyce, Ib. 539.

Defence of Property by Spring-Guns.

GEORGE HOOKER, BY HIS NEXT FRIEND, ETC., v. JOHN MILLER.

Supreme Court of Iowa, October Term, 1873.

Hon. J. M. BECK, Chief Justice.
" WM. E. MILLER,
" C. C. COLE,
" JAMES G. DAY, } Judges.

1. Spring-Guns—Trespassers.—Where the owner of a vineyard sets a spring-gun, so arranged with cords or wires, that a trespasser coming into the vineyard will by coming in contact with such cords or wires, discharge the gun and receive injury therefrom, and gives no notice of having such spring-gun in his vineyard, and a trespasser entering the vineyard, comes in contact with such cords or wires, whereby the

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gun is discharged, and he receives injury, the proprietor is liable in damage to the trespasser.

2. ——. In Pari Delicto.—The rule *in pari delicto* does not apply in such cases.

3. ——. Notice.—Whether notice that such a contrivance had been laid for the protection of the property, would justify the resort to such means, the court do not determine.

Action to recover damages resulting from injuries sustained by plaintiff from a gun-shot wound received by him by means of a spring-gun placed by defendant on his own premises. There was a verdict and judgment for plaintiff: defendant appeals. The facts of the case appear in the opinion.

S. P. Vannatta, I. M. Preston & Son, for appellant; *Thompson Davis*, and *Nichols*, for appellee.

BECK, Ch. J.—The defendant was the owner of a vineyard, and had lost grapes by trespassers entering his enclosure and carrying them away. To protect his fruit from such persons, he planted a spring-gun, so arranged that it would be discharged, in the direction of one entering his premises, by means of wires or cords, which the trespasser would be likely to come in contact with and disturb. He gave no notice whatever that he had so arranged the gun, or of his intention so to do. The gun being thus placed, and charged with powder and shot, the plaintiff, in the night-time, went into the vineyard, without defendant's permission, and received a severe wound from discharging the gun, through the arrangements provided for that purpose. The plaintiff testifies, that his object in entering the premises was, to ask permission of the defendant to take some grapes. But it may be conceded for the purpose of this case, that he entered with the intention of wrongfully taking the fruit without the plaintiff's permission. The court instructed the jury, in effect, that if defendant had set the gun in such a way as to destroy life, or do great bodily harm, of which the plaintiff had no knowledge, and the plaintiff, in entering the premises for the purpose of taking grapes, without defendant's permission, was wounded by means of the gun, he is entitled to recover; that the act of plaintiff in that case, was but a misdemeanor, and would not justify its resistance by means that would take life, or do great bodily harm; that defendant had no right to use a spring-gun for his protection against a mere trespasser, without notice to him, and that defendant's liability, on account of the wound caused by the spring-gun, is the same as though he had discharged it with his own hands.

The giving of these instructions, and the refusal of others presenting a conflicting doctrine, constitutes the foundation of the errors assigned by defendant.

I. The act of the plaintiff entering defendant's vineyard in the night-time, conceding that it was for the purpose of taking grapes without permission, is a misdemeanor. Acts 12 Gen'l Ass. Ch. 74; § 2, Code § 3898. But the defendant had no right to prevent or resist the trespass of the plaintiff, by using means dangerous to life, or by inflicting great bodily injury. In doing so he violated the law, and became liable for injuries sustained by plaintiff, under the doctrine that all injuries inflicted by one, while acting in violation of the law, will support an action in favor of the injured party against the perpetrator. This court has held that a mere trespass against property other than a dwelling, is not a sufficient justification to authorize the use of a deadly weapon by the owner in its defence; and that, if death results in such a case, it will be murder, though the killing be actually necessary to prevent the trespass. The State v. Vance, 17 Iowa, 138. The rule is based upon the consideration that an act of violence done to prevent trespass which causes death, is beyond the provocation, and the perpetrator is guilty of murder. If the intention was not to take life, or the act was done in the heat of passion, the offence would be extenuated, and become no more than manslaughter.

Under the law, at the time of the killing, for which defendant was convicted, in the case just cited, a trespass, of the character of the one committed by the person killed, which was not different from the act of the plaintiff in this case pleaded by the defendant as a justification, was not punishable as a misdemeanor. But this fact cannot defeat the application of the rule of the case now. The rule is based, not on the light in which the law regards the act and the punishment provided for it. The criminality of the act, or the turpitude of the trespasser is not the foundation of the rule. But it is based upon the limitation which the law imposes upon the right of the owner of property in rendering it protection. He cannot prevent a trespass by using means dangerous to life. Now, if the act of the trespasser is punishable as a misdemeanor, that fact does not demand greater violence, or more dangerous means, to secure protection, than if the same act were regarded as a mere trespass, and not a crime. In other words, it requires no more violence to protect property from a trespasser when there is a statute punishing him criminally, than it would in the absence of such an enactment.

The act of defendant, we conclude upon the authority cited and upon principle, in preparing the means whereby the plaintiff's life was endangered, and from which he sustained great bodily injury, was unlawful. It follows in the application of familiar doctrines, which do not demand the support of authority to secure their recognition, that he is liable for the injury inflicted upon plaintiff.

It has been held in England that a trespasser, having notice that spring-guns are laid upon the premises, cannot recover in an action against the owner thereof, for injuries sustained thereby. Ilott v. Wilkes, 3 Barnewall & Alderson, 304. And that when a trepasser, without such notice, is injured in the same way, he may recover in such an action. Bird v. Holbrook, 4 Bingham, 628. So, the owner of a vicious dog is liable for injuries sustained by a trespasser, from being bitten by such dog. Shirfy v. Bartly, 4 Sneed, 58. In New York, the same doctrine with modifications on the side of humanity, has been recognized. It has been there held that the nature and value of the property ought to be such as to justify the use of means for its protection which are dangerous to life, and that the trespasser must have full notice of the mischief, in order to exempt the owner from liability for injuries inflicted. Loomis v. Terry, 17 Wend. 496.

Whether notice to the trespasser of the dangerous contrivances laid for the protection of property, would relieve the owner of liability for injuries caused thereby, we do not determine, as the facts before us do not involve that question, no such defence having been made in this case. The authorities that have come to our notice seem to recognize such a rule.

It has been often held that it is no justification for killing animals, that they were trespassing upon another's premises, or doing injury to his property. Ford v. Taylor, 4 Texas, 492; Tyner v. Cory, 5 Ind. 216; Wright v. Ramscot, 1 Saund. 83.

This rule is doubtless supported upon the consideration that the protection of one's property will not justify the resort to means that are destructive to the property of another, when not demanded by necessity, or the nature of the rights and property concerned. Certainly, humanity requires that a like rule be extended to the person of a trespasser, and that he be not exposed to bodily injury or death, on the mere ground that he is, at the time, acting in violation of law.

II. The defendant insists that under the rule, *in pari delicto*, or of contributory negligence, the plaintiff cannot recover. If the case be regarded as one of simple negligence on the part of defendant, plaintiff could not be held to the exercise of care, and, in its absence, of contributing to the injury by his own negligence, without having notice of the dangers to which he would be exposed. He could not be regarded as wanting in care, by failing to use means for his protection from dangers unknown to him, or in exposing himself thereto. The rule *in pari delicto*, affords no protection, in a civil action, to a party who has control of dangerous implements and negligently uses them or places them in a situation unsafe to others, whereby another person, without knowl-

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edge thereof, is injured, although, at the time, in the commission of a trespass.

This qualification of the rule is demanded on the ground that proper regard for life and the person of others requires care, on the part of persons using deadly weapons and dangerous implements, that injury to others may not be inflicted, and that mere trespasses and other inconsiderable violations of the law, are not to be visited by barbarous punishments, or prevented by inhuman infliction of bodily injuries. The instruction of the court directing the jury that the doctrine of contributory negligence was not applicable to the case, is therefore correct.

It is our opinion that the jury were properly instructed, and the instructions asked by defendant were correctly refused.

AFFIRMED.

NOTE.—1. *Defence of Property by Spring-guns—The English Rule.*—The question whether the owner of property may lawfully resort to the use of spring-guns and engines of like character, for protecting it in his absence, against trespassing men or animals, is somewhat novel in this country. The question first arose in England in 1817, in the Common Pleas, in Deane v. Clayton, 7 Taunt. 489. The defendant, who was the owner of a wood, had fixed to the trees what were commonly known as dog-spears, being iron spears, fastened to the trees past which the hares were accustomed to run, placed at such a height that while the hares would pass under them, dogs and foxes pursuing the hares would run against them, and be killed. The defendant had posted notice that such spears were set in the wood. The plaintiff being engaged in hunting in the wood with a aluable dog, the dog made his escape from him, and, pursuing a hare, ran against one of the spears and was killed. The judges were equally divided as to whether the plaintiff ought to recover damages, and so no result was reached. Three years later, in the leading case of Ilott v. Wilkes, 3 Barn & Ald 304, (cited in the principal case), the question came before the King's Bench upon the following state of facts: The defendant had placed spring-guns in a wood owned by him, and had posted notices that such guns were so set. Nevertheless, the plaintiff, entering the wood to gather nuts, trod upon a wire connecting with one of them, by which it was discharged, and he severely wounded. The question received an exhaustive discussion, and all the judges agreed that the plaintiff could not recover. In both of these cases the plaintiff had *notice* of the existence of the engines which caused the injury; and in both cases the judges were agreed that, had there been no notice, the plaintiff would be entitled to recover, and that without notice, it would not be lawful to expose even a trespasser to mortal injury. And agreeably to this view, in a subsequent case—Bird v. Holbrook, 4 Bing. 628, (cited in the principal case)—where the defendant for the protection of his property, some of which had been stolen, set a spring-gun, *without notice*, in a walled garden, at a distance from his house, by which the plaintiff, who had climbed over the wall in pursuit of a stray fowl, was shot, it was held that the defendant was liable in damages, on the ground that there had been no notice; but the correctness of this ruling is doubted in Jordin v. Crump, 8 Mees. & Wells. 789. So, in Jay v. Whitefield, an unreported case, cited in 3 Barn. & Ald. 308, and in 4 Bing. 644, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered £120 damages; but it does not appear whether or not notice had been given in this case.

The reasoning upon which Ilott v. Wilkes proceeded was, that since the plaintiff had *notice* that there were spring-guns set in the wood, the act of discharging the one which caused the injury to him, was his own act, and not the act of the defendant. The fallacy of this reasoning is conclusively shown by SHERMAN, J., in Johnson v. Patterson, 14 Conn. 1, where the reasoning of Justice HOLROYD is said to involve the proposition that a man is not responsible for not guarding against the *intended* consequences of his own *innocent* act; and, if he does not, that shall be considered as *his own act*, which is the act of *another*. The reasoning of the judges appears to have been little better than mere sophistry, intended to clothe with some color of legal reason, a barbarous rule of law, which really had its foundation, like the English game laws, in feudal and aristocratic policy—a policy which has no existence in this country. And, it is to be said to the credit of the English legislature, that very soon after the determination of this case, the rule declared by it was abolished by statute, 7 and 8 Geo. 4, ch. 18; and this statute has been substantially re-enacted in the 24th and 25th Vict., ch. 100, § 31, by which it is declared, in substance, that whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years, [27 and 28 Vict. ch. 47,] or to be imprisoned for any term not exceeding two years, without hard labor. And by the subsequent provisions, whosoever shall knowingly and wilfully permit such traps to be set, is deemed to have set them himself; provided this act shall not apply to traps set to destroy vermin, nor to engines set at night for the protection of dwelling-houses.

But, notwithstanding this statute, the English judges seemed disposed to favor the practice prohibited by it as much as possible. Thus, in Wootton v. Dawkins, 2 Com. Bench, N. S. 412, the plaintiff entered the defendant's garden at night, without his permission, to search for a stray fowl, and, whilst looking closely into some bushes, he came in contact with a wire, which caused *something* to explode with a loud noise, knocking him down and slightly injuring his face and eyes. It was held—1. That the defendant was not liable for this injury at common law. 2. That, in the absence of evidence that it was caused by a spring-gun or other engine calculated to inflict grievous bodily harm, he was not liable under the 7 and 8 Geo. 4, ch. 18, § 1

2. *Dog Spears—The English Rule.*—The question left unsettled in Deane v. Clayton, *supra*, as to the right to protect game in parks by means of dog-spears, was finally resolved in favor of the right, in Jordin v. Crump, 8 Mees and Wells. 782, where the rule was laid down that a person, passing with his dog through a wood, in which he knows dog-spears are set, has no right of action against the owner of the wood, for the death or injury of his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured; because the setting of dog-spears was not in itself an illegal act, nor was it rendered so by the 7 and 8 Geo. 4, ch. 18.

In a case earlier than any of the above, it was held that if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept on his neighbor's premises, must probably be attracted by their instinct into the traps; and, if, in consequence of such act, his neighbor's dogs are so attracted, and thereby injured, he is liable in damages. Townsend v. Wathen, 9 East, 277. But in this case it was proved to have been his intention to kill dogs by this means, as well as other animals; several dogs having been killed in such traps, and he having allowed his game-keeper a reward of one shilling for every dog so killed.

3. *Spring-guns—The American Doctrine.*—The question as to the lawfulness of the use of spring-guns in the defence of property first arose in the United States in Gray v. Coombs, 7 J. J. Marshall, 478, in the court of appeals of Kentucky, in 1832; and it was there ruled that where a person has valuable property in a strong warehouse, well secured by locks and doors, he may, as an additional security *at night*, erect a spring-gun which can only be made to explode by entering the house; and if a slave in endeavoring to break into the warehouse is killed by such spring-gun, the owner of the warehouse will not be liable to the master of the slave for his value.

The question next received an exhaustive discussion in Johnson v. Patterson, 14 Conn. 1, decided in the supreme court of errors of Connecticut in 1840; although it was not directly involved in the case. The action was for damages for poisoning the plaintiff's fowls. The defendant, to prevent the plaintiff's fowls from trespassing on his lands, as they had before done, mixed Indian meal with arsenic, and spead it upon his land, having given the plaintiff previous notice that he should do so; and such fowls coming afterwards upon the defendant's land, ate the poisoned meal, in consequence of which some of them died; it was held, 1, that the previous notice, in contradistinction to notice after the fact, was sufficient; 2, that notwithstanding such notice, the defendant was not justified in the use of deadly means, and consequently was liable in damages. And, the right of an owner to defend his property in his absence, by means of engines or poisons placed so as to kill or injure trespassing men or animals, was discussed at length upon principle and in view of the English authorities, and it was held, that no such right exists in Connecticut. But the doctrine of this case was limited to cases of trespass merely. What may be done to prevent *burglary* or *felony*, was admitted to be governed by other rules.

The question appears next to have arisen in State v. Moore, 31 Conn. 479, determined in the supreme court of errors of Connecticut, in 1863. The defendant was indicted for a *nuisance* in placing spring-guns in his blacksmith shop, so as to endanger passers-by on the highway. The jury, by a special verdict, found that the defendant placed spring-guns in his shop for its protection against burglars; that the guns were loaded with large shot, and so placed as to discharge their contents obliquely towards the highway, the travelled path of which was about a rod and half from the shop; that the shop was lathed and plastered on the inside and double-boarded on the outside, but that it was possible that scattering shot might pass through the boards at places where, by reason of the cracks between them, there was not a double thickness of boards; and

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that the travelling public were annoyed and apprehensive of harm from the guns. *It was held*, that it did not appear that there was such real and substantial danger to the public as to warrant a conviction.

Concerning the right of resorting to spring-guns for the purpose of protecting property the court reason, that the mere act of setting spring-guns on one's own premises for their protection, is not unlawful in itself, but the person doing it may be responsible for injuries caused thereby to individuals, and may be indictable for the erection of a nuisance, if the public are subjected by it to any danger; that what a man may not do directly, he may not do indirectly; that a man may not, therefore, place instruments of destruction for the protection of his property, where he would not be authorized to take life with his own hand for its protection; that the right to take life in defence of property, as well as of person and habitation, is a natural right; but the law limits its exercise to the prevention of forcible, and atrocious crimes, of which burglary is one; that in the absence of any statutory provision making it burglary to break and enter a shop in the night-time, with intent to steal, and by the early strict rules of the common law, a man may not take life in the prevention of such a crime; but that the habits of the people and other circumstances, have so greatly changed since the ancient rule was established, that it is very questionable whether, in view of the large amount of property now kept in warehouses, banks, and other out-buildings, it should not be held lawful to place instruments of destruction for the protection of such property; that breaking and entering a shop in the night-season with intent to steal, is, by the law of Connecticut, burglary; and that the placing of spring-guns in such a shop for its defence, would be justified, if the burglar should be killed by them; that the guns would, however, constitute a *nuisance* if they cause actual danger to passers-by in the street; but that the danger to the public must be of a real and substantial nature.

4. *Limit of the Right to defend one's Doods.*—If we adopt the conclusion of the Connecticut case last above quoted, that what a man may not do directly, he may not do indirectly, the question involved in the principal case will be found to have been settled by a great weight of authority. That a person is not obliged to surrender the possession of his goods, his lands, or other property to a wrong-doer without resistance, does not admit of question People v. Hubbard, 24 Wend. 369; Curtis v. Hubbard, 1 Hill, 336; S. C., 4 Hill, 437; Commonwealth v. Kennard, 8 Pick. 133, 137; Commonwealth v. Power, 7 Metcalf, (Mass.) 596; People v. Honshell, 10 Cal. 87; Harrington v. People, 5 Barb. 611, 612; McAuley v. State, 3 G. Greene, 435; 1 Bish. Crim. Law, § 861, 5th ed. He may by the doctrine of these, and all the cases where the rule is stated, use, within a certain prescribed limit, as much force as is necessary to preserve his possession—taking care the degree of force used does not exceed what is necessary, or what reasonably appears to be necessary, for the purpose of defence and prevention. The limit here spoken of, is the limit at which it becomes necessary *to take or endanger life*, in order to protect one's possession. And here, the criminal law, which seeks certainty in its rules as far as possible, divides offences against property into two general classes, namely, *felonies* and *trespasses*, for the purpose of determining whether a killing in prevention of such offences, shall be deemed justifiable or culpable.

And the first rule which may be stated is, that a killing which is necessary, or which reasonably appears to be necessary, to prevent a *forcible* and *atrocious felony* against property, is justifiable homicide. Pond. v. People, 8 Mich. 150; People v. Payne, 8 Cal., 341; State v. Roane, 2 Devereaux, 58; Gray v. Coombs, 7 J. J. Marsh, 478; State v. Moore, 31 Conn. 479; Johnson v. Patterson, 14 Conn. 1. This rule, the common law writers limit to cases of *secret* felonies, or felonies not accompanied with *force*. 1 Hale P. C. 488; 1 East P. C. 273; Foster, 274. Though we do not find this distinction adjudged in any modern case which we have seen, yet it has been quoted with approbation in several. Pond's case, *supra*; Moore's case, *supra*. Mr. Bishop, however, is of opinion that upon principle there can be found no such distinction in the law itself; but why he is of this opinion, he does not saisfactorily tell us. 1 Bish. Crim. Law, § 853, 5th ed. It is pretty clear, that the right to kill in defence of property does not extend to cases of *larceny*, which is a crime of a secret character; although the cases which illustrate this exception, are generally cases of theft of articles of small value. Thus, in Reg. v. Murphy, 2 Craw. & Dix C. C., 20, the prisoner was indicted under the statute for maliciously shooting with intent to do grievous bodily harm, etc. It appeared that on the day in question, the prisoner, who was a game-keeper and wood ranger of Lord Dunsany, and armed with a fowling piece, detected the prosecutor in the act of carrying away from his employer's lands a bundle of sticks, consisting of branches severed from the growing timber by a recent storm; that the prisoner hailed him, when he dropped the sticks and ran; upon which the prisoner called out, "If you don't stop, I'll fire;" but the prosecutor still going on, the prisoner fired, wounding him in the head, back and arms. DOHERTY, Ch. J., said: "There is no doubt that the prosecutor, in carrying away the branches previously dissevered from the trees, was committing a felony, and the prisoner was clearly entitled to arrest him; but in discharging his gun at the prosecutor, and perilling his life, the prisoner has very much exceeded his lawful powers, and I cannot allow it to go abroad, that it is lawful to fire upon a person committing trespass and larceny; for that would be punishing, perhaps with death, offences for which the law has provided milder penalties." And see to the same effect, McClelland v. Kay, 14 B. Monroe, 106; Gardiner v. Thibodeau, 14 La. An, 733; State v. Vance, 17 Iowa, 144; Priester v. Augley, 5 Rich. (Law), 44. It may be observed, however, that the right extends to statutory felonies, as well as to felonies at common law. Gray v. Coombs, *supra*; Pond's case, *supra*; Moore's case, *supra*. And it would seem that the fact that a common law felony has been reduced by statute to a misdemeanor, does not diminish the right of defence applicable to such cases. Gray v. Coombs, *supra*; Drennan v. People, 10 Mich. 169. These cases are in accord upon this point with what is said by the learned chief justice in the principal case, where he says that the rule which forbids the resorting to such dangerous means for the prevention of trespasses does not depend upon the light in which the law regards the act and the punishment provided for it, but upon the limitation which the law puts upon the right of the owner of property in rendering it protection. Language of similar import was used by NICHOLAS, J., in Gray v. Coombs, *supra*, where he said that "a name can neither add to, nor detract from, the moral qualities of a crime; and in the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means to be resorted to for its prevention." 7 J. J. Marsh. 483.

But the ordinary rule is, that a killing to prevent a mere trespass upon property, or any asportation of or injury to it, which does not amount to a felony, is a felonious homicide; or, viewed in the light of a civil action, unlawful. Harrison's case, 24 Ala. 67; Drew's case, 4 Mass. 391; United States v. Williams, 2 Cranch, C. C. 439; Priester v. Augley, 5 Rich. (Law), 44; State v. Morgan, 3 Ired. 186; State v. McDonald, 4 Jones (Law), 22; State v. Brandon, 8 Jones (Law), 467; State v. Vance, 17 Iowa, 144; Gardiner v. Thibodeau, 14 La. An. 733; McClelland v. Kay, 14 B. Monroe, 106. As where a person kills an officer who comes unlawfully to distrain his goods. United States v. Williams, *supra* Or where a person kills a slave who is stealing sugar-cane. Priester v. Augley, *supra*. Or stealing chickens. McClelland v. Kay, *supra*; Gardiner v. Thibodeau, *supra*. Or where a person kills another who lets down a dividing fence, and hauls off manure as to which there is a disputed claim. State v. McDonald, *supra*. Or kills one who is taking corn from a bin, the right to which is in dispute. State v. Brandon, *supra*. Or where a person fires among a party of boys who are stealing his melons, and kills one of them. State v. Vance, *supra*. Or shoots and wounds a person who is carrying off branches severed from his master's trees. Reg. v. Murphy, 2 Crawf. and Dix, C. C. 20.

It is seen, therefore, that the rule that it is unlawful to set engines dangerous to life, for the defence of property against mere *trespassers*, is not only correct upon principle, as enforced by the reasoning of the principal case, but is sustained by a great array of authority; although it is possible that such means of defence are permissible to secure valuable property kept in warehouses and shops against nocturnal depredators.

Power of the States to tax Agencies of the General Government.

UNION PACIFIC RAILROAD COMPANY v. PENISTON, TREASURER OF LINCOLN COUNTY; S. C., 1 DILLON, C. C. R. 314.

Supreme Court of the United States, October Term, 1873.

Nature and extent of taxing power of the states considered, and held that the Union Pacific Railroad company was not such an instrumentality of the federal government, as exempts its road bed and rolling stock from state taxation.

The facts will be found fully stated in the report of the case as determined in the court below, under the name of Union Pacific Railroad Company v. Lincoln County, 1 Dillon C. C. R. 314.

Mr. Justice STRONG delivered the opinion of the court.

That the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court. And in thus acknowledging the extent of the power to tax

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belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that before the adoption of the constitution of the United States, each of the states possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdictions, alike by taxes on polls, or duties on internal production, manufacture, or use, except so far as such taxation was inconsistent with certain treaties which had been made. And the constitution contains no express restriction of this power other than a prohibition to lay any duty of tonnage, or any impost, or duty on imports or exports, except what may be absolutely necessary for executing the state's inspection laws. As was said in Lane County v. Oregon, 7 Wall. 71, "in respect to property, business, and persons within their respective limits, the power of taxation of the states remained, and remains entire, notwithstanding the constitution." It is, indeed, a concurrent power, (concurrent with that of the general government,) and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated, it is as complete in the states as the like power within the limits of the constitution is complete in congress." Such are the opinions we have expressed heretofore, and we adhere to them now.

There are, we admit, certain subjects of taxation which are withdrawn from the power of the states, not by any direct or express provision of the federal constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the national government is legitimately exercised within the states. While it is true *that* government cannot exercise its power of taxation so as to destroy the state governments, or embarass their lawful action, it is equally true that the states may not levy taxes, the direct effect of which shall be to hinder the exercise of any powers which belong to tke national government. The constitution contemplates that none of those powers may be restrained by state legislation. But it is often a difficult question whether a tax imposed by a state does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is, for that reason, alone, inhibited by the constitution. To hold that, would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence, the federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise.

These observations are directly applicable to the case before us. It is insisted, on behalf of the plaintiffs, that the tax of which they complain has been laid upon an agent of the general government, constituted and organized as an instrument to carry into effect the powers vested in that government by the constitution, and it is claimed that such an agency is not subject to state taxation. That the Union Pacific Railroad Company was created to subserve, in part, at least, the lawful purposes of the national government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privileges conferred upon it, upon condition that it should at all times transmit despatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same, for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. So it was provided that in case of the refusal or failure of the company to redeem the bonds advanced to it by the government, or any part of them, when lawfully required by the secretary of the treasury, the road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the company by the United States which at the time of the default should remain in the ownership of the company, might be taken possession of by the secretary of the treasury for the use and benefit of the United States. The charter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of congress to secure an agency competent and under obligation to perform certain offices for the general government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directers, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.

Admitting, then, fully, as we do, that the company is an agent of the general government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from state taxation?

[After reviewing Thompson v. Union Pacific R. R. Co. 9 Wall. 579; McCullough v. Maryland 4 Wheat. 316; Osborn v. Bank, 9 Wheat. 738, the court proceeds:]

It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers.

In this case, the tax is laid upon the property of the railroad company precisely as was the tax complained of in Thompson v. Union Pacific. It is not imposed upon the franchise or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war, that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government; and if it is not, it is prohibited by no constitutional implication.

It remains only to notice one other position taken by the com-

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plainants. It is, that if the act of the state, under which the tax was laid, be constitutional in its application to their property within Lincoln county, the property outside of Lincoln county is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the statutes of Nebraska, the unorganized territory west of Lincoln county, and the unorganized county of Cheyenne, are attached to the county of Lincoln for judicial and revenue purposes. The authorities of that county, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes.

The decree of the circuit court is affirmed.

Mr. Justice SWAYNE concurring:

I concur in the affirmance of the judgment in this case. I see no reason to doubt that it was the intention of congress not to give the exemption claimed. The exercise of the power may be waived. But I hold that the road is a national instrumentality of such a character that congress may interpose and protect it from state taxation, whenever that body shall deem it proper to do so. For some of the leading authorities in support of the principle involved in this view of the subject, I refer to the Chicago and Northwestern Railway v. Fuller, decided by this court a short time ago.

Mr. Justice BRADLEY dissenting, wrote a long opinion, in which he held that if the road-bed may be taxed, it may be seized and sold for non-payment of taxes; seized and sold in parts and parcels; separated by county or state lines, and thus the whole purpose of congress, in creating the corporation, and establishing the line, may be subverted and destroyed. In his judgment, the tax laid in this case was an unconstitutional interference with the instrumentalities created by the national government in carrying out the objects and powers conferred upon it by the constitution.

Mr. Justice FIELD concurred with Mr. Justice BRADLEY. Mr. Justice HUNT dissented from the opinion of the court but wrote no opinion.

Power of Master of Vessel to Create a Lien on Vessel in Violation of his Instructions—When United States Courts will Refuse to Entertain Suits in Admiralty Between Foreigners.

On the 17th instant, Judge BLATCHFORD, sitting in the United States district court for the southern district of New York, rendered an interesting decision in the case of Fechtenberg et al. v. The British bark Woodland, her tackle, etc. The Woodland being in the port of St. Thomas, her master drew certain drafts on her owners, whereby he undertook to pledge the vessel, freight and cargo, for their payment, and which gave to whomsoever might be the legal holder of them, a lien upon the vessel, freight and cargo. These drafts were negotiated with J. Niles & Co., of St. Thomas, who assigned them to the libellants. It is unnecessary to set out the allegations of the libel and answer, as the facts on which the case turns are stated in the concluding portion of Judge BLATCHFORD'S opinion, as follows:

"In the present case the libellants have put in evidence a letter of December 24, 1870, from the claimants to the master. That letter was made known to J. Niles & Co., and to the libellants. It authorizes the raising of the funds by drafts on Heaney & Parker, or by drafts on the claimants, and states that the claimants have no doubt that the master will be able to obtain funds in that way. But it contemplates, as the alternative means, only a bottomry. It authorizes a bottomry if a resort to drafts fails. But it authorizes only drafts or a bottomry. It must be regarded as excluding the master from resorting to anything but drafts or a bottomry, and as excluding him from resorting to the creation of a lien on the vessel by any form or hypothecation other than a bottemry, or to the creation of such a lien as is asserted in this case, whether an implied lien to result from the transactions, or whatever lien the language of the drafts may be claimed to create. J. Niles & Co., and the libellants declined to take the master's drafts, as authorized by the letter, and insisted that the master should undertake to create a lien on the vessel by other means than a bottomry. They insisted that the master should exceed his authority, as defined and limited by the letter. It is of no consequence to show that a resort to bottomry would have been more expensive to the claimants. They had a right to limit the authority of the master, and they did so. It is of importance so to administer the maritime law, that vessels in distress in foreign ports shall not be deprived of the means of obtaining relief; but it is no less important that masters of vessels and persons dealing with them, with knowledge of the instructions under which they are acting, shall keep within the limits of such instructions. As this is not a case *communis juris*, and both parties are foreigners, and the contract was made with reference to the law of the vessel's country, it is a case where the question of the liability of the owners of the vessel can, with especial propriety, be determined by the tribunals of such country. The libel must be dismissed with costs."

National Banks—Rate of Interest.

The supreme court of Indiana, on the 7th inst., delivered an opinion, holding that national banks, organized and doing business in the state of Indiana, may lawfully charge an interest rate of ten per cent., to which may be added the current rate of exchange for sight drafts where there is a purchase discount, or sale of a *bona fide* bill of exchange, payable at other place than the place of purchase, discount or sale. The reserving or receiving of illegal interest by a national bank does not defeat a recovery upon the note for the principal of the debt. In an action upon an usurious contract for loan of money made with a national bank, or with any person on its behalf, or as its trustee, the bank can recover no interest, nor can defendant recover any interest paid. The usurious interest, with the penalty prescribed by the national banking law, is recoverable as therein stated.

Book Notice.

A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES. By Emory Washburn, LL.D., Bussey Professor of Law in Harvard University, author of a Treatise on the American Law of Real Property. Third edition. Boston: Little, Brown & Co., 1873. pp. 776. Sold by Soule, Thomas & Wentworth, Law Booksellers, St. Louis.

The third edition of this treatise contains over 200 pages more than the first, and mentions and cites 600 new cases, decided since the second edition was published in 1867. A comparison with the previous editions shows that the present has not only been enlarged, but otherwise improved.

It is a complete and exhaustive treatise. It will be difficult to find in England, or in this country, a well considered case on the subject of which the book treats, which has escaped the unwearied diligence of the author. For an American lawyer, there is no substitute for this work, and in Great Britain it would seem to be equally useful, being more comprehensive than any treatise on the subject which has there appeared. The most striking feature of the book is the great labor and care which have been bestowed upon it. It fulfils excellently the leading office of an elementary work, in showing the exact state of the law on the subject with which it deals. It would, perhaps, be possible to classify the cases referred to in the text and condense the book two hundred pages, and the work, artistically viewed, would be more symmetrical; but, to the practising lawyer, for whose use it is chiefly designed, its practical value would, in our judgment, be thereby impaired.

Treating of a single subject, which embraces many topics not yet fully settled, it was practicable for the author to undertake to refer to all the principal cases, and to state in the text the exact substance of the more important of them; and this Prof. Washburn has done. A book prepared upon this plan, wherever it is practicable, is more useful to the mass of the profession than one in which the author gives us more of his own views and discussions. It is to be recollected that, in not one place in a hundred

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where the book will be used, is to be found a full library, and this consideration justifies the author in his full statement of the more important adjudications, and in taking the space necessary to display, though with some repetition, the course of decisions in the several states.

While we are of opinion that this work would not serve as an universal model for law treatises, yet for the subject in hand, the plan is excellent, and has been executed with that skill and pains-taking care for which the author is justly noted.

It may be acceptable to some of our readers to give an idea of its scope.

Chapter I. treats of the nature of Easements and the mode of acquiring them by Grant, User and Prescription, and Dedication.

Chapter II. treats of Easements and Servitudes of WAY, and herein of Ways of Necessity, by Grant, how used, and the relative rights of the land-owner and the way-owner.

Chapter III. treats of Easements and servitudes of WATER, and herein of Irrigation; Water for Mills; Artificial Water Courses; Rights in Rain and Surface Waters; Subterranean Waters, and Public Waters.

Chapter IV. relates to Miscellaneous Easements, such as the Lateral Support of Land, and the Support of Houses; Party Walls; Light and Air, etc.

Chapter V. treats of the Loss and Extinguishment of Easements, by uniting the dominant and servient estates; by abandonment, non-user, etc.

Chapter VI. relates to the Repair of Easements and Remedies at Law and in Equity for injuries thereto by action, by injunction and by abatement.

A few topics, and but a few, we noticed in passing, had not been treated by the author with his accustomed fullness. For example, the distinction which is overlooked or disregarded in so many of the cases between ordinary highways in the country, and *streets* in compact places or in incorporated towns, as to the *uses* to which they may properly be put, and the remedies of the public and the adjoining owner for improper uses, is not as fully defined and enforced as it seems to us it is desirable, at least on principle, that it should be.

The chapter on Dedication is a mine of wealth on the subject, and quite exhausts the authorities relating to it, except upon the point, whether the rights of the public in a complete and accepted dedication can be lost by non-user or adverse possession. On this subject there are cases not referred to by the author, and which are essential to a full understanding of the views which the courts have held concerning it, and the state of the law upon the subject.

The principal rights of *riparian owners* are well presented. We think the author does well to question the doctrine which has been sanctioned in New Jersey, (Stevens v. Paterson etc., Railroad, 5 C. E. Green 126, 34 N. J. (Law) 532); in New York, (Gould v. Hudson River R. R. 6 N. Y. 522); and recently in Iowa, (Tomlin v. Dubuque etc. R. R. Co. 32 Iowa 106), that a riparian proprietor upon a navigable river, is without remedy for being deprived of access to the water by the construction of a railroad along the river, outside of the water-line bounding the land of such owner; and to invite comparison with the rights of such owners to *access* to the stream, as laid down by Mr. Justice MILLER in Yates v. Milwaukee, 10 Wall. 497. Without here entering upon the discussion of the subject, we may observe that the doctrine that the riparian owner has no rights except those of alluvion and dereliction, and in particular, that he has no right of access to the navigable water, of which he cannot be deprived without compensation, is not to our mind so clear that it should be adopted by other courts without at least further consideration.

The author's treatment of rights in respect to public streams, and surface-water, party-walls, light and air, and the right of support of land and houses, leaves nothing to be desired. The work is a credit to the law literature of the country, and is published in the excellent style which has justly made the house of Little, Brown & Co. famous

Notes of Recent Tennessee Decisions.

SUPREME COURT, JACKSON, OCTOBER (SPECIAL) TERM, 1873.

[Courtesy of Hon. J. Pierce of Memphis.]

Bankruptcy.—See Replevin; Surety.

Bill of Lading—In the hands of a consignee (though the property be consigned to him on account of a debt) does not amount to actual or constructive possession of the property, but only gives authority to reduce it to possession. Saunders v. Bartlett.

Corporation; Insolvent.—In winding up, each stockholder is liable to the creditors for the full amount of his subscription, irrespective of insolvent stockholders; and the creditors are entitled to immediate payment, and cannot be postponed till after the collection of doubtful claims. Marr v. Bank West Tennessee.

Dray—Is a vehicle, and subject to municipal tax as such. Memphis v. Battaile.

Demurrer.—Under the Tennessee code, abolishing general demurrers—a demurrer to a plea or subsequent pleading, does not ransack the record or reach back to the declaration. Hobbs v. Memphis and Charleston R. R. Company.

Evidence—In cases in chancery, must be *secundum allegata*. Johnson v. Luckadoo.

———. Books of account, when testified to by witnesses, are competent evidence. Apperson v. Harris.

Endorser—Notice to, left at his residence, when it was known that he had abandoned it, is not sufficient to bind him. Selby v. Brinkley.

Frauds, Statute of.—A verbal promise to pay the debt of another is void under the statute, even where the promisor has the debtor's effects in his hands. Murphy v. Renkert.

Infant—Is not bound by a decree obtained in a suit where the administrator, being a party, has also acted as *prochein ami*. O'Connor v. Cobb.

———. Is not bound by the stipulations of the guardian's lease, to pay for improvements. Keep v. Cannavan.

Insurance.—Condition of policy that suit be brought within 12 months after loss, was avoided and nullified by the breaking out of the late war. (Acc. 13 Wall. 158.) Underwood v. Phœnix Insurance Co.

———. Parties to an insurance policy are bound by their contract, according to its fair and reasonable intendment. People's Insurance Co. v. Kuhn.

———. Condition in policy sustained, that "the use of general terms, or anything less than a special written endorsement, does not waive the printed conditions." Ibid.

Jury.—Depositions being taken to be read in each of three cases, the jury that tried one case is incompetent to try the others. Apperson v. Logwood.

Limitations, Statute of.—Part payment of a note within six years, without more, is not sufficient proof of a new promise as to the remainder. Locke v. Wilson.

Malicious Prosecution.—In an action for, under the Tennessee code, want of probable cause is a substantial fact in the case, and a failure to aver it specifically in the declaration, is bad after judgment by default, and is reversible error. Thompson v. Evans.

Municipal Corporation—Is an *imperium in imperio*, and special legislation for it is not unconstitutional. [Acc. Trigalley case, 6 Cold. 382.] Memphis v. Battaile.

Plea in abatement—Lies to an ancillary attachment, and the issues on it are to be tried separately by a jury, before the trial of the main suit. Price v. Bescher.

Partnership—Not liable for money advanced to one partner on his sole credit, though the firm get the benefit of it. Union & Planters' Bank v. Day.

———. On attachment against one member of, the sheriff may take possession of the firm property and sell the debtor's interest in it. (N. B.—The property not in actual possession of either partner.) Saunders v. Bartlett.

Replevin.—The suit as to detention being decided without reference to

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damages, a separate action may brought for the damages. Colby v. Yates.

———. Surety on bond for, may be discharged from it in bankruptcy. Choate's case.

Surety.—On appeal from magistrate. If the principal be discharged on plea in bankruptcy, this is a prosecution of the appeal with effect, and relieves the surety on his bond. Martin v. Kilburn.

Trover.—If a factor pledge the goods of his principal for his own debt, this is a conversion on the part of the pledgee. Merch. Nat. Bank v. Trenholm.

Verdict—Not disturbed for small errors where the merits are reached. Otis v. Consat. Gibson v. Apperson.

Voluntary Conveyance—Not fraudulent, where the grantor retains an abundance of property to pay his debts. Crisp v. Dunn. Bramwell v. Hart.

Witness.—Husband not a competent witness against wife. "The old rule that husband or wife is not competent, is still in force in Tennessee, so far as it rests on public policy and the harmony of interest." Smith v. Tuggle.

———. Under the statute making parties competent, a party need not subpœna himself as a witness, and the rules of the circuit court cannot require it. Douglas v. Blakemore.

United States Supreme Court — Decisions Last Week.

[Compiled from the New York Herald.]

Confiscation; Mortgaged Property; Life estate.—No. 180. Day v. Mican et al.— Error to the supreme court of Louisiana.—The defendants here were plaintiffs in the state court, where they commenced a hypothecary action as the children and heirs of one Mrs. Mican against Judah P. Benjamin and Joseph Benjamin as mortgagors of a parcel of land in Hurstville, and against Day, the plaintiff here, then in possession, to enforce the mortgage by the sale of the property hypothecated. The claim was established by producing a mortgage dated July 23, 1858, in which J. P. Benjamin acknowledged a debt to Mrs. Mican for $10,000 borrowed money, to be paid four years after date, and a mortgage from J. P. & Joseph Benjamin on the same property, with a fact *de non aliendo*, that the mortgagors would not sell, alienate, or encumber the property, to the prejudice of the mortgagee. The proceeding resulted in a judgment against the Benjamins as mortgagors, and from that judgment they have not appealed. Day's title arises in a conveyance made in pursuance of proceedings in confiscation, in virtue of which the property was sold, as belonging to the Benjamins, in March, 1865. The decision below sustained the mortgagees' claim, holding that, upon a proper construction of the act of congress referred to in the record, there was nothing offered for sale, or which could be sold or purchased, except the title of Benjamin at the date of the act, and that the description of the property in the libel of information, and in the marshal's notice of seizure, was not sufficient to justify the conveyance to Day, or to notify the mortgagees of the proceedings, inasmuch as the property is described as being in the town of Huntsville, instead of Hurstville, the name used in the mortgage. The writ of error maintains that this decision was error, because based upon the ruling that only a life estate was confiscable under the act, and because holding that, after condemnation and sale, the property was subject to the mortgage in the hands of the purchaser at the judicial sale.

Two other cases were argued with this, involving the same question, in both of which the property condemned and sold belonged to John Slidell, and in which his children and heirs were successful.

The supreme court *hold*, that in the proceedings in confiscating the property of Judah P. Benjamin, there was not sufficient notice to Mr. Benjamin's mortgagees, and, therefore, affirm the judgment below sustaining the title of the mortgagees as against Day, the purchaser under the proceedings.

In the case of Bougree v. John Slidell et al., the decision affirms the judgment below, holding that the confiscation of the property of Slidell passed only a life estate, and did not affect the title of his children as heirs.

Appeal in Admiralty from Circuit to district Court; Judgment on such Appeal; Final Judgment.—No. 218. Steamer Lucille v. Resposo.—Appeal from the circuit court for Maryland.—In this case the court hold that an appeal in admiralty from the district to the circuit court, in effect vacates the decree of the district court, and a new trial in all respects and a new decree are to be had in the circuit court. The latter court must execute its own decree, and the district court has nothing more to do with the case. An order of the circuit merely affirming the decree of the district court, and nothing more, is not such a decree as the circuit court should render, and is not a final decree, from which an appeal lies to this court. Dismissed. Mr. Justice MILLER delivered the opinion.

Violation of Contract by Government; Measure of Damages.—No. 169. Buckley v. The United States.—Appeal from the court of claims.—This was a suit upon a contract for the transportation of government stores, the claimant alleging a violation of the contract by the government and asking damages therefor. The measure of damages, according to the theory of the claimant, was properly the amount of profits lost by the non-fulfilment of the contract, and thus, considering it, he declined to prove the actual loss sustained, and thereupon the court dismissed his petition. That judgment is here affirmed, the court holding that there was nothing in the contract to support the theory of the claimant. Mr. Justice SWAYNE delivered the opinion of the court.

Actions for Penalties; National Banks; Usury.—No. 178. Tiffany v. The National Bank of the State of Missouri—Error to the circuit court for Missouri.—This was an action by the trustee of a bankrupt to recover double the amount of interest paid by the bankrupt to the bank under the act of congress of June, 1864, which provided that the national banks might charge the same rates of interest (and no more) as allowed by the laws of the state where the bank was located, and, in case of a violation of the act, allowed a recovery of double the amount. The judgment below was for the bank, the court finding that by a proper construction of the laws of Missouri there had been no violation of the federal statute. The judgment is here affirmed, the court saying that in an action to recover a statutory penalty, the statute under which the penalty is to be enforced must receive a strict construction. Mr. Justice STRONG delivered the opinion.

Reversal of void Judgment; Defective Service of Process.—No. 142. Kibbe v. Benson.—Appeal from the circuit court for the northern district of Illinois.—This was the affirmance of a decree below in favor of Benson, touching the title to certain lands in Adams county, Illinois, the court sustaining the position taken by the defendant in error that a judgment in ejectment, which had been recovered against him and which was reversed below, was obtained without proper service. Mr. Justice HUNT delivered the opinion.

Bankruptcy; Preferment by Insolvent; Endorser.—No. 171. Bartholow v. Bean—Error to the circuit court for the district of Missouri.—In this case the court say that a judgment by an insolvent which would otherwise be void as a preference under sections 35 and 39 of the bankrupt law, is not excepted out of that provision because it was made to a holder of his note over due on which there was a solvent endorser, whose liability was already fixed by protest and notice. Judgment affirmed. Mr. Justice MILLER delivered the opinion.

Contract of Acceptance; Cotton Tax.—No 93. Miltenberger & Co. v. Cook.—Error to the district court of Louisiana.—In this case the court sustain a judgment against the plaintiffs in error, upon their acceptance of drafts drawn upon them by a firm in the interior of Louisiana, for the payment of the tax on cotton, which, as collector of internal revenue, Cook had agreed to receive, the court holding that they were liable on their agreement to accept the paper drawn for the amount of revenue tax on cotton shipped to them. Mr. Justice SWAYNE delivered the opinion.

Land Law.—No. 670. Crews v. Brewer.—Error to the circuit court for the southern district of Illinois.—This is an affirmance of the title to certain lands in Illinois, the court sustaining the title of those who held under conveyances from the settlers at the date of the cession to the United States, as against those who claim by pre-emption, and the action of the land department since. Mr. Justice CLIFFORD delivered the opinion.

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, FEBRUARY 5, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

Cases in this and Next Number—Acknowledgements.

We print in this number a highly important decision of the Supreme Court of the United States, to which we have heretofore alluded, upon the subject of the validity of sales under deeds of trust, made during the war, the grantor residing within the insurrectionary territory. Also, an interesting opinion of Chief Justice NICHOLSON, of Tennessee, on the question under what circumstances a deed takes effect as an escrow. Also, an important opinion of Judge NAPTON, of the supreme court of Missouri, about a matter of much interest to sheriffs, namely: the manner of proceeding under the statutes of Missouri, to levy executions upon homestead property. Also, an opinion by DILLON, J., in a contest between a sheriff and an assignee in bankruptcy for the possession of the proceeds of property sold at sheriff's sale under levies made before the commencement of the proceedings in bankruptcy.

We gratefully acknowledge the reception of valuable and able opinions, from Judge ROBERT A. HILL of Mississippi, Judge ERSKINE of Georgia, Judge LONGYEAR of Michigan, Judge SAWYER of California, and other judges, attorneys and clerks. These we shall take pleasure in laying before our readers, either in full or in substance, as fast as our space will permit.

An able opinion by Judge KRUM, in the general term of the circuit court of Saint Louis county, Missouri, on the subject of the effect of the war on contracts of life insurance, is in type, and will appear in our next.

We shall also publish, by request, in our next issue, a recent decision by Judge DILLON, on the subject of elevator receipts, and the nature of the contract for storage of grain in elevators.

Legislative Regulation of Railway Tariffs.

Cheap transportation is the inexorable demand of the people; and to aid in securing it, attention is turned to railway regulation by legislative enactment. The indications plainly are, that this subject, in all its aspects, is to undergo the most thorough examination by the press, by state legislatures, by congress, and eventually, by the judicial tribunals.

Any discussion of it in our JOURNAL must be limited to the legal principles involved. The Dartmouth College case (4 Wheat. 518), decided by the Supreme Court of the United States at the February term, 1819, asserted, for the first time, the principle that a charter granted by a legislature to a *private* (as distinguished from a *public* corporation) was a *contract* within the meaning of the clause of the national constitution which prohibits a *state* from impairing the obligations of contracts. Within the class of *private* corporations, according to this decision, fall all companies whose stock is owned by private persons, though their objects and operations are public in their nature, such as railway, bank and canal corporations. The doctrine of this case has been repeatedly re-affirmed in the court by which it was pronounced and by the supreme court of, perhaps, every state in the Union; and, therefore, if any thing *can* be settled by judicial decision, it is, that unless the right to repeal, amend or modify the charter of a railway company is reserved at the time it is created, subsequent *state* legislatures cannot pass laws which essentially change the rights of the corporators or stockholders.

The railway companies, by which the internal commerce of the country is now so largely carried on, have been created solely by the various states, and in most cases, the power of full legislative control over them has not been expressly reserved; and in many instances, the power to the corporations to fix their own tolls or fares and freights, has been expressly granted. Accordingly, it is a well known fact, that the companies seek shelter under their charters, and the Dartmouth College case, from the threatened legislative regulation of tariffs; and it is a question now before the United States Supreme Court, under the 25th section of the judiciary act, or on its way there from the judgment of the supreme court of Minnesota, sustaining the validity of the railway tariff law of that state, passed in 1871, whether the doctrine of the Dartmouth College case can be invoked as a shield to protect the companies from legislative control by the states over their charges for carrying freights and passengers. An opposite conclusion, denying the power of the states, was reached by the court of appeals in Delaware, in the case of the Phila. & Balt. R. R. Co. v. Bowers, decided at the January term, 1874, the decision being based by the court upon what it regarded as the doctrine of the Dartmouth College case.

Practically, the real question would seem to be, not so much whether the Dartmouth College case is sound law,—for the hope that it will be overruled is scarcely entertained,—as whether it really applies to a railroad which is *publici juris*, and which has been so declared by the Supreme Court of the United States in the recent case of Olcott v. The Supervisors, 16 Wall. 678. In this case, Mr. Justice STRONG, after asserting the principle that railways are public, says, *arguendo*: "The railroad can, therefore, be controlled by the state. Its use can be defined; its tolls and rates for transportation may be limited." The case, however, was one in which the right of the state to amend or repeal the charter was expressly retained.

In the American Law Review for January, 1874, an extremely acute, and very able writer, has an article of fifty pages on the Dartmouth College case, in which he forcibly questions the soundness of every proposition on which it rests. The article embodies much research and reflection; and whoever reads it, will need to have his faith in the Dartmouth case re-assured by reading again the opinion of the great chief justice, which is marked with all his subtle and wonderful powers of reasoning. But the doctrine of that case, even if applicable to state laws, respecting railway tariffs, does not touch the *power of the general government*, so far as that power exists by virtue of the clause of the constitution which gives to congress "power to *regulate commerce among the several states*." And it is on this ground, namely, that the states can only prescribe tariffs for purely *internal commerce*, that is, from points to points wholly within the state, and have no power over rates on lines beyond their limits, and that the power over inter-

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state commerce exists, and exists only, in congress—we say it is on this ground that Mr. McCRARY of Iowa, chairman of the committee on railways and canals, an able lawyer and faithful legislator, bases his bill for federal regulation of tolls, fares and freights, upon inter-state railways. The elaborate report with which he accompanies his bill, shows that he has profoundly studied the subject in all its legal aspects; and it will undoubtedly be gratifying to him to see that the views which he so forcibly presents, as to the plenary powers of congress over the subject of inter-state commerce, including the regulation of compensation to the common carrier, are, in all substantial respects, in harmony with the opinion of the eminent author of the American Law of Railways, as contained in his article on. the subject which has just appeared in the January number, 1874, of the American Law Register. In this article, Judge REDFIELD maintains both the necessity and lawfulness of congressional railway supervision and regulation; and that the power of congress over charges upon inter-state railway lines is *exclusive* of the several states. He says: "There is no hope of relief from any imaginable source but in the national prerogatives. * * * If we cannot reform this evil [unreasonable charges and unjust discriminations,] through independent legislation in the rightful quarter, and pure judicial administration, we shall attempt it in vain by other inventions. * * * The first enactment of congress should contain a declaration that the act shall extend only to such transportation as passes, or is intended to pass, the lines of two or more states. It should also give the national courts jurisdiction in all cases arising under the act. It should make the subject of commerce among the states, either a distinct department of the national government, or subject to the control of a board of commissioners, paid for their whole time, which shall be devoted to the enforcement of the law. The law should require uniform rates for the same service, and no discrimination."

Our only purpose in this article has been to advise our readers of the current legal discussions on this important topic, rather than to express, at this time, views of our own. We shall refer to the subject hereafter.

The Virginia Duel Murder.

The trial of W. Page McCarty, for the murder of John B. Mordecai in a duel, in the hustings court, at Richmond, Virginia, before Judge GUIGON, was, on the 24th instant, brought to a farcical termination by the jury returning a verdict of guilty of *involuntary* manslaughter, and fixing the punishment at a fine of $500. The telegraphic report states that a few minutes after the case had been given to the jury, they returned and asked for instructions as to whether they were required to find a verdict of murder in the first degree or acquit the accused. The judge instructed them that they were not so required. He then, at their request, further instructed them as to the various degrees of murder and *manslaughter*, after which the jury again retired.

If this statement is correct, it is difficult to conceive on what grounds the instructions given can be supported. The deliberate killing in a duel is murder, and nothing but murder; and in those states, where murder is divided into statutory degrees, it is murder in the first degree; because it is done with deliberation and premeditation, with a weapon prepared for the occasion, and by an act intentional of death. As was said by the eminent Judge GASTON of North Carolina, in one of his well-considered judgments, "Deliberate duelling, if death ensue, however fairly the combat may be conducted, is, in the eye of the law, murder. The punctilios of false honor the law regards as furnishing no excuse for homicide. He who deliberately seeketh the blood of another, in compliance with such punctilios, acts in open defiance of the laws of God and of the state, and with that wicked purpose which is termed malice aforethought. While, therefore, because of presumed heat of blood, the law extenuates into manslaughter a killing upon such sudden rencounter, although proceeding upon an insufficient provocation, it withholds this indulgence when, from the circumstances of the case, it can be collected that, not heated blood, but a settled purpose to vindicate offended honor, even unto slaying, in defiance of law, was the actual motive which urged on to the combat." State v. Hill, 3 Dev. & Batt. 497.

Therefore, if the proof show a deliberate killing in a duel, to instruct the jury on the law of manslaughter, is to instruct them on a subject utterly foreign to the case; and such an instruction can have no other effect than to confuse and mislead them and break down their consciences. See Harrison v. State, 24 Ala. 67; Shorter v. People, 2 Comst. 193; State v. Shippey, 10 Minn. 223. These instructions seem to have been well calculated to produce the verdict which the jury returned; and this verdict could not have been more complete nonsense, if the jury had found the prisoner guilty of larceny. For if the killing in a duel could, under any circumstances, be manslaughter, it never could be *involuntary* manslaughter; because such a killing is always intentional of death.

If this case has been correctly stated in the public prints, it should seem that the duty of the judge in charging the jury could have been discharged in a single paragraph, by telling them that if they believed from the evidence, beyond a reasonable doubt, that the prisoner deliberately shot and killed the deceased in a duel, he was guilty of murder in the first degree. The jury would then have been obliged to return the legal verdict; and if there had been anything in the circumstances of the case, or in the state of society existing in Virginia, making it unjust or impolitic to execute the sentence, it would have been a proper case for the executive clemency. As it is, we are unable to see how the court can proceed to sentence the defendant for a crime which he clearly did not commit; and are not surprised to learn that immediately after the return of this verdict, his counsel moved to set it aside.

It is but just to say, however, that the instructions of the court find support in the modern doctrine—or rather, in the modern interpretation of an old doctrine—that in criminal trials the jurors are judges of the law as well as of the facts; and that, therefore, in trials of indictments for homicide, the prisoner has a right to have the *whole* law of homicide expounded to the jury. We understand that it has been recently decided in two cases in Tennessee, that in every trial for homicide, the prisoner may require the judge to expound the law of manslaughter to the jury; and that if the judge refuses so to do, it is error, and ground of reversal. Little's case, decided at Jackson, Tennessee, April term, 1873, and a case there cited. The doctrine that in criminal trials the jury are, in a free and unrestrained sense, judges of the law as well as

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of the facts, and that the court is, in such a case, a mere *assistant* to the jury, has been pushed to an extreme limit in Tennessee and Georgia, and perhaps in Illinois. In one of these states we have had an opportunity to observe its workings, and believe that it has had a tendency to render the administration of the law in trials for homicide, as unequal and uncertain as the chances of the gaming table.

Title of Purchaser at Execution Sale—Homestead Exemptions.

VOGLER v. MONTGOMERY ET AL.

Supreme Court of Missouri, January 26, 1874.

Hon. WASH ADAMS,
" DAVID WAGNER,
" W. B NAPTON, } Judges.
" H. M. VORIES,
" A. T. SHERWOOD,

1. **Sales of land under execution—Title of purchasing Creditor—Title of innocent purchaser.**—Where an execution creditor purchases at execution sale, and his judgment is subsequently reversed and restitution awarded, the title reinvests in the execution debtor; but where, before the reversal, the execution creditor conveys to a stranger, who purchases in good faith, he will hold the title unaffected by the reversal.

2. **Homestead Laws, how construed.**—Homestead laws should be liberally construed with the view of promoting the benevolent purpose of securing to a family a home protected from the creditors of the person who is its head.

3. **Levy upon Homestead—Possession of Homestead—Notice to Officer.**—The homestead exemption is for the benefit of the family, and a sale of the homestead under execution is void. The exemption need not be claimed, and the possession and use of property, as a homestead, are notice to the officer making a levy that it is held as such.

4. **———. Appraisement.**—When the homestead exceeds in amount or value the statutory limitation, it is the duty of the officer holding an execution, before making a levy, to proceed under the provisions of the statute to have the homestead appraised and set apart.

5 **Abandonment of Homestead—Fraudulent Conveyance of Homestead.**—The conveyance and repurchase of a homestead without a relinquishment of possession, even though made in fraud of creditors, does not constitute an abandonment of the homestead.

6. **Injunction to restrain Sale of Homestead—Cloud upon title.**—The sale of a homestead under execution will be restrained in equity on the ground that it will cast a cloud over the title of the owner.

Johnson & Botsford for Vogler; *Philips & Vest* for Montgomery, et al.

NAPTON, J. delivered the opinion of the court. This was an application for an injunction to restrain Montgomery, a trustee in a deed of trust from Nussberger for the benefit of Shields, from selling the lot conveyed in the deed on the general ground that such sale would cast a cloud on the title of plaintiff.

The facts appear to be as follows: Vogler acquired the lot and house in the year 1865. Nussberger obtained a judgment against Vogler, about the 4th of Feb., 1868. A few days previous to this, Vogler conveyed the premises to one Suess, and on Jan. 23, 1869, Suess conveyed back the same to Vogler. On Nussberger's judgment an execution issued; the lot was sold under it, and Nussberger became the purchaser, and a deed from the sheriff to him was executed, bearing date August 6, 1868, and recorded Nov. 6, 1868. There was a mistake in the description of the boundaries of the lot in the deed, as there was in the deed by which it was acquired by Vogler, and a second execution was obtained and levied on the lot, and a sale made under it to Nussberger, who received a second deed from the sheriff, dated 20th of August, 1869, with a correct description of the boundaries of the lot. At or previous to this second sale, the sheriff was notified that Vogler claimed the lot as his homestead. No claim had been asserted at the first sale under execution. Vogler was married and had four children, and he and his family lived on the premises. The judgment under which these sales were made was reversed on the 24th of December, 1869. The deed from Nussberger to Montgomery for the benefit of Shields was made on the 16th of Dec., 1869.

The petition in this case sets forth these facts and asks an injunction to prevent Montgomery from selling under his deed of trust. The principal grounds upon which an injunction is asked are: First, that the reversal of the judgment destroyed the title of Nussberger under the execution sales, and, secondly, that Vogler's claim of the property as a homestead, rendered the sale and purchase of Nussberger a nullity; and these are the only questions of importance, whether it be held that it was a case for injunction or not.

There is no question that a reversal of a judgment does not invalidate the sales under executions to strangers who purchase at the sale, but as to parties to the judgment the law seems to be settled otherwise; and if they become purchasers, they take a title subject to the ultimate disposition of the case. In this case, the plaintiff in the judgment buys and of course his title is affected by the infirmity, but he conveys to a third person before the judgment is reversed, and the question is, whether this infirmity attaches to the purchaser. In Gott v. Powell (41 Mo. 420) the court excepted the case where some third person has acquired a "collateral right before reversal." The purchaser in such cases must be regarded as a purchaser without notice, since he buys from a party who derives title from a judgment and execution valid at the time, and really occupies the same position as if he had himself bought at the sheriff's sale. Whilst therefore the title of the plaintiff in the execution would be annulled by the reversal of the judgment, the sale or conveyance by the plaintiff to a third person before the reversal of the judgment, would be valid, and the purchaser, supposing the purchase to be in good faith, would be protected from the risks which his vendor would be subject to. In this case, the deed to Montgomery was made four days before the reversal of the judgment under which Nussberger bought, and so far as this point is concerned, he must be regarded as having acquired a good title.

But, it is further objected that the sheriff's sale was void because of the property being claimed as a homestead, and therefore protected from execution by our statute on that subject.

The construction of our homestead laws, (1 Wagner's Statutes, p. 697,) has never, so far as I have observed, been before this court; so we are left to resort to the general practice of all courts in construing obscure and doubtful provisions of a statute, to carry out as nearly as possible what is believed to be its main scope and design, and in this we may be guided to some extent by adjudications in other states where similar laws have long existed. It seems too well settled in the various courts in the states where the homestead law has been discussed, that such laws, being prompted by benevolent intentions, are to be liberally construed, and in such a way as to promote the design of securing to a family, a home protected from the creditors of the person who is its head.

It is easy to foresee or imagine cases in which the ministerial officers, who are to be governed by it, must be greatly embarrassed in regard to their duty in executing some of its provisions, but we do not propose to anticipate difficulties which may not occur or which future legislation may remove.

The points which arise on the present record have been mostly passed on by courts of last resort having similar statutes to ours.

Our statute limits the homestead in Sedalia, where this case originated, to thirty square rods of ground in extent, and in value not to exceed fifteen hundred dollars. The second section of the act allows the house-keeper, or head of the family, in cases where the limitation is exceeded either as to quantity or value to designate or choose such part as will not exceed the limitation, and provides that where there is such designation or choice, or where there is none made, in either event, the sheriff shall appoint three appraisers to fix the boundaries and location of the homestead, and that the sheriff shall *then* proceed with the levy of the execution on the residue of the real estate.

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We infer from this section that in a case where a homestead is claimed, the sheriff cannot proceed with the levy until he has thus appointed appraisers; nor does it seem to be material whether the house-keeper or the head of the family, asserts his claim or not.

It may be that he is absent. This law is for the benefit of the family, the wife and children as well as the head of the family. The occupancy of the house as a family residence, is a fact easily ascertained by the officer. He cannot proceed with his levy, until he has ascertained in the mode directed by the act, the extent and the value of the premises, and that it is beyond the limit protected against executions.

The question of the title, we suppose, was not to be investigated by the sheriff. If the householder had no title, the execution and levy was of course unavailing, and the law was designed to protect his possession. If, however, there was an incumbrance on the property merely, the third section of the act directs how that is to be considered.

In this case it appears that Vogler had, prior to the levy, conveyed his title to the premises to one Suess, and upon this ground it is claimed that he forfeited all the protection which the homestead law gives. If this conveyance was in good faith, and valid, then it is obvious that an execution and a sale under it would convey nothing; but if it was fraudulent, as it doubtless was deemed to be by the execution creditor, then the title was in Vogler, and the homestead law exempted it from execution. It appears to be the received opinion that neither a fraudulent conveyance nor an act of bankruptcy on the part of the head of the family, will produce a forfeiture of the benefits of the homestead exemption. (Cox v. Wilder, 2 Dillon, C. C. 46.) Judge DILLON thinks these laws are chiefly for the benefit of the family, and therefore will not allow the fraudulent acts of the head of the family to subvert the policy of the law, and this opinion was upon our Missouri statute.

As Nussberger then derived no title from either execution, levy or sale, he could convey none to Montgomery, and the proposed sale by Montgomery would convey no title. And this is urged as a reason why no injunction should be allowed.

But it is the true policy of courts to prevent litigation, and a sale by the trustee would undoubtedly cast a doubt over plaintiff's title, and embarrass a sale, if he desires to sell.

The judgment is affirmed with the concurrence of the other judges.

AFFIRMED.

Validity of Sales under Deeds of Trust not affected by the War.

THE WASHINGTON UNIVERSITY v. GEO. B. FINCH, JAMES J. DALY, BANKRUPT, AND EDWARD R. CHAMBERS.

Supreme Court of the United States, January 12, 1874.

Sales under Deeds of Trust—War.—A sale of real estate made under a power contained in a deed of trust executed before the late civil war, is valid, notwithstanding the fact that the grantors in the deed, which was made to secure the payment of the promissory notes, were citizens and residents of one of the states declared to be in insurrection at the time of the sale, and that the sale was made while the war was flagrant.

Appeal from the circuit court of the United States for the districts of Missouri.

John M. Krum, for the plaintiff in error; *John F. Jones*, for defendant in error.

Mr. Justice MILLER delivered the opinion of the court.

James J. Daly and Edward R. Chambers purchased of W. G. Elliot, in March, 1860, certain real estate in St. Louis, Mo. For the principal part of their purchase money they gave him their promissory notes, and to secure the payment of these notes, they made a deed of trust to Seth A. Ranlett, conveying the property thus purchased with authority to sell it in satisfaction of these notes, if they were not paid as they fell due.

The notes were assigned by Elliott to the appellant, the Washington University, and the money being unpaid and due, the real estate so conveyed was sold by Ranlett, in accordance with the terms of the trust deed, to the university, on the 9th day of December, 1872. The trustee made the university, which was a corporate body, a deed for the land, and the university afterwards sold it for value, to one Kimball.

Daly and Chambers were both citizens of the State of Virginia, residing in the county of Mechlenburg, when they bought the land of Elliott, and have resided there ever since. Chambers and Finch, assignees of Daly, who had been declared a bankrupt, filed the bill, on which the present decree is founded, on the chancery side of the circuit court of the United States for the district of Missouri, to have the sale decreed void, and to have the proceeds of the sale of the land of the university to Kimball declared a trust fund for their use; and the court decreed accordingly.

The sole ground of this relief is, that the sale by the trustees took place during the late civil war, and that Daly and Chambers were citizens of the state of Virginia, resident within that part of the state declared by the president to be in a state of insurrection.

The argument is, that, inasmuch as all commercial intercourse was forbidden between the people of the loyal states and those residing in the insurrectionary districts, both by virtue of the act of congress and by the principles applicable to nations in a state of war, all processes for the collection of debts were suspended, and that the complainants being forbidden by these principles to pay the debt, there could be no valid sale of the land for such payment.

The case before us was not one of a sale by judicial proceeding. No aid of a court was needed or called for. It was purely the case of the execution of power by a person in whom a trust had been reposed in regard to real estate, the land, the trustee and the *cestui que* trust all being, as they had always been, within a state whose citizens were loyally supporting the nation in its struggle with its enemies. The conveyance by complainants to Ranlett vested in him the legal title of the land, unless there was a statute of the state of Missouri providing otherwise, and, if there was such a statute, it still gave him full control over the title, for the purposes of the trust which he had assumed. No further act on the part of the complainant was necessary to transfer the title and full ownership of the property to a purchaser under a sale of the trustee.

The debt was due and unpaid. The obligation which the trustee had assumed on a condition, had become absolute by the presence of that condition. If the complainants had both been dead, the sale would not have been void for that reason, if made after the nine months during which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan, it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditor had both a legal and a moral right to have the power, made for his benefit, executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed upon him before the war began. His power over the subject was perfect; the right of the holder of the note to have him exercise that power was perfect. Its exercise required no intercourse, commercial or otherwise, with the complainants. No military transaction would be interfered with by the sale. The enemy, instead of being strengthened, would have been weakened by the process. The interest of complainants in the land might have been liable

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to confiscation by the government; yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country, or any other, is shown us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse between citizens of states, which are in a state of public war with each other, but no case has been cited of this kind, even in such a war.

It is said that the power to sell in the deed of trust, required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, inasmuch as it was impossible for such notice to reach complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspaper could never reach him, to delay the sale indefinitely, or defeat it altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by giving notoriety and publicity of the time, the terms and the place of sale, and the property to be sold, that bidders may be invited, competition encouraged, and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default, and his property liable to sale at any time, and no notice to him is required.

But the authority of certain cases decided in this court is relied on, in which the effect of the state of the late civil war is considered, in judicial proceedings, between parties residing on different sides of what has been called the line separating the belligerents.

The first of these is that of Hanger v. Abbott. That case laid down the proposition that when a citizen of a state, adhering during that war to the national cause, brought suit afterwards against a citizen residing, during the war, within the limits of an insurrectionary state, the period during which the plaintiff was prevented from suing by the state of hostilities, should be deducted from the time necessary to bar the action under the statute of limitations. It decided nothing more than this. It did not even decide that a similar rule was applicable in a suit brought by the latter against the former; and it decided nothing in the question now before us, even if the sale here had been under a judicial proceeding. [6 Wall. 532.[

Another case is that of Dean v. Nelson, 10 Wallace, 158. If the present had been a sale under judicial order, that case would have some analogy to this, and some expressions more general than was intended may, as this court has already said, tend to mislead. That case was a proceeding within an insurrectionary district, but held by our military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence, and who were forbidden absolutely by the order which expelled them, and which was addressed to them by name, from coming back again within the lines of the military authority which organized the court. Inasmuch, as without their consent, and against their will, they were thus driven from their houses, and forbidden to return by the arbitrary, though probably necessary, act of the military power, we held that a judicial decree by which their property was sold during the continuance in force of this order, was void as to them. To that doctrine we adhere, and have repeated it at this term in the case of Lasere v. Rochereau.

But this court has never decided, nor intentionally given expression to the idea that the property of citizens of the rebel states, located in the loyal states, was, by the mere existence of the war, exempted from judicial process for debts due to citizens of the loyal states, contracted before the war. A proposition like this, which gives an immunity to rebels against the government, not accorded to the soldier who is fighting for that government in the very locality where the other resides, must receive the gravest consideration, and be supported by unquestioned weight of authority before it receives our assent. Its tendency is to make the very debts which the citizens of one section may owe to another an inducement to revolution and insurrection, and it rewards the man who lifts his hands against his government by protection to his property, which it would not otherwise possess, if he can raise his efforts to the dignity of a civil war.

The case of McVeigh v. The United States, 11 Wallace, 259, holds that an alien enemy may be sued, though he may not have the right to bring suits in our courts, and that when he is sued he has a right to appear and defend himself. "Whatever," says the court, "may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence."

And this proposition is supported by the authorities there cited, as well as by sound reason. If such be the rule in regard to alien enemies in a war between independent states, it should be quite as applicable, if not more so, between citizens of the same government, who are only enemies in a qualified sense in a civil war. See, also, Masterson v. Howard, of the present term.

We are of the opinion, that the sale by the trustee, in the case under consideration, was a lawful and valid sale, and that complainant's bill should have been dismissed. The decree of the circuit court is, therefore, reversed, with directions to dismiss the bill.

REVERSED.

Husband and Wife Witnesses against each other. —Deed Delivered as an Escrow.

LUCRETIA H. SMITH AND ANNIE GUION, BY NEXT FRIEND, ETC., v. THOMAS R. TUGGLE, ET AL.

Supreme Court of Tennessee, Jackson, Special November Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY, }
" ROBERT MCFARLAND, }
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED, }
" THOMAS J. FREEMAN, }

1 **Competency of Witnesses—Husband and Wife.**—A statute making parties competent as witnesses, does not render husband and wife competent to testify for or against each other.

2. **Escrow.**—In order that a deed executed by the vendor and delivered to a third person shall have effect only as an escrow, it is essential that the conditions upon which it is delivered, should have been agreed upon between the vendor and the vendee.

3. ——. **The Rule more fully stated.**—The rule is said to be, that in every case of escrow, there is a contract of privity between the grantor and grantee. The person to whom the deed is delivered is, by mutual agreement, constituted the agent of both parties. He does not hold the deed subject to the grantor; and it is always in the power of the grantee to entitle himself to the deed, and to the estate, by performing the stipulated conditions. [Acc. Wellborn v. Weaver, 17 Georgia, 275; Carter v. Turner, 5 Sneed, 178.]

4. ——. **The Rule illustrated—Case in Judgment.**—Where the vendors delivered a deed to a third person upon the condition that it should not be delivered to the vendees, until payment of the purchase money should be made direct to themselves, but these conditions had not been agreed upon with the vendees, and were unknown to them, it was held that such third person was the agent of the vendors only; and he having received payment and delivered the deed to the vendees, the vendors cannot maintain a bill in equity to have such deed declared void, nor to enforce a vendor's lien for the purchase money.

6. ——. **Subsequent Purchaser.**—In such a case a subsequent *bona fide* purchaser has a right to act upon the faith that the deed was delivered as it purported to be; and he will not be deprived of his property because of any equities which previous vendors may have, unless upon unexceptionable evidence.

7. **Innocent Purchaser.**—A person who advances his money and takes a deed of trust to secure the debt, occupies the status of an innocent purchaser; otherwise, a person who takes a deed of trust to secure a pre-existing debt.

NICHOLSON, CH. J., stated the case and delivered the opinion of the court.

The bill in this case was filed by Lucretia H. Smith and Annie Guion against Thomas R. and J. J. Tuggle and H. L. Guion, husband of Annie Guion, to have certain deeds to the lot in contro-

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versy declared null and void. These lots belonged to complainants as tenants in common. In May, 1862, a deed therefor to McEwen and Taylor, was signed by them, together with H. L. Guion, the husband of Annie Guion, which deed was acknowledged and registered. Afterwards, McEwen and Taylor conveyed the lot, in trust, to F. M. Williamson, trustee, to secure a note for about $18,000, given by McEwen and Taylor, for money borrowed at the time, of one Franciola. The trustee, Williamson, sold the lot to T. R. and J. J. Tuggle, and made them a deed in satisfaction of the note, at $19,000, transferred to them by Franciola. The bill seeks to set aside these several deeds, upon the ground that the deed to McEwen and Taylor was signed and delivered to H. L. Guion, to be delivered to the vendees only on the condition that they should first pay $25,000, the price agreed on, to complainants, and hence that this deed was only delivered as an *escrow*, and because Guion delivered it without any payment being made to complainants, who are charged with notice of the condition, and that the deed is void, It is then alleged that the other deeds were made under circumstances fixing notice of the defect in the title of McEwen and Taylor, and therefore, that they were void. But it is alleged, that if the deed was so delivered as to pass the title to McEwen and Taylor, yet that the purchase money was not paid to complainants, and therefore, that they have a vendor's lien on the land, which they seek to have enforced.

The first question in the case is, whether Annie Guion and her husband, H. L. Guion, were competent witnesses against each other—she having been examined for complainants, and he having been examined for defendants. In their testimony they conflict and contradict each other in many material respects. The chancellor excluded the testimony of the wife entirely, and excluded that of the husband, also, except that he held it competent as against Lucretia H. Smith, the other complainant. We have held, in several cases, that the recent acts declaring that no person shall be incompetent to testify because he or she is a party to the record, or interested in the issue, was not intended to affect the rule of evidence which excludes the husband and wife from being competent witnesses for or against each other. This rule, so far as it rests on public policy, for the preservation of the harmony of the marital relation, continues in full force. In the present case, the husband refused to join his wife as complainant, and hence she has made him defendant, merely to comply with the rule which is assumed in the bill, to require that he must be a party. He has no real interest in the litigation; but according to the testimony of his wife, he received the deed to be delivered to McEwen and Taylor, upon the condition of payment in cash of $25,000, to complainants, and not to her husband; and that he delivered the deed without a compliance with the alleged condition. The husband, in his testimony, denies that he received the deed upon any condition, but insists that he delivered the deed in pursuance of the contract, and received the purchase money for complainants, with their sanction and approval. We think it clear, that it would violate the well settled rules of evidence to hold that such testimony, by either husband or wife, is competent. It comes directly in conflict with the reason on which the rule referred to is based. Nor are we satisfied that the husband could testify in the case, against Lucretia H., the other complainant, without testifying against his wife. The complainants rest their claim to relief on the same title and upon the same allegation, as to the misconduct of the husband.

Without deciding that Guion was incompetent to testify, as against Lucretia H., the co-complainant of his wife, we have examined the case without considering his testimony, which gives to her the full benefit of her own testimony, uncontradicted by his. Excluding the testimony of Mrs. Guion, and not looking to that of her husband, the case rests upon that of Lucretia H. Smith, the other complainant. She states that the property was offered for $25,000, cash; that it was a cash sale. That she and Mrs. Guion signed and acknowledged a paper, on the 30th of May, 1862, which, she thinks, was left in the hands of the clerk, to be handed to Col. Guion, to hold until the money was paid to Mrs. Guion and herself, by McEwen and Taylor; that they never received from McEwen and Taylor the price agreed to be paid, nor from any one; that she had never approved or confirmed Col. Guion's act, in delivering the paper as her deed; that Col. Guion was not her agent; that he had no authority to deliver the paper as her deed until the money was paid to her, and Mrs. Guion; that he delivered it without the knowledge or consent of herself or sister; that Col. Guion had no authority to receive the money. On cross-examination, she states that this paper was left with the clerk to be given to Col Guion, to hold until the money was paid to complainants by McEwen. She supposes it was agreed that the lot should be sold for currency. She does not know that any instructions were given to the clerk; the paper was left in his hands, and, of course, he would give it to Col. Guion to hold until the money was paid to complainants by McEwen; the paper would then be delivered as a deed to McEwen. On re-examination, she states that it was her understanding that the paper was to be placed in the hands of Col. Guion, to be held by him until the money was paid to complainants, and then it was to be delivered as their deed. The clerk testifies that he has no recollection as to any instructions given him when he took the acknowledgment of the parties and received the deed; but from memoranda on the deed, in his handwriting, he is satisfied that he delivered the deed to the register on the 31st of May, 1862, on which day the same was noted for registration, as appears on the deed. It is proven by McEwen, that on the 31st of May, 1861, he paid to Col. Guion $1,000, in Confederate money, and gave him an order on Taylor, at Columbus, Miss., for $24,000, which Guion received as payment, and that he then received the deed. Witness says he negotiated the purchase of the lot with Lyde, a real estate agent; that he had no knowledge when the money was paid; that the deed was delivered to Guion to be delivered to him only upon condition that the purchase money was first paid into complainants' hands; that nothing was said in his negotiation with Lyde as to the kind of money to be paid.

We think it may be fairly deduced, from this testimony, that it was understood and agreed by the complainants and Guion, that Guion was to take possession of the deed after it was certified by the clerk, and hold it until McEwen and Taylor paid the purchase money to complainants, and then to deliver the deed to McEwen and Taylor; but the evidence fails to show that McEwen and Taylor were parties to this arrangement, or that they knew of it. Under this state of the proof, the deed was not delivered to Guion as an *escrow*. An escrow is a conditional delivery of a deed to a stranger, or third person, to be by him delivered to the grantee—but not until a certain condition is performed, when the deed takes effect. It is said in Wellborn v. Weaver, 17 Georgia, 267, 275, that "in every case of escrow, there is a contract and privity between the grantor and the grantee. The person to whom the deed is delivered, is by mutual agreement, constituted the agent of both parties. He does not hold the deed subject to the control of the grantor; and it is always in the power of the grantee to entitle himself to the deed and to the estate by performing the stipulated condition." This doctrine is recognized by this court in the case of Carter v. Turner, 5 Sneed, 178. In the present case, if it be conceded that Guion was such a stranger, or third person, that he might hold the deed as an escrow, yet the proof fails to show that it was part of the contract between the parties, that McEwen and Taylor were to receive the deed only on condition of paying the money directly to complainants. Such proof was essential to constitute the deed an escrow in the hands of Guion. It follows

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that Guion was only the agent of complainants, and that his violation of his instructions as such agent, could not affect the title derived by delivery of the deed to McEwen and Taylor, as it appears that they paid the money and received the deed without any knowledge of the instructions given to Guion by complainants. Blight v. Schenck, 10 Penn. 285; Pratt v. Holman, 16 Vermont, 530; Chitty on Bills, 33; Edwards on Bills and Notes, 92; 1 Parsons on Bills and Notes, 109.

Possession of a deed, by the obligee, is *prima facie* evidence of its execution, McEwen v. Frost, 1 Sneed, 186. The acknowledgment of a deed, and its deposit in the clerk's office, is no delivery, unless the vendee concurred in the act, or afterwards assented to it. McFadgen v. Eisensmidt, 10 Hum. 567. But as the fact of delivery is the assurance of the title, a purchaser for value has a right to act on the faith that it has been signed, sealed, delivered and acknowledged, as it purports to be, in proper form, and by the proper parties; and before such a purchaser can be deprived of his property, the facts which avoid his title must be proved by the grantor by unexceptionable testimony. Blight v. Schenck, 10 Penn. 289. This rule is still more manifestly applicable as between a subsequent *bona fide* purchaser from the first grantee and the grantor.

But it is claimed that if the delivery of the deed to McEwen and Taylor was such as to give them the title, yet that the payment was not a satisfaction of the purchase price for the lot. If the question here was between complainants and McEwen and Taylor, it might be argued with much force, that there was enough on the face of the deed to show to McEwen and Taylor, that the money was going to complainants, and that a payment to Guion under such circumstances, was no satisfaction of the debt to complainants. But the controversy is between complainant and the Tuggles, who claim the benefits of the position of innocent purchasers, for value, without notice of any defect in the title, by reason of a subsisting equity in complainants. This defence is properly made in the pleadings; and by the proof it is shown that the Tuggles succeeded to the rights of Franciola, who advanced his money to McEwen and Taylor, and took a conveyance of the title of the lot to Williamson as trustee, to secure the debt. While the trustee or the beneficiary under a trust deed, to secure a pre-existing debt, cannot defend as a purchaser for value, without notice, yet such a trustee or beneficiary of a deed, to secure a *present* debt for money advanced at the time of the execution, is held to be an innocent purchaser for value; and such purchaser can rely on that defence. According to proof in the case, the Tuggles occupy the position of innocent purchasers; and having the legal title, as well as an equity equal to that of the complainants, they are entitled to the protection of the court.

Upon the whole case, we find no error in the decree of the chancellor, and affirm it with costs.

DECREE AFFIRMED.

Bankrupt Act—Possession of Sheriff under Levy made before Bankruptcy Proceedings were commenced.

CYRUS TOWNSEND, ASSIGNEE IN BANKRUPTCY OF O. H. VIERGUTZ v. THOMAS LEONARD, SHERIFF, ETC., AND CHARLES H. POND.

United States Circuit Court, District of Kansas, November Term, 1873.

Before DILLON, Circuit Judge.

1. Bankruptcy—Levy of previous Execution.—Property in the hands of the sheriff, under execution from the state courts levied *before* the proceedings in bankruptcy were commenced, cannot, at the instance of the assignee in bankruptcy, be taken out of the *possession* of the sheriff by the federal courts.

2. ——, ——. Nature of Sheriff's Possession.—In such a case, the possession of the sheriff is the possession of the court of which he is the officer, and while his possession as such officer continues, no other court can interfere with it.

Judgments against the bankrupt were rendered in the state court, and levies made thereunder by the sheriff, *before* the proceedings in bankruptcy were commenced. The sheriff has made sales under the levies, and the proceeds are in his hands. This is a bill in equity by the assignee in bankruptcy, against the sheriff and the execution plaintiffs, attacking the judgment, levy and sale, as having been obtained and made contrary to the bankrupt act, and with intent to acquire an illegal preference. The federal district court granted an order restraining the sheriff from paying over the proceeds of the sales to the execution plaintiffs, and the proceeds are still in the hands of the sheriff.

The bill prays for a perpetual injunction against the sheriff from paying over the proceeds to the execution plaintiffs, and asks that the proceeds shall be paid to the complainant, as assignee in bankruptcy. An answer has been filed by the sheriff, and proofs taken, and the cause is now upon final hearing. The other defendants have not answered.

Z. E. Britton and *F. P. Fitzwilliam*, for the plaintiff; *Clough & Wheat*, for the defendants.

DILLON, Circuit Judge:—The property or money, of which the assignee, by the bill of complaint, seeks to obtain possession, is in the hands of the sheriff, and was obtained under an execution, which was issued and levied upon the property of the bankrupt before the proceedings in bankruptcy were commenced. Assuming that the bill in other respects, presents a case of equity cognizance, can this court take jurisdiction of the sheriff and the fund in his hands, and subject him and the fund to its control? That this cannot be done on general principles, is conclusively settled. (Peck v. Jenness, 7 How. 612: Taylor v. Carryl, 20 How. 583; Buck v. Colbath, 3 Wall. 334.)

Is the rule in this respect changed by the bankrupt act? The presiding justice of this circuit has held that it is not. (Johnson, assignee v. Bishop, 1 Woolw. C. C. Rep. 324.) And such seems to be the opinion of the Supreme Court of the United States in the recent case of Marshall v. Knox, 8 Bank. Reg. 97; S. C. 16 Wall. 551.

In the case last cited, Mr. Justice BRADLEY says, *arguendo*, that "where an execution on final judgment has been levied by a sheriff prior to the commencement of proceedings in bankruptcy, the possession of the sheriff cannot be disturbed by the assignee; the assignee is only entitled to claim the residue in the hands of the sheriff after satisfying the execution in his hands."

In Johnson v. Bishop, *supra*, Mr. Justice MILLER says: "The possession of the sheriff is the possession of the court, by the command of whose writ he seized the property. And so long as the proceedings in virtue of which it is taken, are pending, that possession will not be interfered with by any other court."

The bill must, therefore, be dismissed; but it will be without prejudice to any other action or suit by the assignee against the said judgment creditors of the bankrupt or either of them.

BILL DISMISSED.

Devise—Construction—Haley v. City of Boston.

We are indebted to Hon. S. J. THOMAS, of Boston, for the following notice of an interesting decision of the supreme judicial court of Massachusetts:

Writ of entry to recover a parcel of real estate. Facts reported by agreement of parties. It appeared that in 1828, Lucy Bullman, a widow, made her will, which at her death, a few years afterward, was approved and allowed. At the date of her decease, her only near relatives were three nieces, one nephew, and one grand-nephew. One of these nieces was then forty-four years old, married, and died in 1849, without having had a child; another was forty-six years old, unmarried, and died in 1869; the other was thirty-nine years old, sick of consumption, and died soon after the will was made. The grand-nephew died without issue in 1849. The nephew died in 1857. The demandants are

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his children born after the death of the testatrix. The will was drawn by Mr. C. P. Sumner, at one time a sheriff for Suffolk, and the father of the Massachusetts senator. In the will, after a preamble in which she sets forth that she made it, "Wishing that the property with which God has blessed me, and of which I may die possessed, may, after my decease, go to those of my near relatives and friends for whom I have a regard," she devised, in the second item, to "my two unmarried nieces, my house and land on the south side of Cambridge street; also, my house and land on the west side of Belknap street; also, my house and land on Brighton street." In the third item she bequeathed to her married niece, $100, and provided that "in case she ever becomes reduced and equally needy with her two sisters, then she shall come in and enjoy one equal third of those three parcels of real estate mentioned; but none of the estates are to be sold unless it be to pay debts and legacies; nor are they to be divided and held in severalty; but they are to be leased and the rents and profits are to be divided between the two first named nieces and the latter, if she becomes as needy and dependent as her two unmarried sisters." In the fourth item she authorized her executors to sell her real estate on Brighton street, without license of court, for payment of her debts, and to divide any surplus of the proceeds among the three nieces. In the items next following, to the thirteenth, she gave specific legacies. The thirteenth was as follows:

"My two estates, one on Cambridge street and one on Belknap street, are to go to the three sisters equally; and if either of them die, then to the surviving two; and if two die, then to the single survivor; but if all three die without heirs, then the income of said estates is to go to John William Haley, son of Capt. John B. Haley, of Portsmouth, N. H.; and in case John W. Haley, should die without issue, then my real estate is to go to the city of Boston for the benefit of the poor. It is never to be sold, but the income is to go for the purposes set forth above. But it is always to be understood that Mrs. Dewolf is not to come in for any benefit derived from my real estate until she shall be needy and dependent, as her sisters now are. And she will, in my opinion, be so, if her husband should become insolvent, or should die, not leaving any property for her support."

John W. Haley was the grand-nephew, John B. Haley the nephew. For the demandants, it was contended that the true purpose of the testatrix was to provide, that at the death of the three nieces, their brother, John B. Haley, if living, should take the estate as heir; but if he was then dead, and John W. Haley alone, of all her near relatives, was left, then John W. Haley should take a life estate only; and if he should die without children, that would be the end of the Haley family, and near relatives, and then it should go to the poor—of whom there is no end. Expressed in informal words, her meaning was this: "If, when the last survivor of my nieces dies, their brother and heir is dead, and there are no other heirs than his son, John W., living, then, I do not devise these estates to him absolutely, as he would otherwise take them; because he may die without children, and then there is an end of the Haley family, in which case they shall go to the poor. The purpose was to limit the estate of John W. Haley. Hence the word "heirs" and the word "issue" in the same sentence. To the suggestion that this construction involves the absurdity of providing that in case of the death of these nieces without heirs, the property should go to one who was an heir, there are two answers: First, there is no such absurdity; since if the nieces died, John B. Haley living, John W. Haley was not an heir at all. The father would take to the absolute exclusion of the son. Second, the avoidance of this absurdity, if there were any, would involve the assumption of others still greater. First, that the testatrix should have contemplated that these nieces, at their ages, and in their circumstances, would have children; and second, that she should have intended to disinherit their brother, who was as near a relative as they were.

Opinion by COLT, J. The construction contended for by the demandants makes the thirteenth clause of the will suicidal, and cannot be supported. Judgment for the tenants.

Notes of Recent Decisions.

Foreign Judgment; Service by Publication; Jurisdiction.—Personal judgment, rendered in one state against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the state where rendered of any personal liability to the plaintiff of the parties proceeded against by publication. Board of Public Works of Virginia v. Columbia College, et al; Supreme Court U. S., Oct. Term, 1873.

———; *Constitutional Law; "Full Faith and Credit."*—The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit. Ibid.

———; ———; ———; *Interlocutory decree.*—No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. So held in a case where a party, relying upon a decree of an inferior state court, objected to the character given to the decree as interlocutory by the highest appellate court of that state, and insisted that it should be treated as a final decree. Ibid.

Equity Jurisprudence; Aid of Creditor.—A court of equity will not exercise its jurisdiction to reach the property of a debtor applicable to the payment of his debts, unless the debt be clear and undisputed, and there exist some special circumstances requiring the interposition of the court to obtain possession of, and apply the property. Ibid.

This rule should be insisted upon with rigor whenever the property sought to be reached constitutes assets of a deceased debtor, which have already been subjected to administration and distribution; and some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the representative of the estate, before distribution. Ibid.

Wife's separate property; Husband's debts.—Property acquired by a married woman on the credit of her separate estate, and afterwards paid for by profits arising out of it, is not liable for the debts of her husband. Purman v. Painter, Sup. Court Penn., Jan. 6, 1874; 4 Pittsburgh Legal Jour., N. S., 83.

Claim against United States; Attorney's contingent fee; Lien.—An attorney or counselor at law who successfully prosecutes a claim against the United States, for a contingent fee, being a part of the amount allowed, has a lien upon the fund, which may be enforced against the claimant, even when the money is in the Treasury of the United States; and the court will award an injunction to restrain the claimant from drawing from the treasury such portion of the money allowed, and decree its payment to the petitioner. WYLIE, J., dissenting. [Cases cited: Wylie v. Coxe, 15 How. 415; Painter v. Drum, 40 Penn. State, 467, 470.] Child v. Trist, Supreme Court Dist. Columbia in Gen. Term, Apr. 1873; 1 Wash. Law Reporter, 1.

———; ———; *Not void as against public policy.*—A contract to prosecute such claim before congress is not void as against public policy, when the services are to be rendered in an open and fair presentation of the facts; and where no secret and corrupt means are employed to mislead or deceive the members of the legislative body. Ibid.

———; ———; *Act of Feb. 26, 1853.*—Nor does such an agreement operate as a transfer or assignment of a part, or interest in the claim, so as to make it void under the act of February 26, 1853. It is a method of fixing the compensation in procuring the allowance of the claim. Ibid.

Lease of Real Estate by Church Committee.—A lease of real estate in which the lessors are described as "acting as a church extension committee by authority and on behalf of the general assembly of the Presbyterian church, old school," parties of the first part, and who executed the lease in

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their individual names and seals, and which contained reciprocal covenants to be performed by the parties respectively, one of which was to pay rent on the part of the lessee to the lessors, as in their own right, is a nullity. It is a nullity as to the owner, because it is not his contract; and as to the lessors, because they have no estate in the property; and as to the lessee, because it is not binding on the other party. And the rule that a tenant shall not be allowed to dispute his landlord's title, has no application to such a case. [Cases cited: Frontin v. Small, 2 Ld. Raym. 1418; Crode v. Ingraham, 13 Pick. 35; Taft v. Brewster, 9 John. 334; Duvall v. Craig, 2 Wheat. 45; Lutz v. Linthicum, 8 Pet. 165.] Stoot v. Rutherford, Sup. Court Dist. Columb. Gen. Term, Apr., 1873; 1 Wash. Law Reporter, 1.

United States Supreme Court — Decisions Last Week.

[Compiled from the New York Herald.]

Resulting Trust.—No. 126. Kitchen v. Rayburn et al.—Appeal from the circuit court for Missouri.—This was the affirmance of the title of the appellees to certain lands in Missouri which, in the court below, the appellant alleged had been purchased by the proceeds of bonds held by Rayburn in trust for him. Mr. Justice STRONG delivered the opinion.

Judgment on Postmaster's Bond.—No. 143. Jones Randolph et al. v. The United States—Error to circuit court for the southern district of Georgia.—This is the affirmance of a judgment on a postmaster's bond, against his sureties, for a defalcation. Mr. Justice CLIFFORD delivered the opinion.

Certificate of Division; Jurisdiction.—No. 136. United States v. Arwo—Certificate of division from the circuit court for the southern district of New York. Instead of answering the questions certified, the court say that the circuit court had jurisdiction, and direct that this statement be certified to that court, as the only answer required to the several questions presented in the record.

Criminal Law—Fine—Imprisonment—Power of Circuit Court to correct erroneous sentence after sentence has been in part executed.—No. 9, original. Ex parte, Edward Lange.—The case of Edward Lange, a New York merchant, who was convicted of stealing mail bags, furnished his firm by the post office department, which was before the supreme court on certiorari and habeas corpus, was argued January 26th. Lange was sentenced to one year's imprisonment and to pay a fine of $500, and was on the same day committed to jail in execution of the sentence, and on the following day paid the fine. Five days after, at the same term, he was brought up on habeas corpus for his discharge, because of error in the sentence, on the ground that under the law he could not be both fined and imprisoned. Thereupon the sentence was vacated by the judge who pronounced it, and he was sentenced to one year's imprisonment. Upon another writ of habeas corpus the new sentence was affirmed, and it was here contended that the original sentence was illegal and the prisoner should have been discharged on the first habeas corpus, and that the sentence being in part executed, the case was beyond the authority of the court to vacate and re-sentence. It was also maintained that the payment of the fine is a bar to the infliction of imprisonment under either sentence. The government insisted that it is well established as the law of this court, and the general rule of the criminal law, that a sentence passed upon a person, if erroneous, may be vacated, like any other judgment, during the term in which it is pronounced, by the court which awarded it, and the prisoner resentenced according to law. As the power of the court to resentence a prisoner is not affected by the fact that he has entered upon the imprisonment ordered by the court under the first sentence, so it cannot be affected by the fact that he had paid the fine. Whether the fine thus imposed may be remitted by judicial authority, is not a question that can be raised in this proceeding; it is sufficient that the fact of its payment does not invalidate the second sentence. William H. Arnoux, for petitioner; Attorney General Williams and Assistant Attorney General Hill, for the government.

It was the opinion of the court that the prisoner was entitled to be discharged, as prayed for in the petition. Dissenting, Mr. Justice CLIFFORD and Mr. Justice STRONG.

Negligence a question of Fact for Jury.—No. 191. Sioux City and Pacific Railroad Company v. Stout—Error to the circuit court for Nebraska.—This was an action to recover for injuries sustained by a child six years of age in playing on a turntable of the company at the town of Blair, in Nebraska. The questions were whether it was negligence on the part of the company to leave the table unenclosed and open to the approach in or near such a village—the company in no other way contributing to the injury—and whether the negligence was a question of law for the court to determine or of fact for the jury. The court below submitted the question to the jury as one of fact, and there was a verdict for the plaintiff. The judgment entered thereon is here sustained, the court holding, in substance, that where there is testimony tending to show negligence, it is for the jury, and not for the judge, to determine the question of proper care, or whether the facts established the negligence alleged. Mr. Justice HUNT delivered the opinion.

Usury—Bankruptcy—A Trustee of a Bankrupt cannot recover a greater Penalty for the taking of usurious Interest than the Bankrupt himself could recover, if solvent and sueing in his own Right.—No. 179. Tiffany v. The Boatman's Savings Institution—Appeal from the circuit court for Missouri.—This was a bill filed by Tiffany, as surviving trustee of one Darby, a bankrupt, to recover money paid to the Savings Institution in discharge of a loan made to the bankrupt, and on which he had paid usurious interest. It was admitted that the bankrupt could not have recovered personally, because he had paid the usury without objection, but it was contended that, being a bankrupt when the usury was paid, the rights of the estate were superior to those of the Institution, and the trustee could not only recover the usury but the entire loan, under the statute against usury. This court hold, in substance, that the fact of usury does not change the transactions between the parties which were lawful, if not tainted with usury, so that Tiffany can recover back the whole sum, when Darby, if sueing personally, could recover only the excess of interest. The trustee has no larger interest than the bankrupt, and is entitled to recover only what Darby's estate was diminished by the transaction. To allow him to recover the whole sum, would be to transfer to the creditors of Darby a sum exceeding $150,000, which he never owned, by way of punishment to the bank for taking excessive interest. A court of equity will not deal with contracts affected with usury in this way. The relief it gives is always based on the idea that the money borrowed, with legal interest, shall be paid. Reversed with respect of certain accommodation notes on which usury was charged but not found below, and the case remanded to enable the circuit court to ascertain in some proper way, the excess of interest paid thereon, and to enlarge the decree so as to recover the sum. In all other respects, the decree of the circuit court was correct. Mr. Justice DAVIS delivered the opinion.

Removal of Causes from State to Federal Courts—Appearance in Federal Court—Estoppel.—No. 192. Home Life Insurance Company v. Dunn—Error to the First Judicial Court of Hamilton county, Ohio. Defendant in error obtained a verdict against the company on a policy of insurance in the court of common pleas of the state. After judgment, a new trial was allowed as a matter of right under the statutes of the state. At the next term of that court, and before further proceedings, the case was transferred to the circuit court of the United States, where transcript was filed and the cause docketed within the proper time. Subsequently, a motion was made to dismiss the case for want of jurisdiction, and, being overruled, plaintiff below was granted leave and filed an amended petition, which is now pending. Thereupon plaintiff below, upon petition in error to the district court of the county, obtained a reversal of the order of removal. The plaintiff in error here then made application to the supreme court of the state for leave to file petition in error to reverse the order of the district court, which was refused, the supreme court thereby, in effect, affirming the order of removal made by the district court. A second trial was then had in the common pleas, which resulted in a judgment for the defendant in error here, which was affirmed by the district court. This writ of error was brought to reverse the order of the district court, reversing the order of removal; and, it is contended that the cause was properly removed, and, being so, it was the duty of the state court to proceed no further in the case. The court hold that the cause was properly removed to the circuit court, and that the plaintiff below, having submitted to its decision on motions therein made, was estopped from prosecuting the case further in the state courts, and

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reverse the affirmance and judgment affirmed by the district court, with directions to that court to proceed no further in the case. Mr. Justice SWAYNE delivered the opinion.

Infringement of Patent.—No. 58. The American Wood Paper Co. v. The Fiber Disintegrating Co., and No. 157, the latter against the former—Appeal from the circuit court for the eastern district of New York.—This was a bill filed by the Paper Company to restrain infringements by the Disintegrating Company of several patents, alleged to be the property of the plaintiff, for the manufacture of paper pulp and fiber from wood, straw and other vegetable substances. The decree below found one of the patents void for want of novelty; another valid, and the Disintegrating Company infringers of it; a third was found not to have been infringed. From this decree both parties appealed to this court, and the decree was here affirmed, each party to pay his own costs in this court. Mr. Justice STRONG delivered the opinion. Mr. Justice CLIFFORD dissenting.

Land Law—Spanish Grants—Lands within Tide Water.—The case of Walker v. The Board of Harbor Commissioners of the State of California, from the California circuit, involving the question of the right of the plaintiffs in error to wharf privileges in front of their lands in San Francisco, has been argued before the Supreme Court. The court below held that the premises—the block bounded by Montgomery, Francisco, Sansome and Chestnut streets—were entirely without the boundary line and the water front, and the decree was for the commissioners. This conclusion was assigned as an error here. On the part of the state, it was contended that the case of Weber v. The Commissioners, decided at this term, disposed of all the questions here present. That decision was in favor of the commissioners. Mr. Hall McAllister appeared for the plaintiffs in error and Mr. T. T. Crittenden for the defendants.

The court *hold*, in accordance with the decision of the supreme court of that state in the case of The People v. Davidson, that the alcaldes of the Pueblo of San Francisco possessed no authority to grant any lands covered by the tide waters of the bay, and that, therefore, the grants under which the plaintiff in error claims, were inoperative to pass any title to the premises in question. Mr. Justice FIELD delivered the opinion.

Book Notices.

A QUARTERLY DIGEST OF DECISIONS OF THE SUPREME COURT OF MICHIGAN. By Henry A. Chaney, Attorney at Law. Lansing, Mich.: W. S. George & Co. For one year (4 numbers), $1.00. Single numbers, 25 cents.

Through the courtesy of the editor, we have been favored with the July and October numbers of this publication. We are highly pleased both with its plan and execution. The value to every judge and practitioner of Michigan of a complete abstract of the decisions of his court of last resort, issued very soon after the adjournment of each term, is so obvious, that it is unnecessary to dwell upon it. And when such a work is done, as this manifestly is, with such fullness and painstaking accuracy, that each case abstracted may be confidently quoted in court without the necessity of procuring a transcript of the original opinion, its value is still more enhanced.

The style adopted by Mr. Chaney, in his second number, is to give the cases in alphabetical order, prefixing each one with a brief statement of the county from whence it comes, and the judgment of the supreme court. Then follows a succinct statement of the facts, and this is succeeded by a statement of the points ruled, with running titles to facilitate reference. To each number there is an index. We here give the first two cases of the October number as specimens of the style of the work:

ATTORNEY GENERAL v. SOULE.

Error to Ionia. Decree affirmed; the State to pay the taxable costs of the defendants in both courts. See Comp. Laws, § 7407.

STATEMENT.—Soule's will provided funds "for the establishment of a school at Montrose for the education of children, to be expended according to the direction of (the) executors." The executors did not execute the special trust, and the state unsuccessfully brought suit to compel them to do so, or else to cast upon the court the duty of carrying out the trust according to the doctrine of approximate execution.

1. *Charitable bequests sued for by State.*—The basis of suit by the state for a charitable bequest is, that there has arisen such a public right, as makes it the state's duty, through its law officer, to take action for its enforcement; there is no public right of intervention, unless the gift is definitely to a charity, such as equity recognizes, and one more or less public or general.

2. *Public application of bequests.*— If a bequest is such that it may or may not be used for a *charity*, and is ambiguous as to the *public* or *private* quality of the charity, and if, consistently with the will, the fund may be applied to a purpose not public, the attorney general cannot interpose to compel a public application.

3. *"Establishment of school;" how construed.*—The term "establishment of a school," in a bequest for such a purpose, may mean the employment of a teacher, or the organization of an institution, or the erection of a building, or part or all of these things, and it does not bind the executors to any specific scheme, nor preclude them from erecting a school of an exclusive character, in no just sense public, nor to be recognized as a charity.

ATWOOD v. CORNWALL.

Error to Kalamazoo. Judgment reversed.

STATEMENT.—Atwood paid Cornwall a counterfeit fifty-five dollar bill. Five months later, Cornwall, having meanwhile transferred it and received it back with the information that it was bad, returned it to Atwood, and sued him for the amount. Atwood obtained judgment in a justice's court, but Cornwall recovered in the circuit.

4. *Proof of counterfeits.*—In a suit to recover the amount of a bill the genuineness of which is disputed, evidence of the conversations and opinions of persons through whose hands it has passed is foreign to the question of its identification, and not being lawful evidence of its bad character, ought to be excluded as in the nature of hearsay. But its character may be shown by the expert testimony of a banker.

5. *Guaranty of negotiable paper.*—A person passing negotiable paper, warrants its genuineness to the extent that if it is found bad, and returned within a proper time, he must make it good.

6. *Recovery barred by negligence: estoppel.*—A party who would otherwise be able to recover back the amount of bad money passed upon him, will be debarred of his action by lack of diligence. If payment of what is supposed to be legal-tender paper is to be regarded as contingent and not absolute, the receiver should be regarded as having elected to retain it, unless he uses speedy and active diligence to determine its character, and to notify the giver in order that the latter may protect himself against prior parties. Where "unnecessary delay" appears, the taker cannot keep alive the liability of the giver, and shall not recover. For cases of estoppel, see Camidge v. Allenby, 6 B. & C. 373; Jennison v. Parker, 7 Mich. 355; Phœnix Ins. Co. v. Allen, 11 Mich. 501; Phœnix Ins. Co. v. Gray, 13 Mich. 191; Edwards on Bills. 207, 551.

7. *Familiarity with legal tender.*—Inasmuch as all creditors must receive coin and legal tender paper in payment, if offered, and as they refuse a tender thereof at their peril, the law assumes that every business man will become generally familiar with the money of his country, so as to be able to exercise a judgment upon it.

8. *Innocent takers of bad money in equal equity.*—The innocent taker of counterfeit money is not generally guilty of culpable negligence, and among several takers, one cannot be held more in fault than the rest for not detecting the cheat. The common law seems to indicate that of two innocent parties, the taker of counterfeit coin cannot claim recourse against him from whom he took it, (Sheppard's Touchstone, 140; Wade's case, 5 Co. 114), probably because parties in equal equity shall not be disturbed.

9. *Distinctions between worthless paper.*—For distinctions between counterfeit and otherwise valueless paper, see Edwards on Bills, 205-7, and note.

We heartily commend this effort of Mr. CHANEY, and hope it will serve as a model for imitation in other states. Considering the exceptionally high character of the supreme court of Michigan, we should think it would meet with considerable patronage outside of that state. We shall avail ourselves of the privilege of abstracting from its columns freely for the benefit of our readers.

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THE SPIRIT OF LAWS. By M. de Secondat Baron de Montesquieu, translated from the French by Thomas Nugent, LL.D. A new edition, carefully revised and compared with the best Paris edition, to which are prefixed a memoir of the life and writings of the author, and an analysis of the work by M. D'Alembert. Cincinnati: Robert Clarke & Co., 1873.

Montesquieu, in his day, one of the leading intellects of the civilized world, did not seek to lay down any code of so-called "natural laws;" nor was it his object to unfold a favorite system of his own which should at once revolutionize the jurisprudence of European states. He aimed to present in this, his great work, upon which the best years of his life were spent, a clear and logical statement of the results of his immense reading and extensive observation, regarding the different kinds of laws which men can have, the comparisons which can be made between them, and their relations with those things concerning which they prescribe rules. The store of materials, which by the voyages and discoveries of the seventeenth and eighteenth centuries, were at the disposal of the sociologist, were used by him with freedom and yet with a scrupulous anxiety to avoid false conclusions.

The reception given to his work by the leading minds of France, showed that in a century when intellect seemed subservient to despotism, the spirit of progress and of civil freedom was abroad in the hearts of many who, perhaps, wondered that

"* * * he dared to speak.
What some scarce dared to think."

He lived, thought, and wrote at the right time, and, though seemingly, far ahead of his age—was really its living, daring exponent.

His biographer says of him: "He first made himself, as it were, a stranger in his own country, that he might know it better. He next visited Europe, and with the deepest attention enquired into the characteristics of the several peoples by whom it was inhabited. In fine, he had examined and judged nations and eminent men that no longer exist, but in the annals of the world. Thus he gradually rose to the highest title a wise man can attain, that of legislator of nations."

Natural law, divine law, ecclesiastical law, civil law, political law, international law, all are discussed,—and the principles which prescribe their nature and which determine their objects, are announced.

While dwelling upon the Romans and the French as the peoples whose fame and interesting history make them especially useful as examples of the application of his principles, M. de Montesquieu evidently finds the highest political freedom established by the constitution and laws of England. Nor is it remarkable that he should be filled with admiration for that government, which then exhibited in its well-balanced stability, and in the apparent contentment and prosperity of its people, such a contrast to his native land, where checks upon an absolute monarchy were unheard of, and the mass of people were sunk in such misery as to lead De Tocqueville, in writing of them, to say, "No such state of things existed in any other great nation of civilized Europe. * * * * Crushed for centuries under the weight of abuses which no one shared with them, living alone, and brooding silently over their prejudices, their jealousies, and their hatreds, they were hardened by their hard experience, and were as ready to inflict as to bear suffering." This liking for the plan upon which the English government was administered, is displayed quite freely throughout the work; and as our own constitution bears a close resemblance, in many important particulars, to that of England, his views become of living interest to us Americans. Indeed, no student of law or of politics in any wide sense, can afford to neglect him. The style of the work is an admirable example of the superiority of the great writers of France to all other European writers, in the art or power of perspicuity. The most profound thoughts are expressed in the most simple and intelligible forms of speech. It is this virtue which makes his history—if so we may call it—of civil jurisprudence most simple and comprehensive. He always announces his opinions in terms perfectly unambiguous. He is, however, too fond of strewing his work with epigrams, brilliant and ingenious, but wearisome from their abundance.

Of the translation but little need be said. That of Dr. Nugent, of 1750, is retained; and that it is a faithful one we have the testimony of the author himself in a letter to the translator, in which he says: "Your translation has no blemishes but those of the original which are to be charged to my account; and I am much obliged to you for your ability in concealing them from the public eye." Montesquieu's epigrammatic French is rendered into clear and vigorous English.

CALIFORNIA CITATIONS: An Aphabetical Table of all the Cases cited in the Opinions of the California Reports, and of the California Cases cited in the Reports of the other States; with the points as to which they are Cited, Approved, Affirmed, Criticized, Doubted, Denied, or Overruled. By ROBERT DESTY, Attorney-at-Law. San Francisco: Sumner Whitney & Co. Price $7.50.

This work resembles somewhat in plan Bigelow's Overruled Cases. It is, however, much fuller, in that it states the *point* as to which each case has been cited, commented upon, overruled, doubted, etc. On the other hand, it embraces only such cases as have been cited in the reports of California. Works more or less similar to this have been found useful in other states. Linn's Index of Pennsylvania, Wait's Table of New York Cases, and Wendling's Index to Illinois Reports. This work will be indispensable to every lawyer in California, and will be a valuable addition to every bar and private library. If every state in the Union had an index of this character, it would be easy, by putting them together, to make a concordance of American cases which would be of infinite value to the practitioner.

The author has displayed considerable care and industry, and the publishers have brought out the work in excellent style.

THE LAW OF REMEDIES FOR TORTS, INCLUDING REPLEVIN, REAL ACTION, PLEADING, EVIDENCE, DAMAGES. By FRANCIS HILLIARD. 2d edition, greatly enlarged. Boston: Little, Brown & Co.: 1873. pp. 771. Sold by Soule, Thomas & Wentworth, St. Louis.

The profession is familiar with the various legal works of Mr. Hilliard, and with his mode of constructing them. The practical judgment of the bar establishes that they are *useful*: and this is a great merit. "The Law of Torts" is, perhaps, the best of his productions, and has been received with no inconsiderable favor by the body of the profession, The work before us, on the "*Remedies* for Torts" is a supplement or sequel to the former, but can be used either independent of it, or in connection with it. It was prepared afterwards, and the new matter in it ought, for convenience sake, to have been incorporated into the first work. If the author would hereafter recast the two works and throw them into one, he would render a service which those who have occasion to use the books, would not fail to appreciate. The work before us is the second edition, and the statement in the title page that it is "greatly enlarged," is borne out by the volume, which shows an increase of about two hundred pages.

Legal News and Notes.

—JUDGE R. W. HUGHES, the recently appointed judge of the United States district court, has arrived in Norfolk, and will make preparations to take up his permanent residence there.

—MRS. DELIA SHELDON DRUMMOND, the lamented wife of the Hon. THOMAS DRUMMOND, judge of the United States circuit court at Chicago, was buried in Graceland cemetery in that city on Thursday the 22d inst.

—THE house committee on the judiciary has not yet considered the Judge DURELL impeachment case, all the evidence not yet being in printed form for the information of its members.

—WE regret to learn that Judge EMMONS of the sixth circuit, is still suffering from a deprivation of his sight. We trust that this affliction is but temporary, and that the country is not to be deprived of the benefit of his clear judicial mind and great learning.

—MR. EDMUNDS of Vermont, has introduced a bill in the senate to provide assistance to circuit judges in certain cases. It authorizes the employment of a secretary, at a salary not exceeding $2,500, to assist any federal judge who, by reason of physical infirmity, is unable, in the opinion of the attorney general, to perform his judicial duties without such assistance. Referred to the committee on the judiciary.

—IN the Tichborne case, last week, Mr. Hawkins concluded his summing up for the prosecution with a passionate vindication of Lady Radcliff, who, he declared, had never been soiled by the filthy, blighting, unholy, and unnatural touch of the defendant.

—THE supreme judicial court in Boston, affirmed the decree of Justice DEVONS in committing for six months, for contempt of court, J. W. Cart-

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wright, one of the receivers of the Hide and Leather Insurance Company, and former president thereof, for withholding and applying to his own use some $12,000 of the assets of the company.

—MR. MILLS of Texas, has introduced a bill to repeal all laws authorizing the formation of associations of persons for the purpose of banking, which, if it become a law, will abolish all national banks, and provide for the settlement of their accounts at the treasury and the surrender of the bonds upon which their circulation was based. The bill was referred to the committee on banking and currency.

—THE Supreme Court of the United States adjourned on Friday last until Monday the 2d of March. This recess is taken to enable the judges, who have a large number of cases before them, an opportunity to fully examine them and prepare opinions, etc. The court has accomplished more business this session up to the present time, than has been heretofore done in a full session. On the re-assembling of the court, the chief justice will take his seat.

—HON. JAMES THOMPSON, late chief justice of the supreme court of Pennsylvania, died suddenly in the supreme court room in Philadelphia, on the 28th instant, while engaged in the argument of a cause before the supreme court in *bank*. A colloquy of a not unpleasant character had taken place between the counsel and the bench, and Judge THOMPSON was leaning on a desk, about to resume his argument, when he dropped down, and in five minutes ceased to live.

Judge THOMPSON was born in Middlesex, Berks county, Pennsylvania, October 1, 1806. He received a good education, and after leaving school entered a printing office for the purpose of learning type-setting. He commenced the study of law, and in 1828 he was admit ed to the bar. His talent and energy speedily gained him a good practice, and turning his attention to politics, he was thrice elected to the legislature—in 1832, 1833, and 1834. During his last term he was elected speaker of the house, and made a very excellent impression as a presiding officer, by his knowledge of parliamentary rules, and firmness and impartiality. In 1836 he was a presidential elector, and for six years he sat in the district court as presiding judge. In 1845 he was elected to congress and served until 1851. He was elected judge of the supreme court of Pennsylvania for fifteen years, in 1857, and was the democratic candidate for re-election in October, 1872, but was defeated. During the latter part of his term he was chief justice.

—MR. ALVORD has introduced a bill into the New York Assembly, to regulate the purchase and sale of gold bullion, gold coin or United States treasury gold certificates. The bill provides that all contracts for future delivery beyond the day of contract, whether it be seller's or purchaser's option or for a day certain, are hereby declared to be fraudulent and wholly void, unless at the time of the making of any such contract of sale, the seller shall actually have and hold in his possession, as his own property, such gold bullion, gold coin, or United States treasury gold certificates, and shall continue thus to hold, possess and own them, ready to be delivered at the time for the fulfillment of such contract, undiminished in the quantity required by the terms of the contract. Rules and regulations of associations contrary to these provisions, when enforced or published, are made a misdemeanor and subject to a fine of not not less than $500 nor more than $5,000, or six months' imprisonment, or both.

—SINCE the bankrupt bill has passed the house, the judiciary committee of the house have been in constant receipt of communications from different sections of the country, nearly all of which object to a repeal of the law, but all asking more or less modification of the existing law; and there are quite as many minds as there are persons writing, each of whom suppose they have the exact remedy for existing difficulties.

—THE principal feature of the Indiana financial bill, introduced recently by Mr. Orth, of that state, into the national house of representatives, is the provision permitting any holder of a United States bond to take it to the treasury and exchange it for currency, and *vice versa*—exchanging one for the other back and forth at pleasure. Another provision authorises the the secretary to prepare two thousand million dollars of greenbacks, to hold in reserve, in readiness to exchange for bonds, or *vice versa*, as called for. The bill covers eighty-five pages of legal-cap manuscript, and is indorsed by petitions from twenty-seven counties of Indiana. Mr. Orth states that he introduced it at the request of petitioners, and will make a speech in its favor.

—MR. CONKLING'S bill to provide for an international commission of the maritime powers to lay down ocean courses for steam vessels, and otherwise provide for increased safety of sea travel, directs the president to appoint a commissioner on the part of the United States, to meet with such other commissioners as may be appointed by foreign maritime powers, whose co-operation he shall invite for the above described purpose. The United States commissioner is to be confirmed by the senate. The bill is to be framed in accordance with the memorial of the New York chamber of commerce on said subject.

—IN 1869 or '70, Amanda Rushing, a married daughter of Isaac Kembro, of Davidson county, brought suit in the circuit court for damages alleged to have been sustained from his whipping her. She was rendered judgment for $3,500 damages, when the defendant appealed to the supreme court, where the judgment of the court below was affirmed. It appears that, between the time of the alleged whipping and the bringing of suit, the defendant, by deed of gift, transferred all his property to his remaining children. Mrs. Rushing now files a bill in the chancery court alleging that the conveyance to the remaining two children was fraudulent, and made for the purpose of defeating her claims and those of other creditors against him, and asks that the conveyance on this account be set aside.—*Nashville (Tenn.) Banner.*

Notes and Queries.

EDITOR CENTRAL LAW JOURNAL.—In view of the question and answer in your first issue, this question suggests itself: If the state supreme court, in a certain case has passed on questions involving a construction or an interpretation of the statutes, will the federal court for that state, for that reason, in an *analogous* case, follow the decisions of the former?

ANSWER.—If the decision of the state court were not upon the same, but only upon an *analogous* question, we presume it would have not an authoritative, but only a persuasive force.

*** We hold over several questions proposed by correspondents, for future attention.

Notes of English Decisions.

[From the Law Times.]

Attachment for Disobedience of order to produce Documents—Servant forbidden to produce by Master—Corporation—Common Pleas at Lancaster.—In obedience to the instructions of his directors, and in disobedience of the order of the district prothonotary of the common pleas at Lancaster, and of the order of an arbitrator, the secretary of a railway company refused to produce before the arbitrator numerous books and papers of the company, which the attorney of the plaintiff in the case referred to swore to be material to the plaintiff's case: Held, that the secretary, being in the position of a servant, was justified in obeying the orders of his masters not to produce the documents, and a rule to attach him for contempt discharged. Whether an action would lie in such a case, *quære:* (Crowther v. Appleby; Re Sharpley, 29 L. T. Rep. N. S. 580. C. P.)

Equitable Mortgage—Agreement to execute Legal Mortgage—Marriage Articles—Settlement—Constructive Notice—Priority.—In 1866, L. deposited with a bank the title deeds of certain real estate to secure the balance of his account, and at the same time he executed a memorandum by which he agreed to execute a deed for legally carrying out the security. In 1871, two days before his marriage, articles were executed by which he agreed to settle the same property, stating, in answer to enquiries by the solicitor of the intended wife, who prepared the articles, that the property was unincumbered, and that the title deeds were at his banker's for safe custody. Shortly after the marriage a settlement was executed by which he conveyed the legal estate in the property to the trustee of the settlement. On a bill by the bank for foreclosure, Held, that it was the duty of the solicitor to have made further enquiries of the bank; that the intended wife must be taken to have had constructive notice of the equitable charge in favor of the bank, and that the plaintiff was entitled to a foreclosure: (Maxfield v. Burton, 29 L. T. Rep. N. S. 571. Rolls.)

Power of Appointment—Execution—Doctrine of Cy-Pres—The donee of a power of appointment of an estate to one or more of the children of A., by his will devised the estate to B., the son of A., for life, with remainder to the first and other sons of B. (who were not objects of the power) in tail male. Held, that the *cy-pres* doctrine was applicable, and that B. took an estate tail; (Dine v. Hall, 29 L. T. Rep. N. S. 568. Rolls.)

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, FEBRUARY 12, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

Disturbing Religious Worship—A Curious Case.

It is not often that a case arises combining the comical with the serious in as peculiar a manner as the case of The State v. Linkhaw, 69 North Carolina Reports, 214. The defendant, a member of the Methodist church, was indicted for disturbing the congregation. It was in proof that he sang, during religious worship, in such a manner as to disturb the congregation, and greatly interrupt the services. One of the witnesses imitated his singing in a manner which "produced a burst of prolongued and irresistible laughter, convulsing alike the spectators, the bar, the jury and the court." It was in evidence that the disturbance occasioned by his singing was decided and serious. "The effect of it was to make one part of the congregation laugh, and the other mad; the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant." The defendant, being on many occasions expostulated with by the church-members and authorities, replied, "that he would worship God, and that as a part of his worship it was his duty to sing."

It was not contended by the state that the defendant had any purpose or intention to disturb the congregation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services. Nevertheless, the trial court instructed the jury that he must be presumed to have intended the necessary consequences of his bad singing; and they accordingly returned a verdict of guilty. But the supreme court (SETTLE, J.) said that this admission of the state put an end to the prosecution; that, although a man is generally presumed to intend the consequences of his acts, yet the presumption is here rebutted by a fact admitted by the state. "It would seem," said the court, "that the defendant is a proper subject for the discipline of the church, but not for the discipline of the courts."

Bankrupt Act—Illegal Preference—Confession of judgment by Corporation—Is an Insurance Company a Banker or Trader?

Several interesting questions under the bankrupt act were decided by DRUMMOND, circuit judge, on the 31st ult., in reversing the decree of the district court for the northern district of Illinois, adjudicating the Great Western Telegraph Company a bankrupt. The petition was filed by one Hilton, claiming to be a creditor of the company for over $20,000, evidenced by several judgments obtained on promissory notes made by George L. Otis, treasurer, to Selah Reeve, and by him indorsed to David A. Gage, and by Gage to petitioner. Hilton alleged as acts of bankruptcy, that the company allowed judgments to be rendered against them by default in favor of the Commercial National Bank, on which executions were issued.

The company filed an answer denying the acts of bankruptcy, and alleging that they had had the judgments entered by default set aside, and pleas entered, and that, as to the judgment by confession, the power of attorney was void, since Otis, who gave it, was not authorized. The case was tried, and the company was adjudicated bankrupt. The case was taken before the circuit judge by a petition for review.

In giving his judgment, reversing the decree of adjudication of bankruptcy, Judge DRUMMOND is reported as making, in substance, the following observations: "That before the late decision of the Supreme Court of the United States in the case of Wilson against the City Bank of St. Paul, 1 CENTRAL LAW JOURNAL, 40, overruling the case of Buchanan v. Smith, 16 Wall. 277, it had been held that where a party was insolvent and allowed judgments to be obtained against him by default, without defence, such an act was suffering his property to be taken in legal process, within the meaning of the bankrupt law, and was the commission of an act of bankruptcy. But the rule laid down by that case establishes the reverse proposition.

"It was indispensable, also, in order that the judgments by confession be upheld, that the execution of the warrants of attorney by which judgments were confessed, should be clearly established as given, by the proper authority. In this case, it was contended that the attaching the seal of the corporation to the warrant was sufficient evidence of the lawful authority. The decision of the supreme court of this state in the Terwilliger case practically decided that the persons professing to act as officers were in reality enemies of the interests of the corporation, and the proof offered in the court below, of the seal having been attached by duly authorized officers was not sufficient. The executive committee, whose duties were defined by the charter, passed a resolution approving the execution of certain notes which were issued, upon which judgments were ultimately obtained, but made no allusion to warrants of attorney.

"Again, there being a controversy in the state courts as to the validity of the judgments which were rendered, the court below should have given a reasonable time to contest the validity of these judgments, before foreclosing all their rights by an adjudication in bankruptcy, not an indefinite time, but a reasonable time, and should have permitted and required it to contest these matters in the state courts.

"In regard to the alleged insolvency, the corporation being in the hands of its enemies, and on account of the peculiar condition of its property, it was difficult to say if it were absolutely insolvent. But assuming the validity of the notes, there might be a question as to whether non-payment thereof would be an act of bankruptcy, the company not being a merchant or trader. But it was not necessary to consider this question. It is better for the interests of the petitioning creditor that the company should be permitted to prosecute its own affairs, rather than be forced into bankruptcy. The foundation of these proceedings being of such a doubtful character, the court did not feel disposed to decide the company bankrupt. The adjudication would, therefore, be reversed, and an order be made of the district court to permit the company to contest the proceedings of the state courts and warrants of attorney.

"This does not dismiss the proceedings in bankruptcy, but sets aside the adjudication, and allows the company time to de-

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cide the suits in the circuit court against them, or the petitioning creditors can amend their petition, alleging new grounds, and obtain an adjudication in that way."

Negligence—Liability of a Railroad Company for Injury to a Child, Caused by an Unguarded and Unfastened Turn-table.

The Supreme Court of the United States, on the 28th ultimo, affirmed the important principle that under certain circumstances, a railroad company may be liable on the ground of negligence, for a personal injury to a child of tender years, caused by a turn-table, built by a company upon its own uninclosed land, and left unguarded and unlocked, in a situation that renders it likely to cause injury to children.

The case in which this doctrine was asserted, was Stout v. Sioux City & Pacific Railroad Co., and is reported in the court below, in 2 Dillon, C. C. R. 294. The action was brought by an infant, by his next friend, for an injury which happened in the town of Blair, in Nebraska, under the following circumstances:

The plaintiff was a boy of the tender age of six years and two or three months. The town of Blair was a new place, and contained a population of about one hundred people. On the plat of the town is a tract of land of variable width, extending almost the entire length of the plat, owned and used by the defendants for their road-bed and depot grounds, and which divides the town into two portions. The cross streets of the town run up to this railroad ground and there stop, with exception of one or two streets, which were laid out across it. On this ground, which was not enclosed, was situated the defendant's depot house, and, about one-quarter of a mile distant from the depot house was located the turn-table, on which the plaintiff was injured. There were but few houses in the immediate neighborhood of the turn-table, and the plaintiff's parents lived in another portion of the town, and about three-fourths of a mile distant from the turn-table.

The plaintiff, without the knowledge of his parents, started with one or two other boys to go to the defendant's depot, about half a mile away, with no definite purpose in view. When the boys had arrived at the depot, it was proposed by some of them to go to the turn-table to play; and the boys proceeded to the turn-table, about a quarter of a mile distant, traveling along the defendant's road-bed or track. When the boys had reached the turn-table, which was not attended or guarded by any employe of the company, and which was not then fastened or locked, and which revolved easily on its axis, two of them commenced to turn it, and the plaintiff, in attempting to get upon it, (being at the time upon the railroad track), had the misfortune to get his foot caught between the end of the rail on the turn-table, as it was revolving, and the end of the iron rail on the main track of the defendant's road, and his foot was badly cut and crushed, resulting in a serious and permanent injury.

There was the evidence of one witness, an employe of the company, that he had previously seen boys playing at the turn-table, and had forbidden his children to play there. But this witness had no charge of the turn-table, and did not communicate the fact to any of the officers or employes of the company having charge of the turn-table. It appeared from the plaintiff's testimony, that he had not before that day been engaged in playing at the turn-table. The turn-table was constructed on the defendant's own land, in the usual and ordinary manner.

The ground of complaint against the defendant, as set out in the petition, was that the turn-table, as it was constructed, was of a dangerous nature and character, when unlocked or unguarded, and that being, as it is alleged, in a place much resorted to by the public, and where children were wont to go and play, it was the *duty* of the defendant to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded, so as to prevent injuries such as befell the plaintiff. The basis of this action, therefore, was that the defendant owed the plaintiff a duty of this kind; that, in failing to discharge this duty, the defendant was guilty of negligence; that this neglect caused the injury to the plaintiff, and that, therefore, the defendant is liable in damages therefor.

On these facts the company contended that the jury should be directed, as *matter of law*, that in respect to its turn-table it owed no duty towards the plaintiff, and hence, was under no liability to him. The circuit court refused, but submitted the question of negligence to the jury under instructions as to the elements of actionable negligence in such a case. The case appeared to be one of first impression. The jury found for the plaintiff and judgment was rendered upon the verdict, and it is this judgment which has recently been affirmed by the Supreme Court.

That court hold, under the circumstances, that it was for the jury, and not the court, to determine whether the alleged negligence, which was the foundation of the action, was established. We shall hereafter lay before our readers the text of the opinion in this novel and important case. Several other like injuries caused by turn-tables have been mentioned in the newspapers within the past two years.

Contract of Life Insurance not Abrogated by War.

JOHN WOODSON SMITH AND FANNIE M. SMITH, HIS WIFE, RESPONDENTS, v. THE CHARTER OAK LIFE INSURANCE COMPANY, APPELLANTS.

In the Circuit Court of Saint Louis County, Missouri, General Term, Jauuary, 1873.

Hon. JAMES J. LINDLEY,
" CHESTER H. KRUM,
" GEORGE A. MADILL,
" JAMES K. KNIGHT,
" HORATIO M. JONES, } Judges.

1. **The late Civil War—When it began.**—The war of the rebellion is held to have begun in the state of Virginia, at the date of the issuance by the president of the United States of his proclamation of intended blockade, which embraced that state, namely, on the 29th day of April, 1861.

2. **Life Insurance—War—Agent in Insurrectionary State.**—The breaking out of the late war did not operate to sever the relation of principal and agent between a Life Insurance company domiciled in one of the loyal states and its agent in an insurrectionary state; and the payment of premiums to such an agent was not unlawful.

3. ——. **Tender of Premium to Agent in Insurrectionary State.**—When, therefore, a premium was tendered to such an agent, it was his duty, notwithstanding the fact that communication with his principal was interrupted by hostilities, to receive it unconditionally; and the refusal so to receive it, constitutes on the part of the insurance company, a breach of the covenants of the policy, for which such company is liable in damages.

4. ——. ——. **Measure of Damages in such Case.**—The measure of damages in such a case, is the value of the policy at the time of the breach of its covenants by the insurer.

5. ——. ——. **Subsequent Breach of Policy by Insured.**—The fact

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that after the covenant of the policy had been thus broken by the insurer, the insured, in violation of the stipulations of the policy, voluntarily entered the Confederate army, does not prejudice his right to recover damages of the insurer for the previous violation of the contract on his part.

6. ——. ——. **Case in Judgment.**—In the year 1853, a resident of the state of Virginia effected an insurance upon his life for the benefit of his wife, in a company whose corporate residence was in the state of Connecticut. Payment of the stipulated premiums was regularly made until the 6th day of May, 1861, when, a payment becoming due, it was made to the agent, who received it upon the condition that he should be able to communicate with his principal and procure the proper receipt for the same. Being unable to communicate with his company, he subsequently, on the 14th day of March, 1862, returned the money to the insured. In November, 1861, the insured entered the Confederate army without the consent of the insurer, and remained in such service until the year 1863. The insurer having, at the close of the war, refused to renew the policy, the insured, jointly with his wife, brings this action to recover damages for a breach of the covenant of the policy, alleging that by reason of his advanced age, he is unable to effect an insurance on his life except at a much greater cost than the premiums stipulated to be paid in this policy. *Held*, that the plaintiffs are entitled to recover, and that the measure of their damages is the value of the policy on the 6th day of May, 1861.

This case comes here by appeal from special term, having arisen under a policy of life insurance issued by the appellants.

The petition alleges, that on the 6th day of May, 1853, in consideration of the payment of an annual premium of one hundred and four dollars, during the life of John Woodson Smith, the appellants issued the policy sued on, whereby they insured the life of said Smith in the sum of five thousand dollars for the term of his natural life. The policy was obtained for the benefit of the wife of said Smith, the respondent, Fannie M. Smith. The petition alleges, that the premium due on the 6th of May, of each year, was paid from 1853 to 1861, but that on the 6th day of May, 1861, the premium then due and payable, was tendered by respondents to the appellants, who thereupon refused to receive and accept such premium. It is alleged also, that since the 6th of May, 1861, the appellants have refused to receive premiums which have subsequently become due, and have declared the policy void and of no effect. The petition negatives the conditions of avoidance specified in the policy, and alleges, that since the breach of the contract of insurance by the appellants, in 1861, John Woodson Smith has advanced so far in years, that his life cannot be insured in a solvent company at as favorable rate of premium as is stipulated for in the policy sued on, and that his life can only be insured by the payment of a premium largely in excess of that required by the contract of the appellants.

Under this petition, the respondent, Fannie M. Smith, seeks to recover such sum by way of damages, as will place her in as good a condition as she would have been in under the policy, had it not been terminated by the appellants.

The answer is a traverse, together with an affirmative defence of failure on the part of the respondents to pay the annual premiums due in the year 1861, and for each year thereafter. The answer alleges also a breach of the conditions contained in the policy; in that John Woodson Smith voluntarily entered the military service of the so-called Confederate States, and remained in such military service without having first obtained the consent of the appellants. The answer sets up a further breach, in that Smith has become so intemperate as to seriously impair his health. There is also a plea of the statute of limitations. To this answer there is a reply.

The case was tried at special term before a jury. Evidence was introduced by the respondents, which showed that they are husband and wife; that the premiums due under the policy were paid down to May 6, 1861; that, on the last named day, the amount of the premium was tendered by a brother of the assured to the agent of the appellants, in Lynchburg, Virginia; that the agent hesitated in regard to receiving this premium, on the ground that communication had ceased between his principal and himself; that he received the money, however, upon the condition, that he could communicate with his principal and obtain a proper receipt, and that subsequently, on the fourteenth day of March, 1862, the agent returned the money to the brother of the assured, who accepted it—the agent stating, that he had been unable to communicate with his principal and that he declined to take upon himself the responsibility of receiving such premium in the name of the appellants. The respondent, John Woodson Smith, testified that he entered the military service of the so-called Confederate States voluntarily in November, 1861, and remained in such service until the year 1863. It appeared, that the assured is a man in good health and not addicted to habits of intemperance. This is all of the evidence which is material to the questions raised by the instructions, whose propriety the appellants dispute, under this appeal. It should be stated, however, that evidence was introduced showing the present value of the policy sued on, and that the verdict was rendered in accordance with such testimony.

Samuel Knox, Esq., for appellants; *Messrs. Noble, Orrick & Shannon* for respondent.

KRUM, J., delivered the opinion of the court.

At the outset of this opinion, we announce, that we regard as proper the theory of the respondents as to the measure of the recovery upon the policy, whose covenants it is alleged were broken by the appellants. If the facts of this case show a breach of the policy sued on, then the measure of respondents' recovery will be the present value of such policy at the time of such breach. It is a matter clearly susceptible of determination; and we cannot see why the rule of recovery is not just and equitable. If, without fault on his part, a contract of life insurance be terminated unlawfully by the company, it cannot be maintained successfully, that the assured, cannot sue at once as for a breach of the covenants of such policy, and that the measure of his recovery will not be the value of his policy at the time of such breach.

Passing now to the questions raised by the instructions given for the respondents, we shall consider, first, the direction to the jury, as to the time when the war of the rebellion began in the state of Virginia. Under this instruction, the jury were directed that the proclamation of the president of the United States, dated August 16, 1861, was to be deemed and taken by them as the beginning of actual hostilities between the United States and the so-called Confederate States; and that before such date, neither of the parties to the contract of insurance was released from obligation under it by reason of the war of the late rebellion. The appellants complain of this instruction as designating an improper date for the beginning of the war in Virginia. This instruction does not state correctly the date when the war began in Virginia. This matter has been adjudicated expressly by the Supreme Court of the United States, in the case of the Protector, 12 Wall. 700. There the chief justice, in delivering the opinion of the court, uses this language: "Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact was, at the commencement of hostilities, obliged to act during the recess of congress, must be taken."

And the court say, that the proclamation of intended blockade by the president, may be assumed as marking the date at which the war began. The proclamation of intended blockade, which embraced the state of Virginia, was issued on the 27th day of April, 1861. So that on the 6th of May, 1861, war existed in the state of Virginia.

It remains to be determined, now, what effect the existence of war had upon the duties of the parties to the contract of insurance. At the instance of the respondents, the jury were instructed that it was the duty of the agent of the appellants, at Lynchburg, Virginia, to receive the premium, unconditionally, upon the 6th of May, 1861. This was a proper direction. The inauguration

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of war, in the state of Virginia, on the 27th day of April, 1861, did not operate to sever the relations of principal and agent, between the appelants and their agent at Lynchburg. The payment to such agent was lawful; it was incumbent upon the respondents to make such payment, and it was the duty of the agent to receive it.

In Buchanan v. Carey, 19 Johns. 136, a contract made before the war of 1812, by a citizen of the state of New York, to deliver timber in the United States to a citizen of Canada, was upheld to sanction a delivery of timber, during the war, to an agent of such citizen of Canada, said agent residing then in the state of New York. The contracting parties had become enemies before the delivery of the timber called for by the contract. But the alien enemy had an agent in the state of New York, to whom the delivery was made in behalf of his principal. The court held, that had such contract been made during the war, it would have been illegal and void, but, as it was made before the war, no rule of public policy forbid its execution within the limits of the United States, after the war had begun, by a delivery of the property covered by the contract, to an agent of the alien.

In Conn. v. Penn., 1 Peters, Circuit Court, 496, it is held, that "the rule can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could, in no respect, be construed into a violation of the duties imposed by a state of war upon the debtor. The payment, in such cases, is not made by an enemy, but it is no objection, that the agent may possibly remit the money to his principal." This doctrine is approved in Ward v. Smith, 7 Wall. 447. The case of the United States v. Grossmayer is precisely in point. There, during the war of the rebellion, Grossmayer, a citizen of New York, being a creditor of one Einstein, a citizen of and resident of Georgia, made an arrangement with Einstein, by which the latter was to remit to the former the amount of his debt in money, or if that were not possible, to invest the sum in cotton and hold it for Grossmayer until the close of the war. Under this arrangement, Einstein bought cotton, and shipped it to Savannah, to be held there for Grossmayer. It fell into the hands of the United States forces and was sold. Grossmayer preferred a claim for the proceeds before the court of claims, and that court gave judgment in his favor. Upon appeal, this judgment was reversed, the supreme court holding that the contract made during the war was not only inconsistent with duties growing out of a state of war, but in open violation of a statute on the subject. The court say: "A prohibition of all intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine, that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it; but in such a case, the agency must have been created before the war began; for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all of the authorities. United States v. Grossmayer, 9 Wall. 72.

We hold, therefore, that the agent was bound to receive unconditionally, the premium which became due and was tendered on May 6, 1861. The misdirection as to the time when the war began in Virginia, was immaterial. This defect was cured, moreover, by the farther direction, that before the date named in the instruction, neither party was released from his obligation under the contract. This, however, was not because the war did not begin in Virginia until August 16, 1861, but because the outbreak of the war there on the 27th of April, 1861, did not alter the respondent's duty to pay the premium, or the agent's duty to receive it when tendered. The contract of life insurance is executory on the part of the insurer, while it has been executed by the payment of the premiums due from the insured. It is said to be a continuing contract, in the sense that it is to be performed in the future; but it is not a contract of continuance in its performance. Cohen v. N. Y. Mut. Life, 50 N. Y. 610. It is settled law, that the contract of life insurance is not dissolved by the outbreak of war. And in Sands v. N. Y. Life Insurance Co., 50 N. Y. 626, a payment by the assured to the agent of the company within the limits of the Confederate States, during the war, was sustained as valid, although such payment was made in Confederate notes. "The result is," say the supreme court of Massachusetts, in Kershaw v. Kelsey, 100 Mass. 561, "that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources; and every kind of trading, or commercial dealing, or intercourse, whether by transmission of money or goods, or order for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form, looking to, or involving such transmission, or by insurances upon trade, with or by the enemy. Beyond the principle of these cases, the prohibition has not been carried by judicial decision." We hold, therefore, that the outbreak of the war did not operate to discontinue the appellant's agency in Virginia. The appellants may have expressly revoked the authority of their agent, but no such revocation has been shown. It was lawful on the part of the respondents to pay the premium to the agent. It was not only lawful for him to receive it in the name of his principal, but it was his duty to receive it without condition. He could have held it until the close of the war, but even if he had remitted it to his principal, such action on his part could not prejudice either party. These views are supported, not only by the authorities already cited, but by elaborate considerations of the doctrine in New York Life Insurance Company v. Clopton, 7 Bush. (Ky.) 179; Manhattan Life Ins. Co. v. Warwick, 20 Grattan, 614, and Hamilton v. Mutual Life Ins. Co., 9 Blatchford, 234.

The jury were instructed farther, in regard to the premium due on May 6, 1861, that if they believed that if the respondents paid such premium when due, and voluntarily accepted its return in March, 1862, then they should find for the appellants. On the other hand, if they believed that the agent refused to receive the premium except upon condition, and afterwards, in accordance with such condition, required the respondents to accept a return of such premium, then such conditional receipt was not in conformity to the contract of insurance, and the jury should find for the respondents. This direction put the issue of payment of premium fairly before the jury. If it was paid and then the respondents consented to receive it back, they could not recover in this action. But it is manifest, that there was no payment on the 6th of May, 1861. In order to constitute a payment, there must be both a delivery by the debtor and an acceptance by the creditor, with the purpose on the part of the former to part from, and of the latter to accept of, the immediate ownership of the thing passed from the one to the other. Thompson v. Kellogg, 23 Mo. 281. But the agent received the premium conditionally, and upon a failure of the condition, returned the money to the respondents. The respondents were ready, and offered to pay the premium when due—this was all that could be expected of them. When the agent of the appellants refused to receive the premium except upon conditions, there was a breach of the contract of insurance, and the appellants became liable to the respondents. In view of what we have said in regard to the attitude of the parties in May, 1861, the subsequent entry of the assured into the military service of the Confederate States, could not have preju-

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diced the rights of the respondents against the appellants. The contract was broken already—a cause of action had occurred already in favor of the respondents.

It seems to us that a proper determination of the case was had at special term. The case was tried upon a different theory from that which has been indicated; but the judgment is, manifestly, for the proper party, and we have been able to see no reason why it should be disturbed.

The judgment will, therefore, be affirmed.

The other judges concur.

AFFIRMED.

NOTE.—We have before us two other well-considered opinions upon the subject embraced in the above case: One by Hon. ROBERT A. HILL, sitting in the circuit court of the United States for the southern district of Mississippi, in the case of Seyms v. New York Life Insurance Co., and one by Hon. H. H. EMMONS, sitting in the circuit court of the United States for the western district of Tennessee, in the case of Tait v. New York Life Insurance Co. Judge HILL'S opinion is ably reasoned, but does not review the recent cases on the subject. He takes substantially the same view of the question as that taken in the principal case. Judge EMMONS' opinion is reasoned with his accustomed ability. He takes the opposite view of the case, and holds that the contract of life insurance was abrogated by the war, if the insurer and insured are citizens respectively of the opposing belligerents, and each domiciliated within the territory of the opposing belligerents.

His opinion contains an exhaustive review of the authorities, not only those precisely in point, but also those which bear upon the general question. We select for publication the principal case, because it is the opinion of five judges, before whom the case has been fully argued by able counsel and with full access to the authorities. We believe that the principal case cites all the reported judgments upon the question how far the contract of life insurance is affected by war, except the two we have just mentioned, and the case of Dillard v. Manhattan Life Ins. Co., 44 Ga. 119. This last case holds, like Tait v. The N. Y. Life Ins. Co., that the contract of life insurance was abrogated by the war; but the counsel do not appear to have cited any recent decisions bearing upon the question, and the opinion is very brief, and the subject does not appear to have received the attention at the hands of the court that its importance would warrant.

The reasoning on which Judge EMMONS proceeds is, that the keeping alive of such a contract is *beneficial to the public enemy*. This, it is admitted in the case of Sands v. The New York Mutual Life Ins. Co., 50 New York, 632, would terminate the contract, if such were the case; but this is denied, especially when the policy contains a provision rendering it void if the assured shall enter the military or naval service, or die in the known violation of any law of the United States. Where the policy contains such a provision, PECKHAM, J., argues (50 New York, 635) that its perpetuation would be *injurious* to the public enemy. Again, Judge EMMONS argues that the fact that the sum insured will not in any event be paid until after the return of peace, does not furnish any reason against the doctrine that such a contract is avoided by war; because, if continued, it remains "one of the most certain sources of future payment which could be placed in the hands of our enemies;" it constitutes "*present capital in the hands of the enemy.*" This argument is forcibly answered by Judge BLATCHFORD in Hamilton v. The New York Life Ins. Co., 9 Blatch. 249-50, as follows: "Nor is it perceived how the amount or value of a policy on the life of an alien enemy, who dies during the war, can be availed of to aid the war, by the government of the country of the assured, in any way, or to any extent, in or to which the amount or value of a *promissory note*, made before the war, and falling due during the war, can be availed of to aid the war, by the government of the country of its holder, while its maker continues to be an alien enemy. Yet it was never heard that the obligation to pay a note was, under such circumstances, or for such reasons, abrogated by a war."

Judge EMMONS' opinion places the question entirely, as we understand it, upon grounds of public law, and political duty. In the Georgia case (44 Ga. 122), the same conclusion is reached on a somewhat different ground. MCCAY, J., pronouncing the judgment of the court, reasons as follows: "It would have been *illegal* for Mrs. Dillard, [the wife of the insured,] to pay the premium to the company, during the war, contrary to the act of congress. And were this a case of *forfeiture* for a failure, we should hold that a forfeiture was prevented by the illegality of the performance of the condition. But is this such a case? The company contracts to pay so much at the death of the insured, if the annual premiums are paid as stipulated. It is clear from the policy, and from the known practice of all the companies, that the insured has a right, at any time, to refuse to pay, and give up his policy. The contract, upon its face, requires to be renewed from year to year, by the payment of the premium. Indeed, a contract of life insurance is, at best, nothing but an undertaking that the company will take the annual premiums paid, invest them safely, and pay the insured the product, after deducting the expenses of the business. Indeed, if every person insured lived to an average age, this would be exactly the contract. But, as any individual may die at any time, the company agree to pay him what his premium *would amount to*, making up its losses upon him by the payment of those who live beyond the average age. The regular annual payment of the premium agreed on is thus a condition *precedent* of the contract, and not a condition subsequent. And it is just here, that the authorities relied on fail to apply. If a condition subsequent becomes illegal, there is no forfeiture; for the estate having once vested, it shall not be divested because the party fails to do an illegal or impossible act. (Code, § 2680). But it is different with a condition precedent. If that be illegal, the right never vests. It is not a question of forfeiture, but a failure to do the thing necessary to acquire the right. (Brown's Leg. Max. 176.) And this, it seems to me, is a distinction based upon principles of justice and sound sense. If I promise a man to sell him my house, provided he appear on a particular day with the money, and he fails, for whatever reason, other than my fault, he has no right in the house. But if I sell him the house, and it is agreed that he shall forfeit it, if he fail to pay me for it in full, by a particular day, then the *cause* of his failure may, both in equity and sound sense, become very material!" On the other hand, in the case of Cohen v. The New York Mutual Life Ins. Co. 50 New York, 623, we find the following counter reasoning: "At the time of making the contract in this case, the plaintiff had the legal right and ability to make the annual payment, but the effect of the war was to make the attempt unlawful without any fault on his part. The operation of a condition as express and absolute as in this case, was held suspended during the war, in Semmes v. Hartford Ins. Co. (14 Wall. 158). The condition there, as here, was by the act and agreement of the party; and yet its performance being impossible, it was held to be inoperative."

The cases which hold that the contract of life insurance was not abrogated by the war, proceed chiefly upon the ground, that such a contract is in part *executed* by the payment of premiums; that by such payment, the beneficiary acquires a *vested right* in the benefits promised by the contract, of which he cannot be deprived by a casualty beyond his control, like the breaking out of a war. And some of the cases urge, in forcible language, that to hold the contract abrogated by the war, would be grossly unjust to the person for whose benefit the insurance is effected, and that such a defence on the part of the insurer, is an unconscionable defence. Thus, it is said in the Kentucky case: "To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal, for no better cause than the inevitable non-precise payment of premium, which the law prevented the appellant from a right to receive." * * * "A suspension of the remedy, and not a dissolution of the contract, is all that is necessary, befitting or just." New York Life Ins Co. v. Clopton, 7 Bush, (Ky.), 184, 188. In the case in 9 Blatchford, the question is put by Judge BLATCHFORD in this way: "The defendants in effect say to Goodman (the insured): 'It was unlawful for us to receive from you your premiums for 1862, 1863, 1864 and 1865, as they became due; it would have been idle for you to have tendered them to us; yet, as the contract was that you should pay them at specified times, the contract is forfeited; our liability to pay you the $5,983.05 is at an end, and besides that, the $2,307.50 paid us as premiums on the policies of 1849, and 1858, is forfeited to us.' I do not believe a defence of that kind to a policy of life insurance situated like the present one, was ever allowed by any court of justice in any civilized community. I certainly shall not be the first judge to set a precedent of the kind." Equally strong is the language of ANDERSON, J., speaking for a majority of the court in the Virginia case, where he states the case thus: "They [the insurers] refused to receive the last premium when it fell due and was tendered, and now refuse to pay the policy because the premium was not paid; and, moreover, claim of the defendant in error a forfeiture of the premiums which he had paid, amounting to $5,155, besides interest; and they invoke the intervention of the court to sustain them in these pretensions." * * * "It would be a monstrous perversion of law, and repugnant to our every sense of justice, to say that this company, after having received more than half the sum assured, could, by this act, determine the policy, hold on to the money they had received, and say to their confiding victim, 'You may whistle to the winds for your merited reward, notwithstanding you relied upon our covenant and good faith to pay it.'"

And while the court admit that this language puts the case too strongly, yet they say further on, that the proposition that the company could withhold from the agent the printed receipts by which payment of the premiums was to be acknowledged, "would be to say that they could refuse to receive payment, and thereby release themselves from the obligation of the policy, and subject the assured to a forfeiture, without any default of his, of all the pre-

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miums he had paid—a conclusion against which the sense of mankind would revolt."

These extracts indicate, to a partial extent, the reasoning of the courts on the subject. The result of the recent adjudications may be summed up, as follows:

1. The contract of life insurance is not abrogated, but only suspended, by the outbreak of a war which places the insurer and insured within opposing lines of belligerent occupancy. Smith v. Charter Oak Life Ins. Co., *supra;* Seyms v. New York Life Ins. Co., U. S. Circuit Court Southern District Miss. Nov. Term, 1873, (HILL, J.); Cohen v. New York Mutual Life Ins. Co., 50 New York, 610; Sands v. New York Life Ins. Co., 50 New York, 626; Manhattan Life Ins. Co. v. Warwick, 20 Grattan, 614, (two of the five judges dissenting); New York Life Ins. Co. v. Clopton, 7 Bush. (Ky.) 179; Hamilton v. New York Mutual Life Ins. Co., 9 Blatchford, 234. *Contra*, Tait v. New York Life Ins. Co., U. S. Circuit Court Western Dist. Tenn. (EMMONS, J.); Dillard v. Manhattan Life Ins. Co., 44 Ga., 119.

2. If the stipulated premiums are paid until the outbreak of the war, but not thereafter, and the assured die during the war, the beneficiary or legal representative may, by giving notice and making proof of death within a reasonable time after the close of the war, demand and compel payment of the sum stipulated in the policy, less the unpaid premiums accruing previously to the death of the insured, with interest. Sands v. New York Life Ins. Co., *supra*; Seyms v. New York Life Ins. Co., *supra;* Manhattan Life Ins. Co., v. Warwick, *supra*, (two of the five judges dissenting); Hamilton v. New York Mutual Life Ins. Co., *supra;* New York Life Ins. Co. v. Clopton, *supra. Contra*, Tait v. New York Life Ins. Co., *supra;* Dillard v. Manhattan Life Ins. Co., *supra.* And this principle applies to an insurance maintained by a *creditor* upon the life of his debtor. Manhattan Life Ins. Co. v. Warwick, *supra.*

3. If the insured survives the war, and within a reasonable time thereafter the unpaid premiums accruing during the war are tendered by him, and the insurer declines to receive the same, or to acknowledge the policy as in force, the beneficiary in the policy may maintain a bill in equity to reinstate the contract and declare the rights of the parties. Cohen v. New York Mutual Life Ins. Co., *supra.*

4. Or, under like circumstances, payment of the premiums having been tendered to, and refused by, the company's agent, during the war, the beneficiary may treat such refusal as a breach of the contract, and may maintain an action at law for damages; and the measure of damages is the value of the policy at the time of such breach of contract. Smith v. Charter Oak Life Ins. Co., *supra* (principal case.)

5. The relation of principal and agent between an insuranee company residing within one of the lines of belligerent occupancy, and its agent residing within the other, is not terminated by the fact of war. Smith v. Charter Oak Life Ins. Co., (principal case) *supra;* Sands v. New York Life Ins. Co., *supra.* Hamilton v. New York Mutual Life Ins. Co., *supra;* Manhattan Life Ins. Co. v. Warwick, *supra;* New York Life Ins. Co. v. Clopton, *supra. Contra*, Tait v. New York Life Ins. Co., *supra.* And see Ward v. Smith, 7 Wall. 447, 452; United States v. Grossmeyer, 9 Wall. 72, 75. Provided, the agent had been appointed before the war. 7 Wall. 75.

6. And it is the *duty* of the insurer to provide an agent in the state where the premiums, by the terms of the policy are to be paid; and this duty continues, notwithstanding the intervention of war. Hamilton v. Mutual Life Ins. Co., *supra.*

7. Although an agent under such circumstances, would not have the power lawfully to enter into new contracts of insurance, [New York Life Ins. Co. v. Clopton, *supra;* Ward v. Smith, 7 Wall. 452], nor to transmit money received for premiums across the hostile lines to his principal: yet he might lawfully receive premiums on policies in force before the war, and such the insured might lawfully pay. Manhattan Life Ins. Co. v. Warwick, *supra;* Sands v. New York Life Ins. Co., *supra.* At least, a tender to such an agent, and his refusal to receive the premium because of his inability to transmit the same to his principal because of the intervention of a state of war, would save a forfeiture of the policy. Hamilton v. Mutual Life Ins. Co., *supra.*

8. Payment of premiums under such circumstances in *Confederate money*, is a good payment, Sands v. New York Life Ins. Co., *supra.* But the right of the company through its agent to refuse payment in such funds, is recognized in Manhattan Life Ins. Co. v. Warwick, *supra.*

The above summary and quotations give but a meager idea of the effect of the cases examined. The only object of this note has been to indicate, to some extent, the *judicial sentiment* on the question, and the grounds on which the courts have proceeded, as well as the chief points which have been ruled.

—THE attention of the Chilian congress had been taken up with the new penal code and the new educational act.

Warehouse Grain Receipts—Sale—Bailment.

PATRICK RAHILLY v. WILFORD L. WILSON, ASSIGNEE OF ATKINSON & KELLOGG.

United States Circuit Court, District of Minnesota, December Term, 1873.

Before DILLON, Circuit Judge.

1. **Grain in Elevators—Sale—Bailment.**—Where grain is stored in an elevator warehouse with the understanding implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price or the same amount of grain of the like quality, but not the identical grain deposited nor grain from any specific mass, the transaction is a sale and not a bailment.

2. **Criteria of sales and bailments stated.**

This is appeal in bankruptcy from the decree of the district court, granting the relief prayed in the original bill of Rahilly, filed for himself and the other warehouse grain receipt holders, and dismissing the cross bill of the First National Bank of St. Paul.

The suit was brought in the district court to settle the title to twenty-one thousand five hundred bushels of wheat, or its representative in money, now lying in the registry of that court.

Geo. Atkinson & Co., and their successors, Atkinson & Kellogg, were engaged at Lake City as warehousemen and commission and forwarding merchants, during the fall of 1868, and up to December 8th, 1870, when they filed their petition in bankruptcy, and were adjudicated bankrupts.

The firm of George Atkinson & Co. was composed of George Atkinson alone until April 1st, 1870, when Kellogg became a partner. The old name was used until September, and was then changed to Atkinson & Kellogg, and so continued until their failure, at which time they had in their warehouse the wheat in controversy, which was taken possession of by the assignee in bankruptcy.

At the date of their bankruptcy, they had outstanding warehouse receipts issued to farmers to the amount of about thirty-five thousand bushels, representing Nos. 1 and 2 grades of wheat, and two receipts dated November 23, 1870, to the amount of twelve thousand bushels, issued as collateral security for the payment of three drafts given to pay an overdrawn bank account with their bankers, to the amount of ten thousand dollars. These two receipts were issued to the drawee named in the drafts, and they had been endorsed over to their bankers. They represented twelve thousand bushels of wheat, and are now held by the First National Bank of St. Paul, having come into its possession in the course of a transaction which will hereafter be mentioned.

The complainant, a farmer to whom some of these receipts had been issued in behalf of himself, and the others holding receipts to the amount of thirty-five thousand bushels, filed this bill against the assignee, and seeks to appropriate the fund exclusively to the payment of their receipts. The bank, by stipulation, is made a party defendant, has answered the bill, and also filed a cross bill, alleging that it has, to the extent of its claim, a prior right to payment out of the fund in court.

Both suits were heard together in the district court upon proofs taken.

The complainant, Rahilly, and other owners, on whose behalf he sues, held receipts in the following form:

Not good unless Countersigned by Warehouseman.

LAKE CITY, Minn . . . . 1869.

Warehouse of George Atkinson & Co.
Received *in store*, of P. H. Rahilly . . . . bush. No . . Wheat.

(Signed) GEO. ATKINSON & Co.,

. . . . . Per Atkinson.

The receipts issued by Atkinson & Kellogg, were similar, with

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the addition of the words "subject to warehouse charges and advances," and an omission of the words "in store."

The proofs show that Atkinson & Kellogg were the owners of an elevator in Lake City, constructed in the usual manner, for the purpose of receiving, storing and discharging grain—the elevating machinery being propelled by steam. There are several similar buildings in the same city, and the proofs show that business in them is conducted in the same general manner. The wheat is brought in by the farmers and is either purchased and paid for at the time by the proprietors of the elevators, or received by them and receipts issued therefor, like the one above copied.

Wheat is classified or graded into what is termed No. 1, No. 2, and rejected. Wheat when received in either mode, is tested, graded, and put into a common bin, each grade being kept distinct, but all of the same grade is mingled together, and this is the invariable practice and known to be so. The warehousemen do not keep the identical wheat on hand for which receipts are issued, but sell and ship at their pleasure: at least, the evidence shows that this is the general practice. The receipts specify *no time for the delivery* of the wheat to the depositor, but the usage or custom is that the holder may select his own time for presenting them, and demand either the market price of the grain on that day, *or* the quantity and quality of grain called for in the receipt. It is expected that the ticket-holder will give the warehousemen who issued it the first privilege of buying, if he will pay as much as the holder can obtain elsewhere. In the event the holder sells to the warehouseman, the latter receives no storage, unless the grain has been carried over the winter; but if he demands grain, or if he sells the receipt to others, who demand grain instead of the market price or value, then the practice is to charge storage. The evidence shows that it seldom happens that the depositor demands grain, but almost invariably elects to take the money, that is the highest market rate of the grade of grain mentioned in the receipt on the day when he closes the transaction and surrenders the instrument. The warehouseman often makes advances on these receipts, charging interest.

The bankrupts, in addition to receiving wheat of farmers and issuing storage tickets as above, also purchased wheat for themselves under an arrangement with Eames & Co., of St. Paul, whereby the latter were to allow them a commission or compensation for their services, of two cents per bushel. Wheat thus purchased was paid for by the bankrupt's own checks on local banks, and the bankrupts reimbursed themselves by drafts drawn from time to time on Eames & Co., on account of wheat shipped to them. All wheat thus purchased was graded and put into its proper bin, mingled with wheat for which receipts or tickets were issued; and when shipments were made, the grain was taken from the amount in the elevator building. As wheat was being constantly received and constantly shipped, the amount in the elevator fluctuated from week to week. In the summer of 1870, before the new crop of that year came in, the bankrupts' elevator was entirely cleared of grain, although many of their receipts, issued in 1869, were then outstanding.

The storage capacity of the bankrupts' warehouse was about 60,000 bushels, although the amount of wheat which was received, handled and discharged therefrom in a year largely exceeded this amount.

When they failed they had on hand 21,500 bushels of wheat, of which about 18,000 had been purchased within a week previous to the failure and mixed with grain then in the building. To pay for this 18,000 bushels, the bankrupts drew checks on their local bankers, Williamson & Co., and between the 15th and 17th of November, 1870, drew in favor of these bankers three drafts on Eames & Co. for $10,000, which were dishonored and returned to Williamson & Co., who demanded warehouse receipts as security, and on the 23d day of November, when it was known that the bankrupts had stopped business, and were in failing circumstances, the bankrupts issued two warehouse receipts for $12,000, which afterwards came into the hands of the First National Bank at St. Paul, as collateral security, with full notice of all circumstances.

The district court held that this transaction was an attempt on the part of Williamson & Co. to obtain from the bankrupts an illegal preference, contrary to the bankrupt act, and that the St. Paul bank was affected with notice thereof, and it accordingly dismissed the cross-bill of the last named bank, but decreed that the ordinary receipt holders were entitled to the grain on hand at the time the petition in bankruptcy was filed. From the decree dismissing the cross-bill, the St. Paul bank appeals, and from the decree on the original bill, the assignee in bankruptcy appeals.

E. C. Palmer & James Gilfillan, for the assignee; *George L. Otis*, for the first National Bank of St. Paul; *Bigelow, Flandrau & Clark*, for the complainant, Rahilly.

DILLON, Circuit Judge.—The proofs satisfy me that the invariable and known course of business at the elevator warehouses in Lake City, was to mingle together all grain of the same grade, whether purchased outright and paid for at the time, or received on tickets specifying the grade and quantity, and which contemplate the future delivery of the like amount of the same grade of wheat to the holders of such receipts when they should call for it, or the payment in money of the value of that amount and quality of grain. Those who deposited wheat must be taken to know, and in fact did know, that it would be thus mingled with other grain; that it would be shipped and sold by the warehousemen, when the latter should deem it to be for their interests (for such was the uniform practice) and consequently if the depositor should demand wheat instead of the value of the wheat, he would not receive, unless by accident, any of the identical wheat deposited, nor any of the immediate mass into which it went. As wheat was being daily received and constantly shipped, the amount on hand fluctuated from time to time. In July, 1870, there was not a bushel of wheat in the elevator building, although many receipts for the crop of the previous year, or years, were outstanding. The proofs show that it was very unusual to deliver wheat to the depositor, as he almost always chose to take the value of the amount and quality called for in the receipt at the date when he desired to surrender it and close the transaction.

Under these circumstances the question is, what is the relation which exists between the grain depositor and the warehouseman? Is the depositor a bailor, simply, and the warehouseman a bailee, or is the former a seller, and the latter a purchaser, of the wheat? The district court held the former theory, and that the holders of outstanding receipts were entitled to the grain in the warehouse at the time of the failure of the bankrupts, and that as the amount therein did not equal the amount called for in the outstanding receipts, they must share *pro rata*. This view proceeds upon the ground that the title in the grain deposited, does not pass to the warehouseman, but remains in the depositor, and that the latter has the title at all times to an amount of wheat in the warehouse equal to that called for in his receipt; and it is contended that if sales are made by the warehouseman, this is a conversion of the depositor's property, and if other like property is placed in the warehouse, the law will imply that it is placed there in substitution for that which was wrongfully removed, and hence that the grain at any time on hand belongs to the depositors to the extent of their receipts of tickets. It seems to me that this view cannot be maintained, and that it would lead to difficulties and confusion, and that it is against the established legal principles by which sales and bailments are discriminated. If this view is sound and the warehouse should burn without the fault of the owner, this would be a defence to any demand on the part of the ticket holder either for the wheat or its value—a proposition which cannot, I think, be maintained, and which is against the precise point adjudged in several well-considered cases, (Chase v. Washburn, 1

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Ohio St. 244, 1853; The South Australian Ins. Co. v. Randall, Law Rep. 3 Privy Council Appeals, 101, 1869.)

Viewed in the light of the uniform course of business, the contract is not one of bailment proper, but one (*mutuum*) where the property passes to the mutuary or receiver, and is delivered to him for his own use or consumption, and where he is not bound to return the identical article in its original or altered shape, but property of the same kind and value; in which case it is a sale, and the title passes, and the receiver becomes a debtor for the stipulated return. (Jones on Bailments, 64, 102; Story on Bailments, sec. 439; 2 Kent's Com. 590.)

That this is a correct view of the relations between the wheat depositors and the bankrupts is expressly adjudged in the following cases which, in their facts, are identical with the one under consideration. (South Australian Ins. Co. v. Randall, *supra;* Chase v. Washburn, *supra,* Lonergan v. Stewart, 55 Ill., 44, 1870; Johnson v. Brown, *infra.* See Myers v. Adams, 8 Nat. Bankr. Reg. 214; Stearns & Raymond 26 Wis. 74.)

Applying the principle above mentioned, the privy council in the case of the South Australian Insurance Co., in an elaborate judgment, decided, where corn was deposited by farmers with a miller to be "stored," and used as part of the current or consumable stock or capital of the miller's business, and was by him mixed with other corn deposited for a like purpose, subject to the right of the farmers to claim at any time, an equal quantity of corn of the like quality, without reference to any specific bulk from which it is to be taken, or in lieu thereof, the market price on any equal quantity, on the day on which he made his demand, with a small charge for general purposes; that the transaction was a *sale* by the farmer to the miller of the corn deposited, and not a bailment. In giving their lordship's judgment, Sir Joseph Napier says: "It appears to their lordships that there is no sound distinction, in principle, between this, and the case of money deposited with a banker on a deposit receipt; * * * that it is not the case of a possession given (by the farmer) subject to a trust, but that it is the case of property transferred for value, *at the time of delivery*, upon special terms of settlement. Law Rep. 3 Privy Council Appeals 109, 113.

And so the supreme court of Iowa, in a case yet unreported, (Johnson v. Brown, Oct. 1873,) has also held. In the case just cited, wheat was left in an elevator with the understanding that when the depositor should be ready to sell it, the proprietor of the elevator would give the highest market price or the same amount of wheat of like grade and quality — the custom being to ship off grain, but to keep on hand sufficient to fill outstanding storage receipts, but not the identical wheat received — and it was adjudged that the transaction was a sale and not a bailment.

I regard the case at bar distinguishable from Young v. Miles, 20 Wis. 615, 23 Wis. 643; and Kimberly v. Patchin, 19 N. Y. 330; and like cases where the bulk from which the mingled articles were to be taken was specific and not subject to constant fluctuations.

I am of opinion, therefore, that the court erred in holding that the receipt owners had the right to the wheat in the warehouse as against the assignee, and its decree in this respect is reversed, and a decree will be entered here dismissing the bill.

I may add, that I am entirely satisfied, in view of the mode of conducting business at the grain elevators, as shown in the testimony, that the foregoing is a sound view of the relation between the grain depositor and the proprietor of the elevator, and that legislation to protect the former against the insolvency of the latter, would appear to be called for.

In respect to the claim of the bank upon the two wheat receipts for 12,000 bushels, made by the bankrupts after their failure to secure $10,000 to their local bankers, I concur so fully in the views of Judge NELSON that I do not deem it essential to do more than refer to his opinion. The decree of the district court, dismissing the cross-bill of the bank is affirmed. The cause will be remanded to the district court with directions to tax the costs in that court equitably as between the receipt holders and the bank. The costs on this appeal will be borne equally between the same parties.

ORDERED ACCORDINGLY.

NOTE.—In Chase v. Washburn, 1 Ohio St. 244, the receipt of the warehouseman, was: "Milan, O., Nov. 5, 1847. Rec'd *in store* from J. C. W. thirty bushels of wheat. H. Chase & Co." The evidence *aliunde* showing that the wheat was received with an understanding that the warehouseman might dispose of it, and that, upon demand, he would return other grain, *or* pay for that deposited, the transaction was adjudged a sale and not a bailment, and therefore it was no defence to the warehouseman that his warehouse was destroyed by fire at a time when it contained wheat enough to answer all his outstanding receipts.

So, in the case of the South Australian Ins. Co. v. Randell, Law Rep. 3 Priv. Council App. 101, 6 Moore P. C. N. S. 341, as in the case to which this note is subjoined, the receipts issued to the farmers by the miller were "to store," and under the circumstances stated in the foregoing opinion, the transaction was considered to be a sale.

In 6 Am. Law Review, 450, the reader will find a valuable article entitled "*Grain Elevators: the title to Grain in Public Warehouses.*" The case of Chase v. Washburn is there printed in full, and is selected "as presenting the ablest exposition of the opposite opinion" to that which the annotator there maintains to be the true doctrine. In that note is cited, perhaps, every reported case on the subject of the title to grain in elevators which had been decided down to April, 1872. The substance of that note will be found condensed in Holmes' edition of Kent's Commentaries. 2 Kent Com. 12th ed. 590.

The case of Rahilly, *supra*, is one where there was an understanding implied from the known and invariable course of business, that the warehouseman might mingle the specific wheat deposited with other wheat of like quality, and dispose of it at his pleasure, with the further understanding that on demand, he would pay the depositor the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass. We have found no adjudged case which holds such a transaction to be a bailment, but there are several directly to the point that it is a sale. Such a case is obviously distinguishable from that of a specific deposit which is not to be changed by the warehouseman, but retained by him until called for by the depositor. This is a bailment. And the case is distinguishable, also, from those where specified amounts of grain of different owners is mixed by consent in specific mass, without any understanding that the warehouseman might dispose of the grain so deposited and mingled. And it may be different from the case where the proprietor of the elevator is a mere warehouseman and where his course of business is, and his duty is, always to keep on hand in the elevator sufficient grain to meet all outstanding receipts, though not the particular grain received. We say it *may* be different from such a case, but it is doubtful whether it is so. See Johnson v. Brown, Iowa Sup. Ct., 1873. But where it is known by the depositor that the warehouseman is himself buying and selling grain on his own account, and also receiving grain "in store," and that he intermingles all that is so obtained, and is constantly buying, receiving and selling, so that the mass is continually fluctuating, and there is no fixed time when the receipts are to be presented, it seems impossible to consider the holders of the outstanding receipts as tenants in common of the whole mass of wheat in the elevator in proportion to the amount of their receipts. And such a case seems to be the same in principle as an ordinary general deposit of money in bank; it creates simply the relation of debtor and creditor; and so the Privy Council in the case of the Australian Ins. Co., above cited, considered it.

The very recent case of Butterfield v. Lathrop, 71 Pa. St. 225, goes upon the same principle. Here, Baxter and numerous other farmers delivered milk to a cheese factory; each was credited with the amount of his milk, and all was manufactured together; the company sold all the cheese; each farmer was charged with the expense, and received his share of the proceeds in proportion to the milk furnished; Baxter's interest in the cheese, etc., was sold under an execution against him. *Held*, that the sale by the factory converted his interest into a money demand, and this interest was, therefore, not the subject of a levy. The arrangement at the factory did not constitute the farmers partners nor tenants in common in the cheese; nor was there an agency or bailment as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner.

On the general subject see and compare Cushing v. Breed, 14 Allen, 376 Warren v. Milliken, 57 Maine, 97; Dale v. Olmstead, 36 Ill. 150; 2 Kent Com., 12th ed., 590, and cases cited in Mr. Holmes' note.

—A COMPULSORY EDUCATIONAL BILL has passed the lower house of the Illinois legislature.

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Bankrupt Act—Lien Created by State Law—Deposits by Savings Banks in other Banks.

In re STUYVESANT BANK.

District Court of the United States for the Southern District of New York.

Before BLATCHFORD, District Judge.

Bankrupt Act--State Law creating Priority.--A state law which allows a savings bank to make, under certain restrictions, deposits in another bank, and provides that in case the bank receiving such deposits becomes insolvent, its directors shall, after providing for the payment of its circulating notes, apply its assets to the payment of such deposits, does not create a lien, nor is a lien created simply by the making of such deposits in pursuance of such statute, which is enforceable under the bankrupt act.

In bankruptcy. The facts are stated in the opinion.

T. Hughson, for the New York Savings Bank; *D. Noble Renan*, for the Sixpenny Savings Bank; *F. N. Bangs*, for the assignee in bankruptcy.

Extract from the opinion of the court—BLATCHFORD, J.—The second section of the act of the legislature of the state of New York, passed April 15, 1853 (Laws of 1853, chapter 257), provides that it shall be lawful for any savings bank or institution for savings, in the city and county of New York, then chartered, or that might be thereafter chartered, "to make temporary deposits in any bank or banking association to an amount equal to ten per cent. of the actual cash capital stock paid in of such bank or banking association, and to receive interest thereon at such rates, not exceeding that allowed by law, as may be agreed upon; provided that all the deposits in any one bank or banking association shall not exceed in amount twenty per cent. of all the deposits belonging to such savings bank or institution for savings, and that no contract or agreement in relation to said deposits shall be for a longer period." The third section of said act provides that "it shall not be lawful for any such savings bank or institution for savings to make any loans to any bank or banking association exceeding the limits above prescribed, unless such savings bank or institution for savings shall require and receive of such bank, for all sums so deposited exceeding the limits above prescribed, such securities therefor and equal in amount as the comptroller or superintendent of the banking department is now lawfully authorized to receive in exchange for bills or notes for circulation." The fourth section of said act provides that "all the assets of any bank or banking association now or hereafter to be created, that shall become insolvent, shall, after providing for the payment of its circulating notes, be applied by the directors thereof, in the first place, to the payment of any deficiency that may arise on the sales of the securities aforesaid, and thereafter, of any sum or sums of money deposited with such bank or banking association, by any savings bank or institution for savings, within the range of twenty per cent., as provided in the second section of this act." The first section of the act of the legislature of the State of New York, passed April 10, 1858 (Laws of 1858, chapter 136), provides that the temporary deposits which any savings bank or institution for savings in the city and county of New York is authorized to make, by the second section of chapter 257 of the Laws of 1853, shall not exceed in amount twenty per cent. of all the deposits belonging to any such bank or institution for savings, nor shall the deposits of any such bank or institution for savings, in any bank of issue, exceed in the aggregate, at one time, the sum of $100,000.

The Sixpenny Savings Bank of the city of New York, a savings bank in the city and county of New York, chartered by the state of New York as a corporation, has proved against the estate of the bankrupt a claim for the sum of $23,261.06, with interest thereon at the rate of five per cent. per annum, from the 11th of October, 1871. In its proof of debt it claims that, under the said two acts, it has a valid and just lien on the estate of the bankrupt, and is, in the distribution and division of said estate, entitled to a preference or priority of payment to any creditor of the bankrupt, other than the New York Savings Bank, on the ground that the said moneys were deposited and loaned under the express agreement that the Sixpenny Savings Bank should be entitled to such priority under the said two acts, and that the said two acts entered into and formed a part of the contract under which said deposit or loan was made to the bankrupt.

The New York Savings Bank, a savings bank in the city and county of New York, chartered by the state of New York as a corporation, has proved against the estate of the bankrupt a claim for the sum of $20,020.41, with interest thereon at the rate of seven per cent. per annum, from the 12th of October, 1871. In proof of its debt it claims that under the said two acts, and its agreement with the bankrupt thereunder, and in pursuance thereof, prior to the insolvency of the bankrupt or any suspension thereof, it is entitled to have its said claim paid in full out of the assets of the bankrupt, before any payment is made to other creditors not entitled by law to a preference. Assuming that all or some parts of the amounts of these claims fall within the terms of the provisions of the state acts, the question arises whether the priority or preference claimed under the fourth section of the state act of 1853, can be allowed in the distribution of the assets of the bankrupt. It is contended on the part of the savings banks that, by virtue of the agreements made by them with the bankrupt under and within the provisions of the state acts, they acquired a lien on all the assets of the bankrupt, in case of insolvency, and are in the distribution of the proceeds of its assets, entitled to the same preference and priority of payment over its general creditors, to which they would have been entitled if its assets had been distributed under the state laws; that the provision of the fourth section of the state act of 1853, is not an insolvent law; that it contemplates a lien on the present and future assets of the bank; that all liens are made in contemplation of insolvency in the same sense as the lien created by the said fourth section; that the bankruptcy act preserves all liens, both legal and equitable, and all charges or encumbrances, and except in cases of fraud on the act, gives to the assignee in bankruptcy only such rights and interests in the estate of bankrupt as the bankrupt had or could assert; and that the rights acquired by the savings banks under the state act, were rights of property, in the form of contracts, constituting equitable liens, which can be enforced against the estate of the bankrupt in the hands of the bankrupt, in case of insolvency, if there had been no proceedings in bankruptcy.

I have given much consideration to the question involved, especially in view of the fact that, at a prior stage of these proceedings, I indicated an opinion in support of the claims of the savings banks, when the question was submitted to me on written briefs. But an oral re-argument, and a full consideration of the provisions of the bankruptcy act have led me to the conclusion that these claims cannot be allowed. I do not think that these claims can, under the terms of the state act, be properly considered as rights of property, inhering in, or adhering to the property of the bankrupt. The savings banks, it is true, made contracts with the bankrupt, but these contracts were merely contracts for the making of deposits and the paying of interest thereon. No part of the state act gives any lien for such deposits on any assets of the bankrupt. Those assets, consisting in part of the moneys so deposited, could be dealt with and disposed of by the bankrupt, free from any lien, charge or encumbrance thereon arising out of such contracts. No provision of the state act purports to interfere with the disposition of the assets of the bankrupt until insolvency occurs, and then a rule for the application of such assets in the distribution of the estate of the bankrupt as the estate of an insolvent debtor, is created by the fourth section of the state act of 1853. But that rule establishes in favor of the savings banks no such interest in the property of the bankrupt, that such

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property passes under the bankruptcy act into the hands of the assignee, subject to such interest. * * * The twenty-eighth section of the present act provides that certain claims shall "be entitled to priority or preference and to be paid in full in the following order." Then follow five clauses. The fifth is, "all debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed." This is limited to priorities or preferences created by the laws of the United States. It does not extend to priorities or preferences created by the laws of a state. Under it the state could have no priority for debts due to it which were not liens or securities, and but for the provision, in the third class of priorities, for such debts due to the state, there could be no priority for such debts. * * * But such priorities or preferences created by state laws in the distribution of insolvents' estates are not liens or securities, or rights or interests in property. If so, they are not saved by the general scope of the bankruptcy act, and they are not recognized by the twenty-eighth section. The claims to priority on the part of the savings banks must be disallowed.

Sale—Attachment of Goods in Transitu—Attachment of Interest of Partner or Joint Owner.

ROLFE S. SAUNDERS v. BARTLETT, GOULD & HEATH.

Supreme Court of Tennessee, Jackson, Special November Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK,
" JOHN L. T. SNEED,
" THOMAS J. FREEMAN, } Judges.

1. **Consignor and Consignee—Attachment.**—Where a debtor ships goods to his creditor, agreeing with the latter that he shall receive and sell the goods and apply the proceeds to the payment of the debt, such goods may be attached by another creditor, although they have reached their place of destination, and although the bill of lading may have reached the first creditor, if he has not actually taken possession of the goods. Such a transaction is not a sale, and the title remains in the consignor until actual or constructive possession by the consignee; and the delivery of the bill of lading is not such constructive possession.

Attachment of partnership goods for debt of partner or joint owner.—An attachment in a suit against a partner or joint owner may be levied upon goods belonging to the firm or joint proprietors, and the levying officer is entitled to the possession of the goods as against a third person who claims them.

FREEMAN, J.,—Joyner & Son were indebted to defendants, and agreed, or it was understood, that said Joyner & and Son should ship their bale of cotton in this case to defendants, and when sold, its proceeds should be appropriated by them to the payment of the debt. The cotton, says the bill of exceptions, was shipped to Bartlett, Gould & Heath, as cotton factors, for sale. When the boat on which it was shipped, arrived at the wharf at Memphis, the bill of lading was sent to Bartlett, Gould & Heath, but before anything was done by them to reduce the cotton to possession, it was attached by Saunders, or at his suit, when the factors replevied it in this suit. We take it to be clear, that the consignors were the owners of this property; it was not a sale; and that the factors had no lien, either general or special, on the cotton, without actual or constructive possession. The possession of the bill of lading was not such possession in this case, but only gave the authority to reduce the cotton to possession as consignee. See. 2d. Head, 94. The case of Kinloch v. Craig, 3d Term Rep. 119, cited and approved by Judge WRIGHT in 2d Head., was a much stronger case than the one now under consideration, yet it was held that the rights of consignee had not attached.

The next question presented by counsel is, that the attachment was against Rodney Joyner, Jr., the second member of the firm, and not against the firm, and that, therefore, the sheriff was a trespasser, not having the right to take possession of the property. This question is one of more or less difficulty, as the authorities are contradictory on the subject. Assuming that the owners were partners, it presents the question as to whether the sheriff can levy an attachment against one of the partners, on the property of the firm, and take possession by virtue of such levy. We think it settled in Tennessee, that he may do so in case of an execution, but he can only *sell* the interest of the partner against whom the process is issued. Haskins v. Everett, 4 Sneed, 531. The same doctrine was laid down in a case of joint ownership in the case of Rains v. McNairy, 4 Hum. 356, Such seems to be the weight of authority in most of the other states of the Union, as well as in England. In fact, it would seem to follow as a matter of necessity, from the principle of allowing the interest of the partner to be sold or taken at all under process against him. See 1st Amer. Lead. Cases, 382-3-4, Ed. 1871. We, therefore, hold that the attachment might properly be levied on the interest of Rodney Joyner, Jr., whether he was partner or joint owner, and the sheriff was properly in possession of the cotton, and that plaintiff below did not have the right to possession as against said officer.

We see no error in the charge. So far as it goes it is correct. It might have been fuller on the questions presented, but no request was made for any additional instructions.

Let the case be REVERSED.

Title to Grain in Public Elevators.

At the instance of several bankers we publish elsewhere in this number the opinion of the United States circuit court for Minnesota, as to the nature of the relation which exists between the depositor of wheat in a public elevator and the proprietor of the building. Such elevators are very numerous, and a large portion of the grain business of the country is transacted in them. It is the practice to issue to the depositor a warehouse receipt, and these receipts are sold and extensively used as collateral security. The nature of warehouse receipts proper is well understood. In cases of bailment, they represent the property bailed, and their transfer passes the title to it. (Gibson v. Stevens, 8 How. 884; McNeil v. Hill, Woolw. C. C. R. 96; Harris v. Bradley, 2 Dillon C. C. R. 284.)

The case of Rahilly presents some different considerations; and is said to have occasioned some surprise to business men who have, perhaps not unnaturally, regarded *all* grain warehouse receipts as standing upon the same footing.

According to the views propounded in the opinion in Rahilly's case, whether the deposit of grain in a public elevator amounts to a bailment or a sale depends upon the nature of the transaction, to be inferred, in the absence of express agreement, from the usual and known course of business. As business at these elevator warehouses is generally conducted, the transaction, in most instances, assuming the correctness of the decision in Rahilly's case, is a sale, and hence these receipts in such cases represent only the personal responsibility of the warehouseman. If this is so, it would seem that the subject is a fitting one for legislative protection to the grain depositor, by requiring the elevator proprietor to give security to the public for the benefit of his receipt holders, or in some other manner to guard them against loss.

Similar principles would apply to cotton in store. If the specific cotton is to remain in store with no power of sale in the warehouseman, it would be a bailment; but otherwise, a sale. Whoever would have a full understanding of the objections which may be urged against the doctrine of Rahilly's case, should read Judge Nelson's opinion in the same case in the court below, published at the time in the Chicago Legal News, and particularly the article in the American Law Review on Grain Elevators. (Vol. 6, p. 450.)

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Book Notices.

COMMENTARIES ON AMERICAN LAW. By JAMES KENT. 4 vols. 12th Edition. Edited by O. W. Holmes, Jr., of Boston: Little, Brown & Co. 1873. Sold by Soule, Thomas & Wentworth, St. Louis.

We have delayed to notice this edition of Kent until we could find time carefully to examine it. A comparison with preceding editions has satisfied us of its superior accuracy, fullness and value.

It is needless to enlarge upon the unequalled merits of this great and crowning work of the chancellor's life. It will perpetuate his fame to the latest times. In every respect it equals, and in some respects it surpasses, the similar work of the great English commentator. It is a noble monument to the ripe learning, the cultivated literary taste, and the wisdom that came from the long and varied judicial experience, of its illustrious author.

Unless Mr. Justice Story forms an exception, Chancellor Kent has done more than any American lawyer to make the jurisprudence of our country known and respected throughout the civilized world. In natural endowments, Marshall was the equal of either of them, and perhaps their superior, and in his long career on the Supreme Bench of the United States, he rendered services in the settlement of constitutional questions, whose value to the country are incalculable; but his name, unlike that of Story and Kent, while it is a household word in America, is not familiarly known to the lawyers of Great Britain or of Europe. The highest title of Chancellor Kent to lasting veneration, is not in his Commentaries, but in his long and arduous life upon the bench, where, almost unseen by the public eye, he gave to private suitors the benefit of his learning, wisdom, and disciplined judgment. The popular fame of the great chancellor rests however, rather upon these Commentaries than upon his Judgments contained in thirty volumes of Law and Chancery reports.

These Commentaries, it is well known, were written after the chancellor's retirement from the bench by reason of his having reached the constitutional limit then in force as to age. The first volume appeared in 1826. The author lived to correct the sixth edition. Previous to the present, five editions have, from time to time, appeared since the author's death. The present is the twelfth; and it sums up the result of a critical examination of it, to add that it is, in our judgment, the best. Since the author's death, the work has had several editors, and the notes had become cumbrous and frequently confused, and inserted without method.

We approve the plan of the present editor, which adopts the text and notes as Chancellor Kent left the work in the sixth edition, and keeps these strictly and visibly separate from the editorial additions. The great and almost authoritative weight which belongs to the opinions of the author, makes it very desirable that there should be no confusion as to what is his and what is not.

We think, also, the editor did wisely to reject, with but two exceptions, the mass of notes, which accompanied the former editions since the sixth, and to edit the work *de novo*, as this has enabled him to systematize and harmonize the editorial additions.

It is an arduous and difficult task to perform thoroughly and well the work of editing the four volumes of Kent, covering, as they do, almost the entire field of jurisprudence except criminal law. Since the author's death, a quarter of a century has elapsed, and it is quite needless to remind the reader how great, in the meantime, have been the changes, and how great have been the additions, both by enactment and adjudication, to the body of the law as it then existed. Obviously, the cardinal duty of the editor is to note these changes and additions, so as to make the work exhibit the law as it exists to-day. To do this thoroughly, methodically, without diffuseness, and yet with sufficient fullness, keeping faithfully within the scope of the original work, and not smothering it with the weight of the additions, requires patience, industry, skill, and good judgment. We find evidence of the presence and careful touch of the present editor in almost every page. After an attentive examination of his labors, we readily credit his statement that they have taken more than three years of his time. His editorial management of one of the leading law journals of the country had well prepared him for work of this character. Bearing the weight of an illustrious name, and animated, doubtless, by a noble ambition to justify the expectations it excites, he has given the profession an amount of faithful, carefully considered work that would not be likely to originate in motives any less cogent; which, we trust, will be appreciated, and which, at all events, demonstrates his various learning, capacity and unflagging industry.

We do not deem it necessary to go into much detail to verify the statements we make concerning the thoroughness with which the work has been brought down to date. The reader will find it illustrated, if he will open the first volume which treats of the Law of Nations and of War, and the Jurisprudence, Federal and State, of the United States. All the important decisions which have grown out of the late rebellion are carefully stated and properly arranged.

Two or three examples will suffice to show the manner in which Mr. Holmes has done his work. An important topic at the present time is the law concerning the removal of suits from the courts of a state to those of the United States. When Chancellor Kent wrote, the 12th section of the judiciary act was the only enactment of congress upon the subject, and he refers to but one decision. The present edition (vol. 1, p. 303), in a condensed note cites the very numerous decisions since made, and gives the points they establish. Another example: Chancellor Kent states (vol. 1, p. 410) that "if a marshal of the United States, under an execution in favor of the United States against A., should seize the property of B., the state courts have jurisdiction to protect the person and the property so illegally invaded." The editor is careful to note that the Supreme Court has twice denied this statement to be law, and refers to the many decisions touching the respective jurisdiction and powers of the federal and state tribunals. Another example: in the Lecture on Bailments (vol. 2, p. 590), the editor in a note that displays his industry and power of condensation, and which to a lawyer who should have occasion to investigate the subject, is alone worth the price of the work, discusses the question whether the deposits in grain elevators are bailments or sales, and the nature of purchases of grain therefrom. We had occasion recently to look for the cases upon this subject, and after several days' search, we discovered only a portion of those here cited, and none which are here omitted. Among other improvements, we are indebted to the present editor for subdivisions of the chapters, indicated by full-faced type; for an improved index, and for presenting all the cases cited in one table. No previous edition equals this in the style in which it is published.

Notes and Queries.

MORGANTOWN, KY., January 28th, 1874.

EDITORS CENTRAL LAW JOURNAL: My object in writing this, is to ask you a question, viz: C. held a policy of insurance, by assignment from H.; but before the assignment was ratified by the company, the house insured was destroyed by fire. C. then placed his policy in the hands of F. as special bailee. F. was sub-agent of the insurance company, and without authority, and against the order of C., surrendered the policy to the company. C. brought an action of replevin against F. to recover the policy.

Can F., as a matter of defence to C.'s action, prove that the policy was worth to C. less than the amount of insurance? or, in other words, can he prove that C. could recover nothing on the policy from the company, and that it was consequently worthless. L. J. S.

ANSWER.—The right to maintain replevin in such cases and what defences may be made to the action, may depend so much upon the local legislation and practice, that we feel scarcely warranted in making a specific answer to our correspondent's inquiry. See in Iowa, Savery v. Hays, 20 Iowa, 25, and cases there cited. As to replevin for public records and papers, see Parish &c. v. Stearns, 21 Pick. 148; School District v. Lord, 44 Maine, 374. *Contra*, LaGrange v. State Treasurer, 24 Mich. 466. Compare Desmond v. McCarty, 17 Iowa, 525.

GRANT CITY, MO., January 10, 1874.

EDITORS CENTRAL LAW JOURNAL: If you will, you may explain how homesteads of widows and children become a vested fee in the widow when the children attain their majority, subject to be disposed of by her in such a way as to defeat their reversionary interest. I am placed in this dilemma by Kelly in his Chapter on Homesteads, Probate Guide, pages 361 and 362, while section 1 and 2, chap. 130, G. S., seem to me to conflict with his opinion. W. J. G.

ANSWER.—There appear to be no decisions in this state illustrating the question; and professional opinion here (at Saint Louis) is somewhat divided as to the construction of the 5th section of our homestead law. By some, it is regarded substantially as a statute of *descents*, vesting in the widow the fee or whatever estate the husband had, subject to an incumbrance, namely, the right of the children so long as they re-

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main in their minority, to an occupancy in common with the widow. According to this theory, upon the youngest child becoming of age, the fee (or whatever estate the husband possessed) becomes an absolute estate in the widow, which she may alienate at pleasure, and which, upon her death, descends *to her heirs* and not to the heirs of the husband. Upon the happening of this event, if this view be the correct one, the estate becomes *by operation of the statute*, a vested fee in the widow, subject to be disposed of by her so as to defeat the reversionary interest of the children, in precisely the same way as *any other heir* takes the estate of his or her ancestor by virtue of the statute of descents. In other words, in this view of the statute, the wife is simply the heir of the husband in respect of the homestead property, subject to the incumbrance before mentioned.

But is this the correct view? Other members of our bar (and some of our judges) are of opinion that the statute is not a statute of *descents*, but a statute of *exemptions* merely; that its object and policy are simply to prevent creditors from sweeping away the homestead and pauperizing the family, and that when this object is attained, the whole force of the statute is discharged. According to this view, the wife, upon the death of the husband, takes a possessory interest merely in the homestead property, which she holds during her life, subject to the right of common user of the children during their minority; she may not alienate it during the minority of the children, so as to deprive them of this right of common user, nor after their majority, so as to defeat their reversionary interest; and upon her death, it passes under the general statute of descents, *to the heirs of the husband*. In opposition to the view that the widow takes the fee, it is urged that upon the death of the widow without issue, the estate would pass to her collateral relatives—an injustice to children which the husband may have had by a former marriage, which the legislature never could have intended. And it is hence urged, that when the law has succeeded in securing a homestead to the widow and minor children, not subject to be taken for the debts of the husband, the boundaries of the legislative intent are reached; and that it is a perversion of the statute to go beyond those boundaries and interpret it as changing the general statute of descents, altering the rights of widow and children *inter se* thereunder, and perhaps disinheriting the children of the husband in favor of distant relatives of the wife.

Without expressing any definite views of our own upon the question, we would say that our homestead law, G. S. ch. III.; 1 W. S., ch. 68, is copied from the Vermont, act, of 1855, (Gen. Statutes Vt. ed. of 1863, p. 456). It would follow that, until it is expounded by our own supreme court, we should naturally look to the decisions of that state for its exposition. The 5th section of the Vermont statute is the same as our 5th section, with one or two slight verbal alterations which do not change the meaning; and the understanding of the supreme court of that state appears to be that it passes the fee, (or the full estate which the husband had,) to the widow, subject to the right of user in common with her, by the children during their minority. See Doane v. Heirs of Doane, 33 Vt. 649, 652; Day v. Adams, 42 Vt. 510, 516. See also 1 Washburn on Real Property, 352, where Prof. Washburn describes the interest of the wife, under the Vermont statute as follows: "The homestead belongs to her *in fee*, vesting upon the death of the husband, and on her death descends *to her heirs*." The late case of Day v. Adams, 42 Vt. 510, is, however, thought by some to support a different view.

Notes of Recent Tennessee Decisions.

IN THE SUPREME COURT AT JACKSON.

[Courtesy of Hon. J. O. Pierce of Memphis.]

Bonds of State and County Tax Collector.—The bonds were taken by the county commissioners, who have been since held to be usurpers of office. Though all the acts of the county commissioners were nullities, if it appear that the bonds were given for purposes which make it the interest of the state to accept them, acceptance will be presumed. State v. McLean, October Term, 1873.

Chancery Practice.—It is not the effect of consolidating causes, without more, to make the testimony taken in one cause apply as well to the other. Lofland v. Coward, October Term, 1873. See *Parties—Relief.*

Confederate Money.—Under pleas of *nil debet* and payment, the plaintiff need not account for the value of Confederate money received by him under duress, because there was no contract. Wilkins v. Fransioli, October Term, 1873.

Where an agency was revoked by the breaking out of the war, but the acts of the agent were subsequently ratified, the principal must account for the value, as scaled, of Confederate money received by the agent. Bruce v. Houghton, October Term, 1873.

Execution.—Property levied on by, and for which a delivery bond is taken, is *in custodia legis* until the forfeiture of the bond. James v. Kennedy, April Term, 1872; James v. Kennedy, April Term, 1873.

Fraud.—Gross inadequacy of price in a sale, is evidence of fraud, as affecting rights of creditors. Hartsfield v. Simmons, April Term, 1873.

———. If the bill alleges facts which constitute fraud, it is not necessary that they be so characterized. Moore v. Shepherd, October Term, 1873.

———. If one seeks to rescind a contract for fraud, he must give notice in a reasonable time after discovering the fraud, and if after knowledge he by act or by silence indicate an acquiescence, he cannot ask rescission. Gilbert v. Hunnewell, October Term, 1873.

Judgment.—see *Nul tiel record.*

Jury.—Want of instructions to, which are not demanded, is not error, if the charge as given reflects carefully and without obscurity the principles applicable to the case. Plunkett v. Robbins, October Term, 1873. See *Verdict.*

Justice of Peace—has no jurisdiction over $50—in a suit against a steamboat under the lien law. Goodloe v. Str. Lloyd, October Term, 1873.

———. Is not punishable for profanity by dismissal from office unless especially indicted therefor as a J. P. Carpenter v. State, Oct. Term, 1873.

Municipal Corporation.—A return of *nulla bona* on an execution against, is not alone sufficient cause for a mandamus to levy a tax. Kimbro v. Memphis, October Term, 1873.

Nul tiel record.—On plea of, in a suit on a foreign judgment, the court may try the question, whether the foreign court had jurisdiction of defendant's person. Barrett v. Oppenheimer, October Term, 1873.

Parties, in chancery.—A purchaser *pendente lite* being in any event bound by the result of the suit, he is not a necessary party, and the court is not bound to admit him as a party. Amer. Exch. Bank v. Andrews, October Term, 1873.

Partnership.—On an issue between the firm and third persons, as to the existence of the firm, while the articles alone are not evidence in its favor, (see 14 Wall. 570), they are still competent, when extrinsic evidence shows they were made on the day they bear date. Plunkett v. Robbins, Oct. Term, 1873.

———. In a suit against, on notes given by one partner in firm name, after dissolution, (plaintiffs having knowledge of the dissolution), in renewal of notes accrued before dissolution, the other parteners pleading *non est factum*, he is held discharged from the original consideration by the acceptance of the new notes, and discharged on the first notes because they were not sued. Farnsworth v. Wade, Oct. Term, 1873.

Relief.—Under a prayer for general, relief may be granted different from that specifically prayed for, if not inconsistent with case made by the bill. James v. Kennedy, April Term, 1873.

Rescission.—See *Fraud.*

Return.—Of Sheriff, upon an execution, may be attacked in chancery, for fraud or mistake. (Acc. 11 Hum. 526.) James v. Kennedy, April Term, 1872.

Taxes.—Though the assessment of, was unconstitutional, yet, as they were paid by the tax payers without protest, and are now in the hands of the tax-collector, he must refund to the state and county, and the remedy by motion exists. State v. McLean, October Term, 1873.

[CONTINUED IN OUR NEXT.]

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass'te Editor.

ST. LOUIS, THURSDAY, FEBRUARY 19, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

Bankrupt Act—Corporation—Deed of Trust Executed by Officers Without Authority—Ratification, Effect of.

The last number of the National Bankruptcy Register (vol. 9, p. 76) contains an interesting opinion from J. K. CRAVENS, Esq., register in bankruptcy for the western district of Missouri, in which he rules the following propositions:

1. Where an officer of a corporation, without authority, executed a deed of trust upon its property, as security for the payment of a negotiable instrument, more than four months prior to the commencement of proceedings in bankruptcy, and no ratification takes place until within four months of the commencement of proceedings, the deed will be held to have been executed at date of ratification.

2. An act done in the name of another, but without previous authority, does not become his act until ratified, and then only by the fiction of relation; and the act of ratification, to relate, must take place at a time, and under circumstances, when the ratifier may himself lawfully do the act which he ratifies. He must be able at the time to make the contract to which by his ratification he gives validity. By ratification he cannot acquire nor confer rights resulting from a transaction, unless in a position to enter directly upon a similar transaction.

3. Where security for the payment of negotiable paper is taken in violation of the bankrupt law, and the paper is transferred by endorsement before maturity, for value, to an innocent taker, the security may be defeated when asserted by the indorsee the same as if asserted by the original holder. But as the indorsee only takes the security as an incident to the debt, and does not exact it from the insolvent, he may prove his claim without prejudice, while the security will be rejected. [As to this last proposition see, however, Carpenter v. Longan, 16 Wall. 271; Kennicott v. Supervisors, Ib. 452, where the reverse is held.] We hope to find space hereafter for the full text of Mr. Register CRAVEN'S opinion, which was evidently prepared with care.

Writ of Error: When Served—Supersedeas Bond—Act of Congress of June 1, 1872, Section 11, Construed.

The Supreme Court of the United States, in the case of the Western Union Tel. Co. v. Eyser, recently decided, has construed the practice act of congress, of June 1, 1872, sec. 11, as to the *time and manner of superseding judgments*, pending proceedings on writ of error or appeal. That section is as follows:

"That any party or person desiring to have any judgment, decree or order, of any district or circuit court, reviewed on writ of error or appeal, and to stay proceedings thereon during the pendency of such writ of error or appeal, may give the security required by law therefor, within sixty days after the rendition of such judgment, decree or order, or afterward, with the permission of a justice or judge of the said appellate court."

It will be recollected that the 23d section of the judiciary act of 1789 declares "that a writ of error as aforesaid shall be a supersedeas and stay of execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the judgment remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of."

The position was taken that since the act of June 1, 1872, sec. 11, *supra*, it was still necessary to serve a copy of the writ of error within *ten* days from the rendition of the judgment. But after referring to the above enactments, to the 2d section of the act of 1803, (placing appeals upon the footing of writs of error,) and to rule 29 of the Supreme Court, that court holds that the writ of error, under the act of June 1, 1872, sec. 11, which is remedial, and, therefore, to be liberally construed, may be "served at any time before or simultaneously with the filing of the bond." Discussing the point thus ruled, Mr. Justice SWAYNE says: "It is expressly declared that the supersedeas bond may be executed within sixty days after the rendition of the judgment, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before or simultaneously with the filing of the bond. Indeed, the giving of the bond alone is made the condition of the stay. The section is silent as to the writ. A construction which requires the service to be still within ten days from the rendering of the judgment is, we think, too narrow. It is sustained by no sufficient reason, and would largely defeat the salutary purposes of the statute. The execution, approval, and filing of the bond are substantial. The filing of the writ is matter of form. Form, under the circumstances, must not be allowed to defeat substance, where the consequences would be of so serious a character."

Bankrupt Proceedings against Corporations—Authority of Counsel.

In Leiter v. Payson, assignee of the Republic Fire Ins. Co. (6 Chicago Legal News, 157), DRUMMOND, circuit judge, decides, construing the bankrupt act, and particularly section 37, that when a petition in bankruptcy is filed *against* a corporation, it is not necessary that the authority to employ counsel, and the authority of counsel to file an answer confessing the acts of bankruptcy, should be previously sanctioned by a vote of the stockholders; and an adjudication upon a confession in an answer filed by counsel, where there was no question as to their employment or as to their good faith, was sustained.

In the course of his opinion, Judge DRUMMOND observes:

"It might be said, with as much reason, that where a corporation is made an involuntary party, indirectly or collaterally, in a bankruptcy proceeding, counsel could not appear to represent it, unless expressly authorized by a vote of the corporators or shareholders. And that would hardly be con-

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tended. It is conceded by petitioners here, that, if the proceedings had gone on in the usual way—if there had been a default and adjudication in bankruptcy rendered, or an appearance by counsel and a hearing or trial, and verdict and a decision of the court making an adjudication—a vote of the corporators would be immaterial, but it is denied that the rule applies to the case of appearance and of a cognovit made by counsel. The necessity for resorting to a vote of the corporators would not seem to exist, in as great degree, in one case as in the other. The corporation, in this case, was not a volunteer. It was compelled to come into court, and plead in conformity with the rules of the court. As it could appear by counsel without a vote of the corporators, there was nothing to prevent counsel, when warranted in so doing by the regular agents of the corporation, from admitting the acts of bankruptcy stated in the petition, provided, upon a proper examination, they were satisfied that the allegations were true, and that a trial or hearing would involve unnecessary expense and delay, and be no advantage to the corporation itself or its creditors. There is no question made as to authority having been given counsel by the proper officers of the corporation, nor of the good faith of either, nor of their having acted upon the subject matter after proper enquiry. All these points must be assumed in favor of the acts of counsel and of the officers of the corporation. The question is, then, simply as to the authority of the corporation to act through counsel in the manner pursued here, and the case would hardly seem to be one calling very stringently for the exercise of the power of interference of the district or of this court."

Illinois Warehouse Law—Legislative Control over Storage Rates.

We publish elsewhere the full text of the opinions of the judges of the supreme court of Illinois on the warehouse law of that state, passed April 25, 1871, entitled "An act to regulate public warehouses, and the warehousing and inspection of grain, and to give effect to Art. 13 of the new constitution of the state." The nature of this article of the constitution appears in the separate opinion of WALKER, J., who rests his judgment, concurring with the majority, wholly upon it. It will be seen that the judges, with the exception of McALLISTER and SCOTT, JJ., sustain the constitutional validity of the enactment.

This opinion is one of unusual interest, in two respects. First, as a determination of the immediate question involved, viz: the extent of legislative control over the compensation of grain-warehousemen in the state of Illinois; and second, because of its real or supposed bearing upon the right of the legislature to regulate the compensation of those who conduct other employments which affect the public weal, such as railway companies.

The act in question treats the grain warehouses of Chicago as *public* warehouses, though owned by private persons, and established and conducted without any charter or special franchise, and fixes the maximum rate of compensation to be received by the proprietors, and prohibits them, under severe penalties, from contracting with customers for any higher rates. It requires the proprietors of the warehouses also to obtain a license to carry on the business, and to give bond with sureties, for compliance with all of the requirements of the law. Munn & Scott, who were the proprietors of a grain warehouse, and had been for many years before the act of July 1, 1871, continued after the passage of that act to carry on their business without obtaining the required license; and, therefore, they were convicted in the lower court and sentenced to pay a fine of $100 and costs. They sought to reverse this judgment on the ground that the act was in conflict with certain provisions of both the federal and state constitutions; and the question of its constitutional validity was the only one decided by the court.

The majority of the court place their decision upon the ground, not of any special power conferred upon the legislature by Art. 13 of the state constitution, but upon the broad ground that the interests involved in the legislation concerning grain warehouses are public, such as intimately concern the general welfare, and therefore are within the rightful domain of legislative power unless withdrawn by some express constitutional provision. To sustain an act of the legislature, if possible, is the acknowledged duty of the judicial tribunals; and in this view, the majority of the court treat the act as intended to prevent the evils which come from a combination between the railroad companies and elevator proprietors, to the detriment of the producers and shippers of grain, who are said to be "under a kind of *moral duress*" to use these warehouses, and as intended, also, to prevent unreasonable and oppressive charges for such use.

The decision authoritatively establishes for the state of Illinois, that such legislation does not "*deprive*" warehousemen "of their *property* without due process of law"; that it does not "take or damage private property for public use without just compensation," and also, that it is not repugnant to any other provision of the state constitution.

Although it may not follow from the judgment of the court, that the legislature, on the assumption that the majority view is sound, would have the extensive powers supposed by Judge McALLISTER in his dissenting opinion, yet the logic or principle of the decision is that the legislative control over property is such that *whenever it is necessary for the protection of the public interests*, the prices which may be charged for the use of such property, or for services of a given character, which the public are under a sort of necessity to have, may be regulated or fixed by the legislature, and that the power of individuals in such cases to fix their own terms or rates, is not unlimited. It is only in this aspect that the decision bears upon the power of state legislatures to control railway tariffs.

If a railway company has the right to fix its own rates for freights and fares under its charter, operating as a legislative *contract* to this effect, it is obvious that this decision does not affect the right of such a company. Whether a railway company has such a right under the doctrine of the Dartmouth College case, is a subject we do not propose now to discuss, and to which we made allusion, in some of its aspects, in a previous number. But if there is no such right given or existing in the nature of a legislative *contract*, which is inviolable by *state* legislation, then the course of the reasoning of the supreme court of Illinois on the subject of compensation to public warehousemen, seems to be applicable to compensation to railway companies, except so far as this may be affected by the *exclusive* power of congress over all that relates to inter-state commerce and the agents and instrumentalities by which it is conducted.

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Validity of the Illinois Warehouse Law.

MUNN & SCOTT v. THE PEOPLE.

Supreme Court of Illinois, February 3, 1874.

Hon. SIDNEY BREESE, Chief Justice.
" PINKNEY H. WALKER,
" BENJAMIN R. SHELDON,
" JOHN M. SCOTT,
" W. K. MCALLISTER,
" A. M. CRAIG,
" JOHN SCHOLFIELD,
} Judges.

1. **Constitutional Law—Illinois Warehouse Law.**—The Illinois act "to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of the state," approved April 25, 1871, is a valid and constitutional enactment.

2. **Fourteenth Amendment.**—The said statute is not repugnant to the fourteenth amendment of the federal constitution.

3. ——. **Special Laws—Exclusive Privileges.**—Nor is it repugnant to the inhibition in the constitution of Illinois against "local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."

4. ——. **Bill of Rights—"Due Process of Law."**—Nor does the legislative regulation of warehouses in the manner prescribed by said act involve a deprivation of "life, liberty or property without due process of law," contrary to the Illinois bill of rights, art. 2, clause 2.

5. ——. ——. **Future Profits not Property.**—Future profits in a business already established are not property; and a law which abridges such profits for the protection of the public does not destroy property, and is not unconstitutional.

6. ——. ——. **Kindred subjects, Mills, Ferries, etc.**—And held *arguendo*, that the act in question falls in the same category with laws regulating public ferries, public mills, the weight and price of bread, and the interest upon money.

7. ——. ——. **Taking Private Property for Public Use.**—Nor is the statute in question obnoxious to clause 13 of art. 2 of the constitution of Illinois, which provides that "private property shall not be taken or damaged for public use without just compensation."

8. ——. ——. **Inherent Powers of Government.**—The power exercised by the legislature in the passage of this law, belongs inherently in every government, and the legislature may exercise it without the aid of any constitutional grant.

9. ——. ——. **The Power Conferred by the Constitution.**—WALKER, J., concurring, considered that in view of the fact that the power to pass the statute in question is expressly conferred by the constitution of the state, the correct result was reached by the majority of the court, but declined to express any opinion as to the *inherent power* of the state legislature to pass such a law.

10. ——. ——. **Dissenting Opinions.**—MCALLISTER, J., dissenting (with whom SCOTT, J., concurred), was of opinion that the act in question is an infringement of the right to *acquire* and *enjoy* property; that it is, hence, an invasion of vested rights; that it involves an exercise of the power of *suppression* or *destruction* of private property—a power which has no limit as to the *degree* of its exercise but the discretion of the legislature; and that it is an invasion, under pretence of police regulation, of the power of the federal government to regulate inter-state commerce.

BREESE, Ch. J., delivered the opinion of the court.

This was a proceeding by information in the Criminal Court of Cook County, on behalf of the People against Ira Y. Munn and George L. Scott, for a violation of the 3d and 4th sections of an act of the General Assembly of this State, entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of the state," approved April 25, 1871. The information was filed by the state's attorney at the July term, 1872. A motion to quash having been overruled, the defendants pleaded not guilty, waived a trial by jury, and submitted the case to the court. The court found the defendants guilty, and, overruling a motion for a new trial and in arrest of judgment, assessed against them a fine of $100 and the costs. To reverse this judgment the defendants bring the record here by writ of error, assigning various errors, one of which raises the question of the constitutionality of the act under which the proceedings were had, and is the only important question in the case.

This is the second argument of the cause. On the first argument, at the last term, the court, after much deliberation, were unable to reach a satisfactory conclusion. In the meantime the court had undergone a change by the election of two new members, and it was deemed expedient and proper that they should take part in the decision; and, to enable them to participate, a reargument was directed, and the questions have again been fully, elaborately, and ably discussed. A case of so much importance demanded, and has received, our most careful consideration, and we are prepared to state the conclusions which a majority of the court has reached. We do not deem it necessary to take up seriatim and discuss the various propositions presented by counsel, or go over the field of argument they have so fully explored; but, in what we shall say, it will be found they have all been considered.

Plaintiffs in error insist the statute in question is repugnant to the provisions of our constitution found in the bill of rights, as clause 2 of article 2: "No person shall be deprived of life, liberty or property, without due process of law;" and to this other provision in clause 13 of the same article: "Private property shall not be taken or damaged for public use without just compensation." One of the counsel for appellants makes these points in addition: The act is repugnant to the fourteenth amendment of the constitution of the United States; and further, if its provisions can be construed as an inhibition of the warehousing business, except under special conditions, and as conferring the privilege of doing that kind of business upon persons able or willing to comply and actually complying with these conditions, then, in so far as it is not based on article 13 of the state constitution, it is repugnant to sec. 22 of article 4, which prohibits the general assembly from passing any local or special laws "granting to any corporation, association, or individual, any special or exclusive privileges or immunity whatever." We will consider these propositions first, as they appear to be thrown into the controversy as mere make-weights,—the real merits resting in the two first.

As to the repugnancy of the warehouse act to the 1st clause of the fourteenth amendment to the constitution of the United States, a slight consideration of that amendment and judicial decisions upon it will be sufficient to satisfy any one, itt has no application to this case. That amendment is as follows: "All persons born or naturalized in the United States, or subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." It is well known the amendment in question was incorporated into the federal constitution to shield a certain class, who had been born and reared in slavery, from pernicious legislation, by which their newly-acquired rights by their emancipation might be so crippled as to render them wholly worthless. In the discussions upon the effect of this amendment, in the slaughter-house cases from New Orleans, and the case of Myra Bradwell, plaintiff in error, taken up from this court, it was not intimated by the Supreme Court of the United States that a regulation by a state legislature of a permit or profession, as a regulation of the use of property, abridged in any manner the liberty of the citizen, white or black.

Upon the other proposition, we cannot perceive that the statute can receive the construction contended for. The section relied on is in these words: "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say." Then follows a large number of specified subjects, the last of which is this: "Granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatever." The inhibition extends only to passing special laws for such purpose. But the law in question is general in its objects, operative throughout the state, and confers no immunity, or special or exclusive privilege or franchise, upon any individual, association, or corporation. It deals with an existing business, closely associated with the great agricultural interests of the state, and seeks to regulate it by laws. This is the whole scope of the act.

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But the important question remains as presented on the first two points made by appellants, and argued with great ability. Does the act in question deprive the owners or managers of this warehouse of their property, in the sense of the constitution? If it does, it is void, and must be so declared. This view of appellants seems to be based, in a great degree, on the fact that they had constructed their warehouse and established the business long anterior to the enactment of this law. It was established while there was free trade in the business, and their charges were subject to regulation only by competition and agreement, and they now claim a right to continue such use without legislative restraint. They further say they have complied with all the provisions of the act, except the one requiring them to take out a license and enter into bond. The argument is, by this legislative interference they are deprived of the use of their property, and, so depriving them of its free and untrammeled use, they are deprived of their property in the sense of this clause of the Bill of Rights. Much ingenious argument has been employed to establish this proposition, and the case of Wynehamer v. The People, 3 Kiernan, N. Y., 378, cited as 13 N. Y., invoked in support, and greatly relied on. We have looked into that case, and find that the court were divided in opinion, and that the judges who held the act unconstitutional were led to that conclusion because, by the terms of the act itself, the property in intoxicating liquors was substantially destroyed, and thus the owner deprived of his property by mere legislative will. They say if the act by its terms had been applicable only to liquors imported or manufactured after it took effect, it would not have been in conflict with the constitutional provision declaring that "No person shall be deprived of life, liberty, or property, without due process of law." The question before the court was, "Did the prohibitions and penalties of the act pass the boundaries of trade-regulation and police, and, by their own force, work the essential loss or destruction of the property at which it was aimed?" The laws in question subjected the liquors to seizure and physical destruction; and, as they were, in every sense of the term, property, and so recognized by law, the owner was, by mere legislation, deprived of his property. It was held that, by the operation of this law, the commercial value of the liquor was annihilated; that it could not be sold; that it was unlawful to keep it; that all legal protection was withdrawn from it, and that it had become a public nuisance. These provisions and results, it was held, swept the liquors from the commerce of the state, and thus annihilated the quality of sale which made them valuable to the owner. This, it was held, was destructive of the notion of property.

It was further said, when a law annihilates the value of property, and strips it of those attributes by which alone it is distinguished as property, the owner is deprived of it, according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended to shield private rights from the exercise of arbitrary power.

This case is much relied on by one of the counsel for appellant, and a labored effort made to bring this within its scope. But the distinction is so obvious that "he who runs may read." Had the act in question sought to deprive warehousemen of any of their antecedent acquisitions, or deprive them of the use of their establishments, or confiscate them, as was the case with the New York liquor law, there would be some appositeness and analogy.

Nothing of the kind has been done or attempted; and it is not even complained by the plaintiffs in error that, by compliance with these sections of the law, they would not receive a fair remuneration on their capital invested, and a reasonable recompense for all their labor and responsibility. In the case relied on, the majority admitted the legislature could regulate trade in property of all kinds, but they could not totally annihilate commerce in any species of property, and so condemn the property itself to extinction. It was on this latter ground that the law was held invalid. What analogy, we ask, is there in these cases? Does the act of our general assembly destroy any species of property, or deprive its owners of the use of it? It does not aim at the extinction of these warehouses, or any of their attributes. The statute may affect them injuriously in a degree, but it does not say they shall not be allowed to exist at all. The constitutional provision is: "No person shall be *deprived* of life, liberty, property," and so forth. This clause, so taken, declares that, in the exercise of the admitted functions of government, private property may not receive remote and consequent injury. No person can claim that, in the exercise of the proper functions of government, his property shall not be diminished in value. The point is, the owner shall not be deprived of his property without due process of law. If, in the exercise of any admitted functions of government, a person's property is rendered less valuable, can it be seriously claimed this provision in the bill of rights has been infringed?

Government in this State is reposed in three departments, composed of separate bodies of magistracy. The whole legislative power is vested by the constitution in the general assembly, composed of two houses—the members of each to have certain qualifications, and to be elected by the people. Every subject within the domain of legislation, within the scope of civil government, not withdrawn from it by the constitution of the state or of the United States, can be dealt with by that body by general laws to affect the whole state and all the people within it. That body is emphatically the guardian of the public interests and welfare, and would be derelict in its duty did it fail to exercise all its powers to their promotion and protection. That body is the sole judge of such measures as may advance the interests of the people. Coming, as its members do, directly from the people, and of them, they know the course of trade, the manner in which the great internal commerce of the state is conducted, and by what instrumentalities, and how by them the producing and other interests of the state are affected. These, it must be conceded, are all fit subjects for legislative consideration, and independent of any constitutional provision; and they would have an undoubted right, knowing that a large proportion of our cereals, to reach the markets of the world, were compelled to pass through certain warehouses called elevators, and subjected to such charges as their owners might see fit to impose, to take up this whole subject as one legitimately within their domain; and if, in their examination of it, they find the owners and managers of these warehouses are an organized body of monopolists, possessing sufficient strength, in their combination and by their connection with the railroads of the state, to impose their own terms upon the producers and shippers of these cereals, to the great detriment of the latter, who are under a kind of moral duress in sending to them, can it be said to be an usurpation of power on the part of the legislature to bring them in subjection to law, so to regulate their conduct and charges by law as to prevent oppression and extortion? Can there be a more legitimate subject for the action of a legislative body? We think not. Shall it be said an interest so vast as this is does not deserve governmental care, and is not a proper subject of some kind of governmental control? And if, in the means provided by the legislature to that end, some reduction in their monthly or annual receipts may be the result, can it be said the owners are thereby deprived of their property? In the case so much relied on, *supra*, it was admitted it was not sufficient; the law might impair the value of the property in even so great a degree as that, and yet destroy no rights. It does not deprive the owner of any right of property. All regulations of trade with a view to the public interests may more or less impair the value of property, but they do not come within the constitutional inhibition unless they virtually take away and destroy those rights in which property consists. Their destruction must be, for all substantial purposes, total. By the law under consideration, no right of property is taken away or destroyed.

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All the property the owners ever possessed in this business remains to them untouched by the strong hand of legislative power. The law must be held to be one potent effort on the part of the legislature to arrest a great and growing evil, by regulating the charges which these warehouses shall demand, and placing them under bonds that they will not violate its provisions.

Great stress is laid on the fact that this warehouse was erected in 1862, long anterior to the passage of the laws, and by this kind of legislation the alternative is presented, either to abandon the use of the property for which it was fitted, or to do business for less compensation than its owners had theretofore and always received. In another part of their argument they say that they, by consent of their customers, have received, during the past year, higher rates of storage than those specified in the act; and so, in this respect, the act is a plain, palpable violation of the clause of the constitution relied on; that depriving them of the value of the use is depriving them of their property. This argument is answered by what we have already said.

It is idle to talk about the consent of their customers to higher rates of charges than this law allows a man to receive. Their customers, before this law was enacted, had no protection against those monopolists; they had no consent to give; they were obliged to have their grain taken to these warehouses, and be subjected to such charges as the organized combination, shutting out competition, might choose to demand. The producer and shipper had no alternative but submission; they were completely in the power of this combination, and it did not fail to demand and enact the highest charges. It is this state of things the law is designed to remedy. One of the first and most imperative duties of the law-making power is to enact all necessary laws to remedy existing evils, taking care, in so doing, not to transgress any constitutional limitation. The means by which to do so most effectually is in the discretion of the legislature, keeping in view the provisions of the organic law. This law in no respect affects the title, possession, or use of this warehouse, by the plaintiff in error. It deprives them of nothing they owned or possessed at the time of its enactment. Anticipated profits are not, and cannot be, held and regarded as property in the ownership and possession of him who owns the article out of which profits are expected to flow. The property is one thing and remains untouched; the profits are not *in esse*, and cannot be claimed as property. When it is said one is deprived of his property, the understanding is, it has been taken away from him—he is divested of title and possession. This provision in the bill of rights has never been so construed by the courts of any state whose constitution has such a provision as to deny to the legislature the power to make all needful rules and regulations respecting use and enjoyment of property. Ever since the organization of our state government the legislature has exercised this power unquestioned. Familiar instances are found in regulating public ferries and public mills. and affixing the compensation in the shape of toll. Another is in delegating power to municipal bodies to regulate the charges of hackmen and draymen, and the weight and price of bread; but, in a property the most largely sought after by all classes of the community, and deemed the most valuable of any, as it controls all others, the legislative power of every state in the Union has been brought to bear upon it, and no court has ever questioned the right so to do. We allude to the interest laws—laws declaring at what rate a man may loan his money. The argument used here, it seems to us, would pronounce these laws unconstitutional; for they do regulate the use of a man's property; they do fix a value upon its uses; and as all observation shows, in most localities, greatly below its market-value. It may be answered, such has been the policy of states, and such legislation has been so universal and continuous as to have familiarized the people to it, and who have adapted their business to its requirements. But here they say, "we were in this business when it was free and unrestricted, and this new policy abridges our gains. It was rightful," they say, "to engage in this business, and so to employ our capital that we may make the largest gains out of it." The interest on money loaned is by law six per cent., with the right to contract for ten per cent., and such has been the law for a long series of years. Under the cover of that law, capitalists have engaged in loaning money at those rates. Some, on the strength of it, have erected costly buildings of granite and marble in which to transact their vast business, surrounded by a corps of clerks and other officials, to whom high salaries are paid.

Will any one deny, after this banker has completed his structure and arranged everything in profitable working order, that the general assembly may declare by law that, after the passage of the law, the legal rate of interest shall be four per cent., and it shall be extortion to contract for more than six per cent., and a violation of the law, to be punishable by fine and imprisonment, or both, in the discretion of the court? Would the money-lender have any right to complain? Would his appeal to this clause in the bill of rights be listened to for a moment? Would any court in Christendom condemn such an enactment as unwarranted by the fundamental law? The use of money is a matter of the greatest public concern, and that it may be regulated by law has never been authoritatively denied. Kindred subjects, such as public warehouses, public mills, the weight and price of bread, and public ferries, are so connected with the public welfare that a government destitute of the power to regulate them, to impose such restrictions upon them as may be deemed necessary to promote the greatest good of the greatest number, would be but the shadow of a government, whose blazonry might well be a "cap and bells" and a pointless spear.

We have not remarked upon article 13, under which this law is supposed to have its efficiency, for the reason we hold the law as effectual for all the purposes contemplated by it, and as valid without as with this article. The article itself seems out of place in an organic law; but the convention, however incongruous it may appear, had undoubtedly the right to put it there. That body could not withstand the appeals that went up to them from the producers and shippers of the great and indispensable wants of man, and forming the most valuable portion of our staple productions, to provide some remedy against the aggression and extortions to which they were subjected by this organized combination of monopolists, already such a formidable power, with but one heart, and that palpitating for excessive gains. We place the right to legislate on this subject upon that power, call it by what name you will, inherent in every organized civil government. Every sovereign power possesses inherently unlimited legislative power when the organic law imposes no restraints. The power to legislate on all subjects affecting the great interests of the whole community must be conceded to exist, and it will not cease to exist until civil government shall be resolved into its original elements. We have nothing to do with the policy of this enactment. That was a question exclusively within the jurisdiction of the general assembly, which under no circumstances has the judicial department a right to question or arraign.

We think what we have said disposes of the other point made by plaintiffs in error, arraigning the law as violative of sec. 13 of art. 2. There is no taking or damaging private property here, and devoting it to public ure. It is an expression of the will of the people, through their representatives in the general assembly, that these instruments of oppression and extortion shall be brought into subjection, to the great relief of the people. We are of opinion the law is a valid, constitutional enactment; and so believing, affirm the judgment of the criminal court.

WALKER, J.—The constitution authorizes the general assembly to pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce, and to prescribe by law such other and further remedies as may be found

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expedient—not to deprive any person of existing common law remedies—to regulate warehouses. This, I think, confers ample power to enact the law under consideration. I, however, express no opinion as to such power independent of these constitutional provisions. I, therefore, concur with the majority of the court in the decision announced.

McALLISTER, J., dissenting.—In 1862, Munn & Scott, the plaintiffs in error, having leased premises, as a mere private enterprise, erected thereon the warehouse described in the information, in which to store grain for hire. They then commenced the business of warehousemen, which was continued down to the commencement of this prosecution for carrying it on without a license from the circuit court of Cook county so to do. It is not disputed that, for the nine years they carried on the business before July 1, 1871, when the act in question went into force, they held title to the premises and exercised their employment in accordance with the law of the land; and it is not pretended that they did so under any grant of the legislature in the nature of a franchise or privilege. Their property was private property; their business was wholly a private enterprise; and their rights in both were necessarily the rights of private property. These propositions cannot be successfully controverted.

On account of the views expressed by my brethren, and the conclusions arrived at, it becomes necessary to examine the questions involved in this case upon elementary grounds. All consideration of a franchise being excluded from the case, the examination, so far as it relates to the nature of their rights, may be regarded as precisely the same as those by which any individual may base a claim of private rights and constitutional protection. The natural rights of individuals are antecedent to and exist independently of the constitution. It is the office of the latter to secure, not to create or bestow them. Therefore, the extent of constitutional protection can only be determined by a correct definition of the rights it was intended to secure. For that purpose I shall rely upon one authority alone, as none can question it.

Chancellor Kent says: "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty and the right to *acquire* and *enjoy* property. These rights have been justly considered and frequently declared by the people of this country to be natural, inherent, and inalienable." 1 Kent's Com. (Comstock's Ed.), 587. Again, on the same page he says: "Right itself, in civil society, is that which any man is entitled to have or to do, or to require from others, within the limits prescribed by law."

Then plaintiffs in error, it must be conceded, had a natural, inherent right to acquire the leasehold estate, to erect the warehouse upon it, and employ the same in the business of storing grain for reasonable reward or hire; and, when the act in question went into force, that right was a vested one.

As was said by CHASE, J., in Calder v. Bull, 3 Dallas, 394: "When I say that a right is *vested* in a citizen, I mean that he has the power *to do certain actions*, or to possess certain things, according to the law of the land." And again: "If any one has a right to property, such right is a perfect and exclusive right." It is to secure these rights that governments are instituted. I cannot stop to give even a brief account of the development or the definition of the natural rights of individuals as recognized by the common law long before the American Revolution, or how the words of Magna Charta became fundamental in all our state governments, and incorporated into the constitution of the United States. I am considering a question now solely under the constitution of this state—the very first section of which, after enumerating the rights of personal security and personal liberty, declares: "To secure these rights and the protection of property, governments are instituted among men," etc. Then the next section embodies the great fundamental declaration of Magna Charta, that "No person shall be deprived of life, liberty, or property, without due process of law." Here, it will be perceived, are three subjects, each expressed by a single word respectively answering to and covering the three absolute natural rights, viz: the right of personal security, the right of personal liberty, and the right to *acquire* and *enjoy* property. It will be further perceived that the right of property is placed upon the same footing as the rights of personal security and liberty; and why, in point of reason and philosophy, should not this be so? It must be admitted that the sense of property is deeply implanted in human nature—is inherent in man; and, if we are to infer a purpose from results, this sense must have been bestowed for the purpose of rousing mankind from sloth and stimulating them to activity, and has, in fact, had far greater influence in founding civil government upon correct principles than any other motive or perception of the human mind. In the elegant and comprehensive language of Kent, "The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections."

Such being the beneficent influence of the natural sense of property in forming and animating all the institutions of a true civilization, the right to its gratification, within the limits of law, was regarded as an absolute, natural, inherent right by the founders of the common law; is included in the fundamental doctrines of the Declaration of Independence as among the inalienable rights of man, and there denominated as the right to the pursuit of happiness; and, in the bill of rights in American governments, it is placed upon an equality with the great natural rights of personal security and personal liberty.

It seems to me palpable that the views of the majority of the court narrow this right below its proper measure. They hold that, if their private property is not taken, if the title to it is not disturbed by the act in question, then these parties cannot be considered as being thereby deprived of their property, within the meaning of the constitutional inhibition. This seems to me an erroneous view.

The bill of rights, as I have said, does not create or bestow these natural rights, and has no reference to remedies between man and man, but was intended for the protection of the citizen as against the agencies of the government itself; and that protection was intended to be as broad as the rights protected. The right under consideration is not only to *acquire*, but to *enjoy*, property. Our government is one of the people, and its functions subject to disturbance by popular excitements, by which one class of men, with certain particular interests and prejudices, either political or otherwise, may come into power, displace all against whom these prejudices run, and oppose them with unfriendly legislation. Suppose the displaced class to be those engaged in agriculture, then laws are passed to cripple the interests of those engaged in it. The price of laborers or employes is fixed at a high rate, and maximum prices for all products at low rates. By-and-by this oppressed class come into power, and they retaliate by singling out the large cities; they prescribe the rates of insurance, a standard for rents, prescribe a schedule of charges for commission-merchants, hotel-keepers, proprietors of newspapers, and, above all, maximum low prices for all implements to be used by the dominant class. Now, in none of these instances would property itself be taken, or the title to it disturbed; but can there be any doubt that by the principles of the bill of rights all such legislation would be unconstitutional and void? It was for the prevention of such things that constitutions are adopted. "When the government," says Cooley, "through its established agencies, *interferes* with the title of one's property, or the *independent enjoyment of it*, and its act is called in question as not in accordance with the law of the land, we are to test its validity by

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those principles of civil liberty and constitutional defence which have been established in our system, and not by any rules that pertain to forms of procedure merely." Cooley's Const. Lim. 356.

Having given this exposition of the nature and extent of the right of property which the bill of rights was intended to secure against the agencies of the government, let us see whether such right was unconstitutionally invaded by the act in question. Before proceeding to that enquiry, it is proper to state that there is no question arising which has any reference to the power of eminent domain or taxation. The act singles out from all the establishments of the state of a similar character the grain warehouses of Chicago. It arbitrarily fixes the maximum rates of hire or reward to be received by the proprietors, and forbids them from contracting with customers for any higher rate. It then prohibits, under severe penalties, their continuance, unless they shall first apply for and obtain a license to carry it on from the circuit court of the county in the manner prescribed, and enter into bond, with sureties, conditioned for a full and unreserved compliance with all laws of the state respecting their business, including, of course, that fixing the minimum rate of hire or reward; for breach of which the license may be revoked, the business made criminal and stopped, and themselves and sureties liable on their bonds. As was justly said by Mr. Justice JOHNSON, of the Supreme Court of the United States: "Licensing acts, in fact, in legislation, are universally restraining acts; as, for example, acts licensing gaming-houses, retailers of spirituous liquors, etc." Gibbons v. Ogden, 9 Wheat. 232.

The proposition is, it seems to me, too plain for argument, that the nature of the power over the business of warehousemen of grain in the city of Chicago, here assumed by the state, is one of suppression—of destruction. For, if the legislature can fix the rate of compensation, then make it criminal to prosecute the business unless they shall obtain a license to carry it on, and give the bond required to submit to the rate so fixed, then the power is limited only by the pleasure of the state, and it may fix the rate so low that the business cannot possibly be continued under it, and is therefore suppressed—destroyed. This is purely a question of power. "Questions of power," says Chief Justice MARSHALL, "do not depend on the *degree* to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." Brown v. State of Maryland, 12 Wheat. 439. This principle was illustrated in the case of McCulloch v. State of Maryland, 4 Wheat. 316, where it was not claimed that the particular tax levied by the state upon the United States Bank would destroy, or even embarrass, that institution. But the validity of the act was assailed wholly upon the nature of the power involved in it; and the central idea of Chief Justice MARSHALL'S opinion was, that a power to tax was a power to tax limited only by the pleasure of the state, and that it was, therefore, a power to destroy. So here, the power to fix the maximum rates of compensation, and make the continuance of the business criminal unless the parties will submit to such rates, procure license, and give the bond—a power whose exercise is limited only by the pleasure of the state as to what that rate shall be—is necessarily a power to destroy a business which had been carried on for nine years according to the law of the land, and in which these parties had vested a right. I insist that they could not be deprived of their rights except by due process of law. The legislature had no more power to accomplish the destruction of such business, and deprive them of their property by such indirect modes, than by a distinct fiat to require the sheriff of the county to burn their warehouses. The majority of the court seem to place their conclusion in part upon the ground that those parties exercised a public employment, and were, therefore, subject to the police power of the state. We had occasion, in The Town of Lakeview v. Rosehill Cemetery, Sept. 7, 1873, to examine somewhat into the nature of that power when resorted to as a color for subverting private rights of property; and there held that it could not be invoked to sustain legislation which invaded private right, where the police-power was but a mere color for such invasion. But these parties did not exercise a public employment. Such was not the character given to their business by the common law. In Coggs v. Bernard, the leading case on the subject of bailments, Chief Justice HOLT, in his celebrated judgment, says: "As to the fifth sort of bailments, viz: a delivery to carry or otherwise manage for a reward to be paid to the bailer, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer at all events, and this is the case of the common carrier, master of a ship, etc." This degree of liability, viz: to answer at all events, attaches by the common law in this country only to common carriers and innkeepers. It does not attach to warehousemen.

Hence we find that Mr. Justice STORY, in classifying bailments, *locatio custodiæ*, or deposits for hire, puts agisters of cattle, warehousemen, and wharfingers together as those whose obligations would fall under the same rule. Story on Bailments (8th ed.) sec. 442. Warehousemen are bound to take common and reasonable care of the commodities intrusted to their charge. Ibid, sec. 444. While common carriers and innkeepers are usurers because they exercise a public employment. Their business was, therefore, simply that of warehousemen. Such was the character given to it by the common law, and in which they had vested rights for nine years anterior to this act. This being so, it was not within the power of the state government, by any declaration, either through a constitutional amendment or the legislature, to change the character of such business so as to subject it to legislative control in the nature of a power of suppression. Because a convention is assembled to amend the constitution, no individual is thereby subject to be deprived of vested rights. The great fundamental principles of a republican form of government continue in force during such conventions, and are not superseded by an amendment of the constitution. Besides, the constitution as amended by the introduction of the article concerning warehouses in no wise contemplated or authorized the assertion of the power of suppression.

But there is another view, in which it is clear the legislature transcended its power by this act. The Chicago River, running west from its connection with Lake Michigan about a quarter of a mile, and then dividing into two branches, one north and the other south, running through the city, forms the port of Chicago. The warehouse in question, and probably all others at which this statute was aimed, are situated upon this port, and constitute the direct and indispensable accessories to commence in grain upon the Great Lakes, between that port and other states. And the question arises: Can these accessories to such commerce be suppressed by the state government? The states have ceded, by express grant in the federal constitution, to the government thereby organized, the power "to regulate commerce with foreign nations, and among the several states." The power, therefore, to regulate inter-state commerce is gone from the several states, and vested exclusively in congress, especially after it has been exercised by the latter. Gibbons v. Ogden, 9 Wheat., 1; Steamboat Co. v. Livingston, 3 Cow., 743; Thurber v. The People, 13 Ill., 535; 5 Howard, 573.

The power to regulate commerce upon the Great Lakes has long since been exercised by congress. If their grain warehouses be in fact, as doubtless they are, the direct and indispensable accessories to commerce in grain upon the lakes, and between the port of Chicago and ports in other states, will it be said that this state can exert a power over them whose very nature is that of suppression—of destruction?

Can the state, by her legislative authority, suppress all commerce in grain upon the lakes between Chicago and the Eastern

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States, when not necessary to the preservation of the morals, health, or safety of the community? If not, then how can it restrain and destroy the very means by which alone that commerce may be carried on with the conveniences suitable to the activity of the age? This power in congress to regulate commerce among the several states is contained in the same grant as that to regulate it with foreign nations, and is placed upon identically the same footing. Now, suppose the legislature of New York should pass an act like this, designed and directed against all warehouses in the city of New York, engaged in receiving, storing, and discharging all commodities, whether imports or exports, brought within the channels of said commerce. These warehouses, it must be conceded, are as directly employed in that commerce, and as indispensable to it, as the vessels upon which it is borne from port to port. The act, it will be perceived, operates directly upon the entire business of warehousemen. The component parts of that business are various transactions in which the carrier and the merchants engaged in such commerce, as well as the warehousemen, are directly interested. So far, therefore, as it operates upon the business, it must upon all these various transactions forming its component parts, and it prescribes rules by which they must be governed or cease altogether. This could be nothing more nor less than an attempt to regulate foreign commerce, as a direct exercise of such power without reference to any police-power. The act was not necessary to the preservation of the health, the morals, or the safety of the community, which are the true purposes of the police-power; but its purpose was to compel the warehousemen to conduct their business upon a compensation prescribed by the state. As was said by Mr. Justice McLEAN, in 3 Howard, 592: "Under the pretence of a police regulation, a state cannot counteract the commercial power of congress." It seems to me the cases are parallel and the act void.

SCOTT, J.—I do not concur in the reasoning or conclusion reached by the majority of the court.

Practice—Appeal Bonds—Liability of Sureties—Bankrupt Law.

HUGH B. MARTIN v. GEO. E. KILBOURN.

Supreme Court of Tennessee, Jackson, Special November Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY, }
" ROBERT MCFARLAND, }
" JAMES W. DEADERICK, } Judges.
" JOHNL. T. SNEED, }
" THOMAS J. FREEMAN, }

Discharge in Bankruptcy—Liability of Sureties in Appeal Bonds.—Where judgment is rendered by a justice of the peace on a note, and the defendant appeals, and gives an appeal bond conditioned that the defendant will "prosecute his appeal with effect, otherwise comply with and perform the judgment of the court;" and in the circuit court the defendant pleads a discharge in bankruptcy, upon which judgment is rendered in his favor, it is error to render judgment against the surety in the appeal bond for the amount of the justice's judgment with costs.

Opinion of the court by NICHOLSON, CH. J.—Kilbourn obtained a judgment on a note of hand against John R. Allen, before a justice of the peace, for $99. Allen appealed to the circuit court of Shelby county and executed appeal bond with Hugh B. Martin as his surety. The condition of the bond was that Allen should prosecute his appeal with effect; otherwise comply with and perform the judgment of the court. In the circuit court Allen filed his plea of discharge in bankruptcy, which was found in his favor, and judgment in his favor rendered. Thereupon the court rendered judgment against Martin, the surety, for the amount of the judgment of the justice of the peace and costs. Martin appeals to this court.

The contract of Martin was that Allen should prosecute his appeal with effect; if not, that he should perform the judgment of the circuit court. Allen did prosecute his appeal with effect, and obtained a judgment of discharge from the debt. We know of no principle on which judgment could be rendered against the surety, unless there is something in the bankrupt law which controls the case. It is provided by the bankrupt law that no discharge of the bankrupt shall release, discharge, or affect any person liable for the same debt, either as partner, joint contractor, endorser, security or otherwise. Martin never was liable on the debt with Allen, in any character. The appeal vacated the judgment, and Martin was only liable in the event judgment should be rendered against Allen in the circuit court. This was not done. On the contrary, Allen prosecuted his appeal with effect, and Martin was no longer liable on his bond. Able v. Payne, 7 Bush, 344.

JUDGMENT REVERSED.

NOTE.—The Kentucky case above cited, holds that sureties in *attachment bonds* are released by discharge of their principal in bankruptcy before judgment rendered against him. 7 Bush, 344.

Resulting Trust—McGlory v. McGlory.

We are indebted to Hon. S. J. Thomas, of Boston, for another interesting decision of the supreme judicial court of Massachusetts, which we take pleasure in laying before our readers:

Bill in equity, brought by William McGlory and others to establish a resulting trust in their favor as heirs at-law of James McGlory, deceased, in five undivided twelfth parts of a parcel of real estate in Boston, against Margaret McGlory, the devisee of said estate under the will of John McGlory, deceased. The case was reported by WELLS, J. In 1848, James McGlory executed a deed of one undivided half part of said estate to his brother John. The consideration expressed in the deed was "one dollar, paid by John McGlory, grocer, trustee of Neil McGlory, and of the love and affection I bear for my brother, the said Neil," do hereby grant, bargain, sell and convey unto the said John McGlory, all my right, title and interest in and to that certain parcel of land, etc. At the end of the description, the grantor declared it to be his "intention hereby to convey one undivided half part of the premises to said John McGlory in trust for said Neil McGlory." John owned the other half. The *habendum* was, to have and to hold the granted premises to the *grantee*, his heirs and assigns, to his and their use and behoof forever. And there were covenants of warranty of seizin etc., with the said grantee, his heirs and assigns. James and Neil respectively died intestate without issue. Afterward John died, leaving a will in favor of his wife, the defendant. James left six brothers and sisters, his heirs, of whom John was one. The claim was to recover the other five-sixths of the half belonging to James, or five-twelfths of the whole. The case was argued at the November sittings, 1871. The court was divided in opinion. At the request of the present chief justice, the case was re-argued in November last, and especially upon the question whether, as the deed purports to convey the whole estate to the grantee and his heirs and assigns "to his and their use and behoof forever," and contains full covenants of warranty, the grantor or his heirs can be permitted to assert a resulting trust. The following rescreipt has now been sent down: The deed to John McGlory was for the declared purpose of creating a trust for the grantor's brother Neil; but for want of words of inheritance, this trust terminated with Neil's life. The consideration was the grantor's love and affection for Neil, and a nominal payment of one dollar, paid in his behalf. The *habendum* and the covenants of warranty, etc., do not necessarily give a benficial interest to the grantee, personally, but are to be interpreted as if the words "trustee as aforesaid," or some equivalent expression, followed the word grantee whenever it occurs in the deed. Judgment for plaintiff, with costs. Decree to be drawn up accordingly.

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Acts of Congress—When they take Effect—Signature of the President.

On the 3d inst., the case of N. D. Carlisle & Son v. Collector Arthur, which had been instituted in the United States circuit court, before Judge NATHANIEL SHIPMAN and a jury, came up for trial. The plaintiffs, as previously reported, are importers in this city, and in that capacity imported a quantity of wool upon which the collector levied a tax of ten cents per pound, and an ad valorem duty of eleven cents, the collector alleging that he was authorized to take this course under the act of congress, of March 2, 1867. The duty thus imposed amounted to $20,000, and was paid under protest by Carlisle & Son, who brought this action against the government to recover back the amount exacted, and claimed that the act of congress under which they were assessed was inapplicable, on the ground that it was not signed by the president until the 4th of March, 1867. The importation was made on the day before the act received the signature of President Johnson. The deposition of ex-President Johnson showed that, though the act appeared to have been signed by him on the 2d of March, 1867, the day of its passage, he did not actually sign it until early in the morning of the 4th of March, 1867, and that he acted thus in pursuance of a custom then prevailing with regard to the signing of bills passed by congress. This deposition was admitted in evidence by the court. Mr. J. H. Choate, when the case came up yesterday, *urged* on the part of the plaintiffs, that by admitting evidence which showed that President Johnson had not signed the act referred to until the 4th of March, 1867, the court would, in effect, decide that although Presidents were in the habit, when they approved of acts of congress, to date them back to the time when they were passed, the acts did not, according to the constitution, become law until the very day when the President really signed them. Judge SHIPMAN briefly charged the jury and directed them to find a verdict for the plaintiffs. This they accordingly did. The amount of the verdict is $20,000 in gold.—*New York Herald.*

Street Railways—Obligation of Conductor to Remove Drunken Passengers.

In the suit by Mrs. Putnam, whose husband was killed by Foster with a car hook on a Broadway and Seventh Avenue car, and on which she obtained in the superior court $5,000 damages, which verdict was sustained in general term, the court of appeals, in Albany, has just rendered a decision reversing this judgment. The latter court hold that, however intoxicated a person may be on a car, if he makes no disturbance, and no passenger requests his removal, the conductor is not obliged to put him off the car. In this case Mr. Putnam only requested the conductor to keep Foster quiet, which he did, and for this reason the court of appeals hold that the railway company are not responsible.—*N. Y. Herald.*

Notes of Recent Tennessee Decisions.

IN THE SUPREME COURT AT JACKSON.

[Courtesy of Hon. J. O. Pierce of Memphis.]

[CONTINUED FROM OUR LAST.]

Verdict.— Resting upon sufficient evidence, for substantial and not merely nominal damages, will not be set aside for error of court in the charge, where it is evident the jury did not proceed upon that ground and were not misled by the charge. Babb v. Dunlap, October Term, 1873.

Vendor's Lien,—Implied, exists and will be upheld in a sale of a leasehold estate. Choat v. Tighe, April Term, 1873.

War.—In a suit on a note, both debtor and creditor continuing to reside in Memphis, but the note itself having been carried south into the Confederate lines, there was no such obstacle to its payment as to relieve the debtor from interest during the war. Gates v. Union Bank, October Term, 1873.

———. The occupation of Memphis by the Federal forces, and the suspension of the courts, suspended the running of the statute of limitations during the war. Apperson v. Harris, October Term, 1873.

———. The Federal commander at Memphis, in 1863, had no authority to establish a "civil commission for the trial of civil suits between citizens," and a judgment by such commission is null and void. Walsh v. Porter, October Term, 1873.

Will—In a will, devising specific legacies to testator's children, to pass to each child when she shall marry or attain lawful age, a condition that any such child marrying within certain prohibitions named, shall forfeit the legacy, is a condition *in terrorem* only, and does not apply to the marriage of any such child before testator's death, nor impose a forfeiture in such case. Brown v. Severson, October Term, 1873.

Recent Reports.

NORTH CAROLINA REPORTS, VOL. 69. Cases argued and determined in the Supreme Court of North Carolina, June Term, 1873. By TAZEWELL L. HARGROVE, Attorney General. Judges: RICHARD M. PEARSON, Chief Justice; EDWIN G. READE, WILLIAM B. RODMAN, THOS. SETTLE, NATHANIEL BOYDEN.

Pursuing our purpose of noticing new volumes of American Reports as far as they are issued, we come to the 69th North Carolina Reports, in which we note several interesting decisions, among them the following:

Agent of Lunatic—Surety.—A plaintiff who has endorsed the notes of a self-constituted agent of a lunatic, to enable such agent to raise money ostensibly for the amily of such lunatic, which money was used by the agent in cultivating the farm of the lunatic, can only recover, in a suit against the lunatic upon the notes signed by the agent, so much of his debt as he can show was actually expended for the necessary support of the lunatic, and such of his family as were properly chargeable upon him. Surles v. Pipkin, 513.

Agreement Compromising debt—Confession of Judgment.—If upon confessing judgment in a suit by a bank against one of its debtors, it be agreed and entered upon the docket at the foot of the judgment, that it may be discharged upon the payment of a certain per cent. in United States currency, or the full amount in the notes of the bank, the plaintiff will be bound by the agreement; and an execution issued for the full amount in United States currency more than two years afterwards, may be set aside, and the bankruptcy of the bank will not alter the case. Hardy v. Reynolds, 5.

Agreement, void.—By a creditor to take one-half of his debt in discharge of the whole; and this although the debtor is a surety, and the debt is due by bond. Bryan v. Fay, 45.

Agreement for Protection of Sureties.—Where, upon the purchase of a chattel personal, the purchaser gave his note, with sureties, for the price, and it was agreed by parol between the parties at the time, that the chattel should belong to the sureties until the note was paid—the effect of such agreement was to pass title to the chattel from the seller direct to the sureties, and not from the seller to the purchaser, and then from him to the sureties for their indemnity; for in the latter case it would have been a mortgage which would have been void for want of registration. Worthy v. Cole, 157.

Agreement between Husband and Wife.—That the wife shall receive in personal property, the price for which land belonging to her was sold, and hold the same to her separate use, to enable her to purchase another tract of land with the same, is valid, such price not resting in the husband, *jure maritii*, so as to be reached by his creditors. Teague v. Downs, 280.

Agreement by Solicitor to discharge defendant—Recognizance.—Parol agreement by state's solicitor to discharge defendant for turning state's evidence, no answer to a forfeited recognizance; because the latter is a matter of record and can only be discharged by something of equal dignity. State v. Moody, 529.

Arbitration and Award.—Where arbitrators undertake to make the case turn upon matters of law, and mistake the law, their award is void. Leach v. Harris, 532.

———. Arbitrators not bound to decide according to law, being "a law unto themselves" but may decide according to their own notions of justice, and without giving any reasons. Ibid.

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Arson—Limitation of Prosecution.—A person may now be indicted, convicted and punished for burning a mill-house in 1863. State v. King, 419.

Assignee in Bankruptcy.—May sue and be sued in the state courts. Cogdell v. Exum, 464.

Assignment, equitable.—An agreement by a debtor sued, to subject one-half of his assets to the payment of the debt, makes him a *trustee pro tanto* of the particular creditor, who thereby acquires a lien and preference over other creditors subsequently suing. Perry v. Merchants' Bank of Newbern, 551.

Attorney.—Cannot compromise client's debt, nor receive anything in payment but legal tender, without special authorization. Moye v. Cogdell, 93.

Bankruptcy—Statute of Limitations.—A bankrupt brings suit in his own name, Sept. 19, 1870, an assignee having been previously appointed. March 11, 1872, the assignee is made plaintiff: Held, that the suit is barred by the two years' limitation of the bankrupt law, the statute running from the appointment of the assignee, and not interrupted by the suit by the bankrupt. Cogdell v. Exum, 464.

Bastardy.—Impotence of putative father may be proved as a defence. State v. Broadway, 411.

Bonds, official.—Bond given by treasurer of railroad company, conditioned that he "shall faithfully discharge the duties of the office, and well and correctly behave therein," does not bind him to keep moneys against all hazards; and sureties are not responsible for moneys lost by a sudden failure of a banking house, such moneys having been there deposited by the treasurer when it was in good standing and apparently solvent. Atlantic & N. C. R. R. Co. v. Cowles, 59.

———. *By-Laws of Company.*—The obligation of the sureties is not affected by the by-laws of the corporation, unless the same are referred to in the bond. Ibid.

Disturbing Congregation.—Singing not indictable, if the singer does not intend to disturb the congregation, but is conscientiously taking part in the services, although he may be a subject for church discipline, on account of his bad singing. ["The effect of it was to make one part of the congregation laugh and the other mad."] State v. Linkhaw, 214.

Confessions.—On a trial for infanticide, it is not competent to prove that the defendant had said that she had had a child this way before and put it away. This would be admitting evidence of a distinct offense. State v. Shuford, 486.

Homestead Laws of North Carolina.—Not unconstitutional. Garrett v. Chesire, 396.

Interest—Promissory Note.—When a note is given with the stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest, as if he had given a promissory note for the amount of such interest—thus taking a middle course between simple and compound interest. Bledsoe v. Nixon, 89.

Libel—Pleading.—An allegation that the defendant published concerning the plaintiff, in a newspaper, etc., a certain article containing the false and defamatory matter following—setting out the article in full, is sufficient, without alleging that each part of the article was concerning the plaintiff. Carson v. Mills, 122.

———. And see the same case for language apparently libellous, imputing professional misconduct to a lawyer.

Mortgages and deeds of trust—Constitutional Law.—An act providing that "no property shall be sold under any deed of trust or mortgage, until the debts, secured in said deed, are reduced to judgment according to the provisions of this act," impairs the obligations of contracts, and is unconstitutional. Latham v. Whithurst, 33.

Sale of Land for Taxes—Notice—Mortgagee.—The mortgagee being the legal owner of the land mortgaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land for unpaid taxes. Whitehurst v. Gaskill, 449.

Sheriff.—Not liable criminally for levying *bona fide* on the property of the wrong person. State v. Tatom, 35.

Taxation—Non-residents.—The levying of a tax upon a non-resident which is not levied upon residents, contravenes the constitution of the United States. Sinclair v. State, 47.

———. *Bank Deposits.*—Money deposited in banks loses its distinct character as money, and becomes a debt due to the depositor from the bank, and as such is a proper subject of taxation. Lilly v. Commissioners, 300.

———. *"Solvent Credits."*—Taxable as property, although derived to a merchant in the usual course of business. Ibid.

———. *United States Circulating Medium.*—A state cannot tax U. S. treasury notes. Ruffin v. Commissioners, 498.

———. ———. Otherwise the circulation of the national banks, until congress prohibits such taxation. Ibid; Lilly v. Commissioners, 300.

Title—Adverse Possession.—The operations of building a shed, quarrying rock, and cutting wood for fuel in a lime-kiln, on the land in dispute, continued uninterruptedly for more than seven years, constitutes such a possession as will give a good title to the person claiming adversely under it. Moore v. Thompson, 120.

Vendor and Vendee—Preference of Assignee.—Where land is sold and title retained by the vendor until the payment of the promissory notes given by the vendee to secure the purchase money, and these notes are assigned by the vendor, with the knowledge and consent of the vendee, the assignee will have the right to have the notes paid out of the land in preference to any claim that may have been acquired by other persons *subsequently* to the time when the sale was made and the notes given. Hadley v. Nash, 162.

We also note several interesting cases involving the construction of wills. The opinions are in general brief—a merit which the judges seem to have successfully studied. The work of the reporter apparently leaves nothing to be desired. His head-notes are exceptionally distinguishable for brevity and clearness of statement. The state printers have not, however, produced the work in becoming style.

WARE'S REPORTS, VOL. 3.—Reports of Cases Determined in the District Court of the United States for the District of Maine and Massachusetts, with some opinions of the District Judge in cases determined in the Circuit Court. By ASHUR WARE, District Judge. Edited by GEO. F. EMERY. Portland: Loring, Short & Harmon.

The publishers' advertisement states that this volume contains the latest opinions of Judge Ware, and is entirely new. It is a sequel to the first and second volumes (the latter originally entitled Davies' Reports) issued in his life-time. The three volumes embrace his judicial labors for more than forty years. The cases embraced in this volume extend from the year 1853 to 1865. The decisions are mostly of cases in admiralty, with a few relating to questions arising under the customs laws. We presume that such questions do not interest many of our readers, and shall not notice these cases further.

Notes and Queries.

SHENANDOAH, IOWA, February 7, 1874.

EDITORS CENTRAL LAW JOURNAL:—Will a chattel mortgage of a debt, note, judgment or other *chose in action*, duly recorded, hold good against third parties, to the same extent as of specific personal property?

Yours truly, W. P. F.

ANSWER.—No; unless some statute so declares. A chose in action may be *assigned*, and if the assignee gives notice of the assignment to the debtor the latter cannot afterwards make a valid payment to the assignor.

SALISBURY, N. C., Feb. 2d, 1874.

EDITORS CENTRAL LAW JOURNAL:—In CENTRAL LAW JOURNAL, page 51, is an interesting article as to the power of a father to surrender his rights over his infant children by contract. I have recently had occasion to investigate this question: Is the widowed mother of an infant child entitled to its earnings? The case was that the infant, aged 18, had worked with another under a contract made with the infant, when the mother, the father being dead, brought an action to recover the value of the infant's labor. I can find no authority directly sanctioning it. If worthy of note please to put it amongst your "notes and queries."

J. M. M.

ANSWER.—A *father* may ordinarily claim the benefit of his minor children's labor *while they live with him and are maintained by him*; and

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he may ordinarily claim the wages of his minor children, unless he has emancipated them, or waived or relinquished the right in their favor. Consult on this point the following authorities: 1 Bla. Com. 453; 2 Kent Com. 193; Jenness v. Emerson, 15 N. H. 486; Nightingale v. Withington, 15 Mass. 272; Hillsborough v. Deering, 4 N. H. 86; People v. Meroein, 3 Hill (N. Y.) 408; Snediker v. Everingham, 3 Dutch. (N. J.) 143; Prickett v. Prickett, 20 N. J. Eq. (5 C. E. Green) 478; Dodge v. Favor, 15 Gray, 82; Brown v. Canton, 4 Lansing, 409; Corey v. Corey, 19 Pick. 29; Boobier v. Boobier, 39 Maine, 406; Burlingame v. Burlingame, 7 Cowen, 92; Whiting v. Earle, 3 Pick. 201.

Does the mother, on the death of the father, succeed to the same right? In the following cases it is held that she does: Hammond v. Corbett, 50 N. H. 501, where the subject is amply discussed; Matthewson v. Perry, 37 Conn. 435; Simpson v. Buck, 5 Lansing, 337. And in the last case it is held that the fact that the minor contributed to the support of the mother, and was not dependent upon her for his support, does not alter the question of her right to recover his wages. These cases, no doubt, express the modern and more liberal view of the question. The old law, however, appears to have proceeded upon the ground that, whereas, the father must support his minor children in any event, he has an absolute right to their earnings; while the widow, since she is bound to support them only when it is *necessary* that she should—that is, when they (the minors) have not sufficient property, exclusive of their earnings, to support them, is entitled to their services only in a qualified sense; that is, she is entitled to their services when she supports them. Reeves' Dom. Rel. 283, 290, 291, 295, 319, 324, 343.

And there are cases which take this view of the question. Thus, the understanding of the supreme court of Pennsylvania seems always to have been that a widowed mother has no right at common law to the services of her minor children. Com. v. Murray, 4 Binney, 494, 495; South v. Deniston, 2 Watts, 474; Fairmont & Arch Street Passenger R. R. Co. v. Stutler, 54 Penn. State, 375. And the same doctrine has been intimated in Alabama. Morris v. Low, 4 Stew. & Port. 123.

OBERLIN, January 9, 1874.

EDITORS CENTRAL LAW JOURNAL:—Whenever any of the states of the northwestern territory had 60,000 inhabitants, they had the liberty to form a permanent constitution, and be admitted to the union on an equal footing with the original states, *provided* the constitution and government to be formed should be republican, and in conformity to the principles contained in those articles of compact. Question: Can the present constitutional convention of Ohio leave out or essentially change the principles of the first five of these articles or of any of them? An answer to this in your valuable journal, if it is in accordance with your plan or purpose, would be gratefully received. J. W. M.

ANSWER.—The ordinance of 1787 provides that the five articles named by our correspondent, as well as the sixth which follows them, "shall be considered as articles of *compact* between the *original states* and the *people* and *states* in said territory, and *forever* remain unalterable except by *common consent*." This ordinance was passed July 13, 1787. Nearly two years later, namely, on the first Wednesday in March, 1789, the constitution of the United States went into operation. Owings v. Speed, 5 Wheat. 420.

Very soon after the adoption of the constitution, an act of congress was passed relating to the northwest territory, which recites in its preamble that in order that the said ordinance "may *continue to have full effect*, it is requisite that certain provisions should be made, so as to adapt the same to the present constitution of the United States;" and these provisions related to matters of detail, conferring on the president certain powers and duties with reference to this territory, which before belonged to congress. And the validity of the ordinance has been frequently recognized and declared by the subsequent legislation of congress. 1 Statutes at Large, 50; 2 Ibid, 58, 309, 514; 3 Ibid, 289, 399, 428, 770; 5 Ibid, 15. By the act of May 10, 1800, the ordinance was extended to and put in force in the Mississippi territory. The acts in pursuance of which Ohio, Indiana and Illinois were admitted into the union provide respectively that the state government "when framed shall be republican, and not repugnant to the ordinance of July 13, 1787, between the original states and the people and states northwest of the river Ohio." 2 Statutes at Large, 174, § 5; 3 Ibid, 290, § 4; 3 Ibid, 430, § 4. These provisions do not, however, appear in the acts admitting Michigan and Wisconsin. It also appears that the compact was modified by congress so far as it related to the *boundaries* of the states to be formed out of the northwest territory. On the other hand, in the act providing for the admittance of Indiana into the Union, the provisions of the ordinance are declared to be "*irrevocable* between the original states and the people and states of the territory northwest of the river Ohio, excepting so much of said articles as relate to the *boundaries* of the states therein to be formed."

The question propounded by our correspondent, then, is, are the people of the state of Ohio so far sovereign that they can, without federal coercion, in changing their organic law, violate the terms of the compact under which they were thus permitted to come into the Union of the States? As a matter of first impression we should say that they cannot, unless by the "common consent."

Upon examination we find, however, that the Supreme Court of the United States has determined that the ordinance of 1787 was extinguished by the constitution; or, that if any of its provisions have continuing validity, it is not because they are in the ordinance, but because they may have derived authority from some other source, such as compacts of cession or acts of congress under the constitution. Pollard v. Hagan, 3 How. 212; Permoli v. New Orleans, 3 How. 589, 610; Strader v. Graham, 10 How. 82, 94. There are a number of other cases bearing upon the question more or less directly: Spooner v. McConnell, 1 McLean, 337; Palmer v. Commissioners, 3 Ibid, 226; Jones v. Van Zandt, 2 Ibid, 611; Lewis v. Baird, 3 Ibid, 56; Astrom v. Hammond, 3 Ibid, 107; Vaughan v. Williams, 3 Ibid, 530; Columbus Ins. Co. v. Peoria Bridge Co., 6 Ibid, 70; Jolly v. Terre Haute Draw Bridge Co., 6 Ibid, 237; Menard v. Aspasia, 5 Peters, 505; Jones v. Van Zandt, 5 How. 230. The decisions of the state courts are conflicting. Two cases in Ohio incline to the view that the ordinance is of perpetual obligation: Hogg v. Zanesville, 5 Ohio, 410; Hutchinson v. Thompson, 9 Ohio, 52. And see, as supporting the same view, Winney v. Whitesides, 1 Mo. 472; Lagrange v. Chouteau, 2 Mo. 19; Rankin v. Lydia, 2 A. K. Marsh, 467. But *contra*, La Plaisance Bay Harbor Co. v. Monroe, 1 Walker Ch. (Mich.) 155. T.

Legal News and Notes.

—THE amendatory bankrupt bill, as reported by the senate judiciary committee, has, after receiving several amendments, passed that body.

—ARTICLES of impeachment have been presented in the house of representatives against Judge BUSTEED.

—"MISS SALLIE KILGORE, attorney and counsellor at law," is on a sign at Noblesville, Ind. She graduated at the Michigan Law School.—*Exchange.*

—MR. TREMAIN, of the house judiciary committee, will shortly report a bill to divide the northern district of New York. It provides that the present northern district of New York shall hereafter embrace only the counties of Cayuga, Tomkins and Tioga, and the several counties of the state of New York lying westerly of said counties, and is to be called the "western district." The residue of the state, not included in the eastern and southern districts, is made a new district, and is called the northern district. The change will make one additional appointment. It is believed that the measure will pass.

—JAMES W. GERARD, an octogenarian lawyer, of New York city, died on the 7th instant. His whole life was devoted to the practice of his profession and to private objects and charities. He never filled a public station. In 1868, on the occasion of his retiring from practice, the members of the New York bar gave a banquet in his honor. At the bar meeting on the occasion of his death, some of the most eloquent and feeling tributes were paid to his memory, which the character of any private citizen can evoke. Mr. Evarts is reported to have applied to him the language of the Roman moralist: Not he alone serves the state who presides in the public councils, or administers affairs of peace or war, or brings forward candidates, or manages conventions; but he who either by steady avocation, or by particular devotion, cares for the nurture and education of the people; he who advances public morals and who diffuses just sentiments of which others have greatest need; and he in his private station is all the while filling a public office. *In privato publicum negotium agit.*

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—A SINGULAR case of marine insurance has recently been tried in New York. One Leitch, engaged in the Mexican trade, insured through correspondents, mahogany and bullion from Minititlan to this city with the Atlantic Mutual Insurance company. According to the statement of Leitch, the bullion was smuggled out of Mexico, and, for concealment, put under the stone ballast. The ship, becoming water-logged, was abandoned, but was subsequently picked up. The insurance company defended on various grounds, but their main ground was that the whole thing was a fraud. The jury gave a sealed verdict for the plaintiff for $46,000.—*N. Y. Herald.*

—FROM the following list of cases disposed of by Hon. JOHN ERSKINE in the federal courts for Georgia, we infer that the position of district judge for that state is no sinecure. Disposed of during November term: Equity, 28; common law, 233; criminal, 12; seizure, 4; scire facias, 6; admiralty, 5. Disposed of at September term, 1873, in the northern district of Georgia: Equity, 2; common law, 35; criminal, 101; seizure, 18; scire facias, 30. In bankruptcy, 248 petitions for adjudication have been filed in the southern district alone during the last half year of 1873; in over fifty of these petitions for injunctions have been filed. All of these orders have been taken in chambers, and in many of them arguments have been had involving nice points of law and equity.

—REPRESENTATIVE LAWRENCE'S bill, introduced and referred to the committee on war claims, provides, that for the purpose of providing a tribunal to hear and determine the claims of aliens against the United States for compensation for alleged torts suffered through the acts of persons for whose doings it may be asserted the United States should be held responsible, there shall be established in Washington a court, to be called the court of alien claims, to consist of three judges, with the power to hear and determine all claims on the part of corporations, companies or private individuals, citizens or subjects of any foreign power, upon the United States, arising out of acts committed against the persons or property of such citizens or subjects during a period of recognized war between the United States and a belligerent, the sovereign of the claimant.—*Washington Chronicle.*

—RIGHT HONORABLE BARON COLONSAY, formerly lord justice general and president of the court of session of Scotland, died on the 1st instant, aged eighty years. Duncan McNeill (Lord Colonsay), son of the late John McNeill, Esq., of Colonsay, was born in 1793. He was educated at the universities of St. Andrew's and Edinburgh. He was admitted to the Scottish bar in 1816, and served as one of the junior counsel of the crown from 1820 to 1824; as sheriff of Perthshire; solicitor general for Scotland under Sir Robert Peel's administration, in 1835, and in the same office, and as lord advocate, under Peel's second administration. He was dean of the faculty of advocates from 1843 till he was appointed a judge of session, in 1851. He represented Argyleshire in parliament from 1843 to 1851. His lordship was sworn in a member of the privy council in 1853, and created Baron Colonsay on the 22d of February, 1867.

Singular Case of Identity.

[From the Cleveland Leader.]

Portland, Maine, has just witnessed one of the most singular cases on record, in which the defendant was a woman variously called Catharine Waller, alias Carrie M. Kent, alias Carrie M. Waite, and whose maiden name, it was charged, was Catharine McKenzie. To commence at the beginning: In May, 1862, John Waller, at that time living in Pictou, Nova Scotia, was married to Catharine McKenzie, of the same place. Two children, one now eleven and the other seven years old, were the fruits of this marriage. In November, 1869, Mrs. Waller came to the States to earn money enough to furnish the house. She stopped a portion of her time in Portland, and the balance of the time in Boston, and seems to have been known as Kate Waller, Kate Wallace, and Carrie M. Kent, and related various stories concerning her life. During all this absence it is reported that she corresponded with Waller. The husband, John Waller, claims that early in 1873, his wife, Catharine Waller, married a man by the name of Waite; so he had her arrested for bigamy.

The case came up for trial in Portland recently, the woman pleading mistaken identity. Mrs. Waite and her husband were in court at the appointed time. Waller was sworn, and testified that the woman in court was his wife. Waller's sister and his brother-in-law also identified the woman as the wife of John Waller. The girl of eleven years stepped up close to the woman and said, "yes, sir, that is my mother." The little boy said this was the woman who visited their home in July last and lived for a time with his father as wife, and that she bought him, the boy, a pair of boots and a jack-knife. Other witnesses were called, who knew this woman as Catharine McKenzie and as Mrs. Waller.

The defendant is said to be quite a handsome woman and was unmoved during the trial. She introduced witnesses to show that she had been mistaken frequently for a woman known as Catharine Wallace, who, it was claimed, was the real wife of Waller, and of course swore positively that she knew nothing about Waller or his children. She made quite a strong defence and the jury failed to agree, nine standing for acquittal and three for conviction.

This is really a most remarkable case, and will pass into the law books to afford precedent as a most singular case of mistaken identity, or of the ability of some persons to show that they are not themselves, but somebody else.

Important Bond Decisions — Doctrine of Lis Pendens not Applicable to Holders of Commercial Paper.

[Associated Press Telegram.]

CHICAGO, February 12.—In the United States circuit court, Judge Drummond has overruled the demurrer to the replications in the Warren county bond cases. The suits are of public interest, not only on account of the amount involved, but in presenting a new phase of liability of towns and counties on their bonds issued in aid of the building of railways. The arguments were very elaborate. Ex-Chief Justice Lawrence and Mr. Harding appeared for the county of Warren, and Judge T. G. Wilson and E. B. McCogg, Esq., for the bondholders. The cases involved the legality of $200,000 of the bonds of the county of Warren in aid of the Rockford, Rock Island and St. Louis Railroad company. Before the bonds were issued certain tax-payers filed a bill in chancery, in the circuit court of that county, to enjoin the board of supervisors from issuing the bonds, alleging that no sufficient notice of the election at which the bonds were voted had been given, and that the county officers had acted collusively with the railway company in issuing the bonds. Upon a hearing, the injunction was dissolved by the circuit court on the 23d of January, 1871. Two days after, the bonds were issued and registered in the state auditor's office, and were subsequently put on the market and sold. After the dissolution of the injunction and issue of the bonds, the complainant appealed to the supreme court of this state, where the decree of the circuit court was reversed, and the bonds declared to be unauthorized and void. Thereupon the tax-payers filed a second bill, making as new parties defendant the unknown owners of the bonds and asking for a like decree as in the first chancery suit, which second bill is still pending. The Portsmouth Savings Bank of New Hampshire, and Augustus T. Post of New York, having purchased the bonds in question in open market, without any actual notice of the pendency of the chancery proceedings in the state courts, commenced the present suits for the recovery of the unpaid interest on coupons due in July and August. The county pleads the adjudication of the state supreme court, declaring the bonds invalid in bar, and insists that the pendency of the chancery proceedings was notice to the purchaser of the bonds. To these pleas the plaintiff filed replications, setting up that they are *bona fide* purchasers for value, and that they had no actual notice of the pendency of the chancery suits, nor any notice that the bonds were invalid. The county demurred to the replication, claiming that the pendency of the suit was notice.

It is this demurrer which Judge DRUMMOND overruled, holding that the doctrine of *lis pendens* does not apply to commercial paper, and also in effect re-affirming the principle, that whenever there is a statute authorizing a municipality to issue bonds, and it does, then they are not liable to be impeached in the hands of a *bona fide* purchaser. The above ruling was in pursuance of the case of Olcott v. The Supervisors of Fond du Lac county, 16 Wallace, 678. In that case the question of *lis pendens* is involved, but the Supreme Court of the United States, on affirming the validity of the bonds did not refer to this question in any manner. Judge DRUMMOND, on this point, is understood to have differed from the ruling in the case above referred to, but felt bound to follow its decission. The present case will shortly be tried on the facts, and the defendants will be allowed to bring up the disputed point on the moving for a new trial.

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, FEBRUARY 26, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

The Louisville and Portland Canal Injunction Case.

We publish in this number the full text of the opinion of Mr. Justice MILLER in the case of the United States v. The Louisville & Portland Canal Company, in the United States circuit court for the district of Kentucky. Although the immediate question arose out of a very special state of facts, local in their character, yet the principles by which it was determined are general, and the manner in which they were applied to the complicated nature of the relations of the canal company to its creditors, to the general government and to the public at large, is both highly interesting and instructive. What can be clearer than the analysis there given of the complex character of the canal corporation under its two-fold legislative history, and the nature of its trust duties? The thoughtful reader will not fail to observe the high view that is taken of the legal rights of the creditors of the corporation, and to note that the learned justice unhesitatingly asserts that their rights cannot be impaired, *even by congress.*

Does an Action for Breach of Promise die with the Defendant?

It will be remembered that about two years ago Mary Francis Wade instituted an action against Martin Kalbfleisch, ex-mayor of Brooklyn, to recover $100,000 for alleged breach of promise of marriage. The ex-mayor was a wealthy widower, somewhat advanced in years, and the "expectations" of Miss Wade were no doubt great. She is said to have been a lady of great beauty and accomplishments; and if this be true, and she could have brought her action to a favorable verdict during the life of the ex-Mayor, no doubt the damages awarded her would have been heavy. This would be inferred, not only from the great wealth of the defendant, but also from a consideration of the very eligible offers of marriage she must have lost, through being the recipient of his attentions. But, unfortunately for her, before the case came to a trial, the defendant died; and she thereupon sought to have the action continued against his estate. But Judge NELSON, of the supreme court of New York, sitting at special term, decided that this could not be done. This decision has now been affirmed in general term; and it is said the question will go to the court of appeals.

Internal Revenue Law—Effect of Supplementary Assessments.

In the United States circuit court for the southern district of New York, on the 14th instant, a decision was rendered by Judge SHIPMAN, upon the question of the power of an internal revenue assessor to make supplementary assessments, and the effect of such assessments as evidence of the liability of the tax-payer. The New York Herald states the case substantially as follows:

The action was brought to recover $3,773. This amount of money was paid under protest to the defendant, who had been collector of the sixth district. Under the act of July 20, 1868, the plaintiff took out a license as a distiller, and in the months of October, November and December, 1868, and February, 1869, he presented to the assessor the returns as required by law. On these returns an assessment was made and sent to the collector, and the plaintiff paid the amount of the assessment. In July, 1869, the assessor, following the instructions of the commissioner of internal revenue, made a re-assessment for the months already specified. This re-assessment increased the first assessment to the sum of $3,773. This amount, as above mentioned, was paid under protest. The case came on for trial in the United States circuit court, before Judge NATHANIEL SHIPMAN; Mr. Goodlett, United States district attorney, appearing for the government, and Mr. Thomas Harlan for the plaintiff. On the trial it was conceded that the returns made by the plaintiff were correct, and that the assessment proceeded upon the supposition—a belief of the commissioner of internal revenue—that the original assessment, as made upon the returns, was erroneous in consequence of a mistake made by the collector. The collector gave proof of the assessment, but did not offer any testimony as tending to show wherein the imputed error in the original assessment consisted. Two questions have arisen on these facts. (1.) When the tax-payer has made a correct return, and the assessor has made an erroneous assessment thereon, which assessment has been paid, has the assessor, under the law, power to make a supplementary assessment? (2.) Is the re-assessment presumed to be correct without affirmative proof on the part of the government that there was an error in the original assessment?

The decision of Judge SHIPMAN decides the first point in the affirmative, provided that the assessor makes the supplementary assessment within the time (fifteen months) stated in the ninth section of the act of July 13, 1866. He answers the second question in the negative.

Contracts by Banks for Interest in Excess of Charter Rates Void—Accommodation Paper—Usury.

Our readers will thank us for laying before them at this early day the opinion of the Supreme Court, in Tiffany v. Boatmen's Savings Institution, published in another column, substantially affirming the views of the circuit court in the same case (1 Dillon C. C. R. 141). It *decides* several questions of great interest and moment, and, notwithstanding the marked judicial caution of the learned justice by whom it was prepared, it *indicates*, perhaps, with some degree of certainty, the views or inclination of the court upon some other question not directly in the path of its judgment.

The opinion is important, because it adheres to the case of the United States v. Owens, 2 Pet. 557, and declares that it must be "accepted as the doctrine" of the court, where the charter of a bank prohibits it from taking greater than a specified rate of interest, and is silent as to the penalty if more than the charter rate be taken, that the effect is to render the whole rate void, and not simply the excess beyond the legal rate. Since the case of the United States v. Owens was decided, the same question has frequently arisen, and the courts elsewhere have generally, but not uniformly, held that the contract was avoided only as to the *excess* (see cases cited,

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1 Dillon C. C. R. 149); but the Supreme Court hold, affirming the judgment of the circuit court on the point, that if the contract be executed and the money paid, neither the borrower, nor his assignee in bankruptcy, can recover anything but the *excess* beyond the legal rate of interest.

As to the other main point in the case, as presented to the Supreme Court, though not raised below, the court hold that where negotiable paper, which is, in fact, accommodation paper, is purchased with knowledge of its origin, and with reason to believe that it was not created in the regular course of business, it is open to the defence of usury. What would be the rule if the purchase was made in good faith, without such knowledge, is not decided; but the reader will notice with interest the observations of Mr. Justice DAVIS, in respect to Nichols v. Fearson, 7. Pet. 103, and "the general current of decisions" upon the subject.

It was made a point in the court below, that the remedy to recover the excess of interest beyond the legal rate was exclusively at law. The circuit court decided that equity would entertain a bill for this purpose, and the point does not seem to have been questioned in the Supreme Court.

Conflict between Federal and State Court for Possession of Property of Insolvent.

Some time since a petition was filed in the United States district court for the southern district of New York, praying that the Glenham Manufacturing Company be declared bankrupt. On this petition Judge BLATCHFORD adjudicated the company bankrupt, and appointed a trustee. It appeared that the marshal, acting under the warrant of the court, took possession of the property of the company; but it was claimed that before he did so, actual possession of it had been obtained by a receiver, who had been appointed in certain proceedings in the state court. The marshal claimed that he held the property by virtue of the warrant issued from the United States district court, but he had been called upon, under an order of the state court, to show cause why he kept possession of the property or be punished for contempt. The case is said to be an important one, involving over a million dollars. Most of the property consists of real estate.

Mr. J. H. Choate, who appeared on behalf of the petitioning creditors, said that the property was now in the custody of the marshal, and he asked that it be delivered to the trustee. With regard to protection or indemnity to the marshal, the court had the whole of the property; it was in the keeping of the marshal; and three-fourths of the creditors had united in a deed to the trustee. Mr. J. C. Carter, who appeared for the marshal, said that the possession was obtained by the marshal without force: it was silently and quietly yielded to him under the authority of receiver; and the question was, was that such an acquiescence as would preclude the state court from again resuming its authority over the estate?

Judge BLATCHFORD is reported to have said that the principle was well settled that the court never issued its warrant to the marshal to take possession of property out of the hands of a receiver of a state court. He had always held that property in the hands of a receiver of a state court could not be disturbed at all. When the marshal took property out of the hands of a receiver of a state court he must give it up; he would no more sanction a marshal taking such property than he would sanction a receiver of a state court taking property out of the hands of the marshal. If the receiver had this property in his hands at the time the marshal took it, the marshal had no business to touch it, and ought to give it back.

Mr. Choate read an affidavit, which contained a statement to the effect that the receiver voluntarily allowed the marshal to take possession at Glenham. Mr. J. C. Carter said the warrant did not tell the marshal what property to take. Judge BLATCHFORD: If the marshal took this property away from the receiver he must give it back; as to indemnity to the marshal, the trustee cannot give it. Some further discussion having ensued, the court denied the motion, with leave to Mr. Choate to renew it again, when the question as to what indemnity should be given to the marshal (in case he has to surrender the property to the receiver) will be taken into consideration.

Indiana Divorces—The "Seventh Clause"—Incurable Insanity no Ground of Divorce.

Indiana has been proverbial for easy divorces. Many an unhappy husband or wife has resorted thither to procure a release from the matrimonial obligations which the laws of no other state would accord them. The peculiar feature of the Indiana divorce act which has given that state such an eminence, is known as the "Seventh Clause." The statute, (2 Gavin & Hord, 351,) after enumerating six separate grounds of divorce, provides (clause 7) that divorces may be granted for "any other cause for which the court shall deem it proper that a divorce shall be granted."

The supreme court of that state seem to have shown a proper disposition to check the unlimited discretion thus conferred, by declaring, as they did in Ritter v. Ritter, 5 Blackf. 81, and in Rubey v. Rubey, 29 Ind. 174, that an appeal lies from a decree granting a divorce under the discretionary clause of the statute. They said, in effect, that it was a legal discretion, which must be reasonably and not arbitrarily exercised, and that its exercise was subject to review in the appellate tribunal. DEWEY, J., in Ritter v. Ritter (*supra*) said: "That power, ample as it is, is not entirely without limits. The statute requires a *cause* of divorce, on which the discretion of the court is to be exercised. The conclusion of the judgment that such cause is reasonable, and such a one as forfeits the marriage contract on the part of the wrong doer, or otherwise, is not an act of legislation. * * * Like all discretionary power in courts, it must be exercised in a sound and legal manner; it must not be governed by caprice, or prejudice, or wild and visionary notions with regard to the marriage institution, but must be so directed as to conduce to domestic harmony, and the peace and morality of society."

In the recent case of Curry v. Curry, determined in the general term of the superior court of Indianapolis, and which will be found in the reports of that court, vol. 1, p. 236, it was held that hopeless and incurable insanity on the part of the wife, unaccompanied by any misconduct on her part, was no ground of divorce under the "seventh clause." The petition alleged "that during the year 1857 said Sarah lost her reasoning faculties, and became insane; that plaintiff immediately and promptly resorted to the use and procurement of every and all means and remedies known to the most eminent physicians of the age and country, for the purpose of

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restoring the mind and health of said Sarah, but without success; that since that time to the present he has continued his efforts for her restoration, and has had her placed under treatment at the Indiana Hospital for the Insane, where she has been kept and treated for about half the time; that the balance of the time she has been kept and cared for in the family of said plaintiff; all of which has occasioned him great expense, and which efforts and medical treatment have availed nothing towards the restoring of said Sarah; that she has been pronounced incurable, and is hopelessly insane; that by reason of her misfortune she has become troublesome, disagreeable and repulsive to her own children, having lost every attribute of humanity; that plaintiff has been impoverished, and himself and his family made utterly and indescribably miserable, by reason of the continued insanity of said defendant; that her presence in the family, and the knowledge of his relations to her, make his life almost a burden, and that his and her children desire that he may be divorced from said Sarah."

NEWCOMB, J., said: "It is not charged that the malady of the wife resulted from any *misconduct* on her part, or that she did any act in violation of her marital duties while sane. She, therefore, has committed no wrong against her husband. The statute places a limitation upon the power of courts in divorce cases, which, in our judgment, is fatal to the present suit. There is no authority conferred to grant a divorce except "upon the application of the *injured party*." Where no wrong has been committed by one party to the marriage contract, it is impossible that there can be, in a legal sense, an injured party. Where no wrong has been done by the party against whom the divorce is sought, a divorce cannot be granted. (Gullett v. Gullett, 25 Ind. 517. It is a great and irreparable injury to a husband for his wife to lose her reason, but he is not an injured party within the meaning of the statute, because the sufferer is not a wrong doer. The injury may be classed among those other accidents or calamities, that are in law deemed the acts of God, for the consequences of which no legal right of action accrues. *Actus Dei nemini facit injuriam.* We hold, therefore, that the state of Indiana has not conferred authority upon her courts to decree a divorce to a husband on the sole ground that the wife has become hopelessly insane; at least, when such insanity has not been superinduced by a vicious or reckless cause of conduct on her part."

Federal Court Practice—Power of a Justice of the Supreme Court to sit in a Circuit to which he is not assigned—The Louisville & Portland Canal Company: The Rights therein of the Bondholders, the Government, and the general Public declared.

THE UNITED STATES v. THE LOUISVILLE & PORTLAND CANAL COMPANY.

United States Circuit Court, District of Kentucky.

Before Mr. Justice MILLER.

1. **Federal Court Practice—Power of Supreme Court Justice to sit out of his circuit.**—Where the judge of the district court for a district where a bill in equity is brought, and the circuit judge for the circuit, and the judge of the supreme court allotted to that circuit are all absent from the district and circuit, another justice of the supreme court has jurisdiction at any place in the United States to hear an application for an injunction, notwithstanding the act of congress of June 1, 1872.

2. **The Louisville & Portland Canal.**—The legislative history of the Louisville & Portland Canal Company when first incorporated by Kentucky, in 1825, down to the present, and its relation to the government of the United States, given by Mr. Justice MILLER, who holds that the corporation is still in existence and has the right to use and control the canal and its revenues so far as may be necessary for the purposes contemplated by the act of the legislature of Kentucky and the joint resolution of the two houses of congress of May 24, 1860.

3. ——. **Rights of Bondholders, Government and Public.**—The United States is the only stockholder in the company, and its directors are naked trustees without an interest; and under the state and federal legislation concerning the canal and the bonds issued to raise money to enlarge and improve it, secured by a mortgage of the revenues and tolls of the canal company, there are three parties interested in the trust and the manner in which its duties shall be discharged by the company: 1st. The bondholders of the company. 2d. The government of the United States, sole stockholder, and which has expended $1,000,000 upon the canal; and 3d, the general public.

4. ——. **Act of June 10, 1872—Power of Congress—Vested Rights of Bondholders.**—The appropriation act of congress of June 10, 1872, in relation to the canal, construed so as not to impair the rights of the bondholders, and the opinion expressed that congress could not abolish or so limit the tolls as to injuriously affect them, "for the plain reason that it would be a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation."

5. ——. **Prosecution of the Work by Government Officers.**—Under the circumstances of the case the president and directors of the canal company were enjoined, at the suit of the United States, from interfering with its engineer, officers and contractors in the prosecution of the work of repairing and improving the canal.

The facts appear in the opinion.

Mr. Justice MILLER:—Upon a bill in chancery directed to the judges of the circuit court of the United States for the district of Kentucky, an application is made to me at Long Branch, in the state of New Jersey, to enjoin the Louisville & Portland Canal Co. from interfering with the engineer officers of the United States, and the person with whom they have contracted for the work of making certain repairs and improvements in said canal, under authority of an act of congress appropriating money for that purpose, approved June 10, 1872. An affidavit of the attorneys of the United States accompanies the application, which shows that the judge of the district court for that district, the judge of the circuit court of that circuit, and the judge of the supreme court allotted to that circuit are all absent from and without the district and circuit. I am of opinion, therefore, that notwithstanding the provisions of the similar section of the act to further the administration of justice, approved June 1, 1872, I have jurisdiction to hear the motion, and that it is my duty to do so.

The language of the act under which the agents of the government are proceeding is important. It is found in the act "making appropriations for the repair, preservation and completion of certain public works on rivers and harbors and for other purposes," and is *verbatim* as follows: "For the continuing the work on the canal at the Falls of the Ohio river, three hundred thousand dollars. And the secretary of war is hereby directed to report to congress, at its next session, or sooner if practicable, the condition of said canal, and the provisions necessary to relieve the same from encumbrance, with a view to such legislation as will render the same free to commerce at the earliest practicable period, subject only to such tolls as may be necessary for the superintendence and repair thereof, which shall not, after the passage of this act, exceed five cents per ton."

A brief reference to the history of this canal, and its relation to the government of the United States, is essential to an understanding of the matter now presented for consideration.

By an act of the Kentucky legislature of January 12, 1825, a corporation was chartered by the name of the Louisville & Portland Canal company, to construct a canal around the falls of the Ohio river, with a capital stock of six hundred thousand dollars divided into shares of one hundred dollars each, with the right to levy tolls on vessels passing through the canal. By subsequent statutes the capital was increased to ten thousand shares, and the United States, under acts of congress, became the owner of twenty-nine hundred and ten of said shares. The canal was constructed and has ever since been in successful and profitable operation; and the tolls collected under the limit of the charter granted by the state yielded such a revenue beyond what was necessary to

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keep the canal in repair, that by the joint legislation of the state and the United States, and by the consent of the individual corporators, a plan was adopted and entered upon to make the canal free to the uses of commerce, except so far as might be necessary to keep it in repair. This plan was inaugurated by an act of the Kentucky legislature, passed in 1842, the provisions of which were accepted by the stockholders, including the United States. Its essential features were, that the surplus revenues of the corporation should be used to buy up all the stock held by others than the United States, and that when this should be accomplished, the canal should be transferred to the control of the government for the use of the public, subject only to such tolls as might be necessary for its superintendence and repair. This plan was so far carried out that in the year 1855 all the shares other than those held by the United States had been purchased in, except five shares left purposely in the hands of as many individuals to qualify them to hold office as directors of the corporation.

But while this process of extinguishing the individual shares had been going on, it became clear that the demands of commerce required an enlargement of the canal and a change in its place of lower outlet, which could only be made by an additional or branch canal. The successful use of the tolls in buying in the shares of private stockholders, pointed at once to the means of making this increase in the capacity of the canal without burdening either the state or federal government; and by statute of the Kentucky legislature of 1857, and joint resolution of the two houses of congress of 1860, the canal company was authorized to do this work and to borrow money for that purpose, and pledge the faith of the company and its tolls or revenues on the money so borrowed. The corporation accordingly issued its bonds for one million six hundred thousand dollars, secured by a mortgage on the canal, its franchises, and its tolls and revenues; and proceeded to expend the sum realized on these bonds, in the enlargement and improvement of the canal. It was proved, however, that when this money was all expended, the canal was still unfinished; and the congress of the United States in the year 1868 commenced a series of appropriations for the purpose of completing the work, which has been continued to the present time. Over nine hundred thousand dollars have thus been appropriated and expended under the control and direction of the officers of the government, and the appropriation of 1872, already referred to, was in continuation of this work.

During this time the president and directors of Portland Canal company and the officers of the United States seem to have acted in harmony, the corporation collecting the tolls, and paying for and superintending the temporary repairs. They have also paid the interest on the debt, and redeemed or bought in about half a million in amount of the bonds. This harmony would probably have continued, but for the clause in the present act of appropriation, that "after the passage of this act the tolls should not exceed five cents per ton." It is the first time that congress has attempted to regulate or limit the tolls to be collected on vessels using the canal. The rate thus limited would not produce enough to make the ordinary and necessary repairs, and pay for the superintendence of the canal. It would leave the interest on the bonds unpaid, and largely impair if not destroy the security of the bondholders for the payment of the principal.

The president and directors of the company construe the act as appropriating the money on the *condition* that the tolls shall be limited to five cents per ton, and they say that an acceptance of the appropriation would be an implied consent to this limitation. They, therefore, notified the officer in charge that they refused to accept the appropriation.

That officer, however, proceeded to let the work and commence operations, and the corporation interfered by physical force to prevent it, and I am now asked by the bill before me, filed in behalf of the United States, to enjoin the corporation from this interference.

The officers of the canal company maintain: 1st. That the corporation is the legal owner of the canal, and that neither the government of the United States nor any one else has the right to assume such control of its property, as the action of the engineer officers seeks to do, without the consent of the directors of the company; and 2d. That a due regard to their duty to the bondholders and other creditors of the corporation forbids them from giving either express consent, or such consent as inaction would imply, to the assumption of the United States, to reduce the tolls found in the appropriation act.

The United States, by its counsel, on the other hand, maintain that since the year 1855 the corporation has had no existence as such, or if it has any existence, it is merely a nominal one, as the agent of the government for whose sole use it is kept alive; and that as the government owns practically all the stock, it has, and should have, the right to control the use, and direct the changes and improvements in the canal. This view is supposed to receive additional force from the powers and duties of the national government in regard to the navigable waters of the United States.

The first, and perhaps the most important question, to be determined is the relation of the corporation and its officers to the possession and control of the canal.

The proposition of the government counsel is based upon the idea that when, under the act of 1842, all the private stock had been bought, the government became, without other action, the owner, and entitled to the possession and control of the canal; and that both by operation of that statute and the necessity of the case, the corporation ceased to have an existence, or at least to have any right or title to the canal; and this argument is made stronger, in the opinion of counsel, by the circumstance that at that time, to-wit, on the 31st day of January, 1855, by a report to the secretary of the treasury, the directors advised him of the purchase of private stock, and the readiness of the corporation to transfer the custody of the canal to the United States so soon as the department was prepared to receive it. But it does not appear that the department was ready to receive the transfer. Certainly no formal act either of congress or of the department, accepting this transfer or acknowledging the obligation on which alone it was to be so transferred, namely, to hold it for the use of the public free of tolls except so much as might be necessary for its superintendence and repair, is shown or claimed. On the contrary, in reply to the notification of the company, the secretary requested them to continue their organization by retaining a share of stock for each director to maintain his eligibility as such, and to manage the affairs of the canal as heretofore.

But whatever doubt may exist as to the precise relations of these officers to the work at that time, is removed by the subsequent act of 1857, of the state legislature, and the joint resolution of congress of 1860. These have already been referred to as authorizing the company to extend and enlarge the canal, and to contract a debt for that purpose; but as the language of the joint resolution of congress, approved May 24, 1860, seems to me to be conclusive of the continued existence of the corporation, I will give its precise terms. It was resolved, "That the president and directors of the Louisville and Portland Canal company be, and they are hereby, authorized, with the revenues and credits of the company, to enlarge the said canal, and to construct a branch canal from a suitable point on the south side of the present canal, to a point in the Ohio river opposite Sand Island, sufficient to pass the largest class of vessels navigating the Ohio river." The resolution had two provisos, one protecting the United States from liability for the debt so incurred, and the other declaring that when the work was completed, *and paid for*, no more tolls should afterwards be collected than was necessary to keep it in repair and pay for its superintendence and management.

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This resolution, beyond all controversy, clearly recognizes three facts of important bearing on the matter in hand: 1st. The existence of the corporation called the Louisville & Portland Canal Compahy; 2d. That it had revenues and credits which might be sufficient to enable it to raise means for this large and expensive work; 3d. That it had the right, or it was then given so far as the United States could give it, to use these credits and revenues for that purpose.

It is inconceivable that this company had any other revenue than the tolls from the canal, or any other credit than that which arose from the right to these tolls, and the ownership or control of the canal. To me it seems that this is conclusive of existence of the corporation and of its right to use and control the canal and its revenues *so far as was necessary for the purpose contemplated by the act of the Kentucky legislature and the joint resolution of the two houses of congress.*

But while these considerations prove the continued existence of the corporation, the validity of the contract by which they pledged the canal and its revenues for the money borrowed for its extension, and its duty to secure and protect this revenue and to do all that lawfully may be done to prevent its destruction, or diversion from that purpose, it is still true that the directors of this corporation occupy a very peculiar position, and one widely different from the directors of railroads, insurance companies and other corporations for private gain. The United States is the only stockholder of this corporation. The directors have really no personal interest in the corporation or its property. They are to all purposes what equity calls trustees without an interest, the depositaries of a naked trust. For whom do they hold this trust, and for whose benefit must they exercise it? This enquiry, though lying at the foundation of the question to be solved here, is fortunately not a difficult one. There are three parties interested deeply in this trust and in the manner in which its duties shall be discharged, which I review in the order of the superiority of their claims rather than their importance.

1st. The holders of the bonds, secured by the mortgage, authorized and placed under a two-fold legislative sanction by the legislature of Kentucky and the congress of the United States. 2d. The United States, the holder of all the stock in the corporation, expending a million of dollars beside for the benefit of the canal; and, 3d. The public, the community, to whose use, free of all charges but those necessary to keep it in operation, it has been solemnly dedicated by the legislature of Kentucky, by the congress of the United States, and by the action of the corporation itself, as well as by all the acts of all these parties from 1842 to the present time, so soon as the enlargement is completed and the debt thereby created discharged.

As regards the first of these, I have no hesitation in expressing my entire conviction that the bondholders have a lien upon the revenues of the canal and a right to insist that the corporation shall protect these revenues, to the extent necessary to make entirely safe the payment of their debt and its accruing interest; and that until that debt is paid, or the mortgage satisfied or otherwise discharged with the consent of these bondholders, this right of theirs remains, with the corresponding duty of the directors of the corporation. But the right of these creditors is limited to this, and so long as their security is unimpaired it is the duty of directors to advance the other interests I have mentioned, for which they are trustees. The interests of the United States and of the public are, for present purposes, identical. The government has, in all its actions, shown its desire and its intent, that at the earliest moment the public use of the canal should be freed from all burdens save those necessary for its repair and management, and her very act which has given rise to the present opposition of the president and directors is wholly in the interest of the public, and designed to hasten the end long contemplated by all parties.

Now, if the act of the United States in completing the enlargement of the canal is an act for the benefit of all these parties, the bondholders inclusive, the resistance of the president and directors is an act in detriment of their trust, injurious to all the interests confided to them, and a mere arbitrary exercise of power which should be restrained. If, on the other hand, any one of those interests would be seriously prejudiced, they should not be disturbed in the exercise of a reasonable discretion in the protection of that interest.

That the work itself which is being done by the government is a useful and a necessary work for the public good, and for that of the United States, as a stockholder and as the representative of the public, is undeniable. That it also adds to the value of the security of the bondholder, and is to that extent in his interest, is equally clear.

But in regard to the latter, if, as alleged by defendant, the work is being constructed in a manner which so far obstructs the use of the canal as will endanger the revenue from which this interest is to be paid, or if, as the trustees seem to believe, the work when completed under the present act of congress, will extinguish the right of the corporation to collect sufficient toll to pay both principal and interest of their debt, then the work should not be done, for these rights are paramount.

In regard to the manner of doing the work, the affidavits submitted satisfy me that no such serious obstruction to the use of the canal, or to the repairs which the directors wish to make, will result from the work as that claimed by the defendant; none which should be set up for a moment in comparison with the great value to all parties of the vigorous prosecution and early completion of the work of extension and enlargement.

But I am satisfied that the president and directors are honest in their belief that an acquiescence on their part in the expenditure of this appropriation on the canal, would bind them legally as an acknowledgment of the government limitation of the toll—an acknowledgment which would be a violation of their official duty. Of this result they will be rid if their action is controlled by a competent court against their protest. To refrain from disturbing the contractors and engineers in expending this money, when their hands are tied by an injunction, raises no presumption of acquiescence in the claim of the government to reduce the toll to a minimum.

Should the court so restrain? or, if they are right in their construction of the statute, should they be permitted to resist congressional interference in this matter?

This leads me to a remark or two on the construction of the appropriation act. The first sentence is a distinct and clear appropriation of $300,000 for the continuance of the work in which the government had for several years been engaged, and in which it had spent, aside from its stock, near a million of dollars. The subsequent sentence directs the secretary of war to report to congress what legislation is necessary to relieve the canal of encumbrance, so that it may be free from all other toll than what is required for its management and repair; and this sentence declares that such toll after the passage of this act shall not exceed five cents per ton.

That the appropriation is absolute and independent of the clause concerning toll, I have no doubt. It might as well be argued that it was dependent on the report of the secretary of war. Whether, therefore, the toll be reduced or not, the appropriation remains and should be carried into effect.

When we consider that the next sentence recognizes the encumbrance on the canal, no doubt meaning the one in favor of the bondholders, so often mentioned in this opinion, and directs an enquiry as to what action by congress is necessary to remove it, I can hardly believe that in the same sentence it was intended to destroy the essential thing on which that encumbrance rested, namely, the tolls. The argument is, therefore, not without force, that congress meant, when they said such tolls should not exceed

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five cents per ton after the *passage of this act*—such act as they contemplated in future to pass—to satisfy or remove that encumbrance.

It must be confessed that the language is not apt for this construction; that in their caution, the directors might well have supposed that congress intended to limit the tolls at once to five cents per ton.

If this construction of the statute be correct, then I have no hesitation in saying that that part of it which so limits the tolls is void, for the plain reason that it is a legislative attempt to destroy vested rights, and a taking of private property for public use without due compensation.

I think I have shown that the prosecution of this work is for the benefit and advantage of all concerned; that it does not seriously interfere with the ordinary use of the canal, and that the accomplishment of the work will neither confer on congress the right to regulate the toll, nor validate the attempt already made to do so, if congress really intended to make such an attempt.

Under these circumstances I have no hesitation in controlling the president and directors of the canal company in the exercise of the great trust committed to them, so far as may be necessary to permit this work to go on, and in exercising this control, I feel satisfied that I am relieving them from an embarrassment and responsibility which they will gladly rest on the shoulders of the court. The injunction will be granted.

ORDERED ACCORDINGLY.

NOTE.—A noticeable feature in the foregoing opinion is the favorable light in which it regards the rights of the bondholders of the corporation: the learned justice declaring with emphasis that even *congress* could not limit the tolls of the canal pledged for their benefit so as to impair their rights. In England parliament would possess this power, as shown by the case of Brown v. Mayor, etc., of London, 9 Com. B. (N. S.) 726, 1861. There a statute discharged the liability of the city of London on bonds payable out of tolls and duties levied on vessels navigating the Thames; and it was held that no action would thereafter lie against the corporation thereon, on the principle that where the performance of an obligation has been rendered impossible by act of the law, the obligation is discharged. See, also, St. Louis v. Shields, 52 Mo. 351; Dillon on Munic. Corp. Sec. 41 *et seq.* (2d ed.), note.

As to the right of the United States to bring an injunction bill in the proper circuit court to protect improvements which she is making under the authority of congress, in navigable waters, from injury which will be caused by acts done by state authority, see United States v. Duluth (city of), 1 Dillon C. C. R. 469; sequel to same case, 2 Ib. 406.

Contracts by Banks for Interest in Excess of Charter Rates—Accommodation Paper—Usury.

JOHN K. TIFFANY, SURVIVING TRUSTEE OF JOHN F. DARBY, BANKRUPT, APPELLANT, v. THE BOATMEN'S SAVING INSTITUTION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

Supreme Court of the United States, No. 179; *October Term*, 1873.

1. **Usury—Missouri Statutes**—Whether the usury statutet of Missouri apply to banking corporations therein, *quære*.

2. —— **Bank Loans—Charter Rate of Interest**—On the principle that a contract to do an act forbidden by law is void, if a bank in making a loan exceeds the charter rate, it cannot recover on the note, although the statute does not declare the note void, and is silent as to the effect of taking more than the prescribed rate of interest: following U. S. v. Owens, 2 Pet 575.

3. ——. —— ——. **Where Contract is executed.**—But this principle does not apply to cases where the contract is *executed* and the money has been paid; in such case the borrower, or his assignee in bankruptcy, can only recover back the excess beyond the charter rate.

4. ——. ——. ——. **Accommodation Paper**—The same principle applied to purchases of accommodation paper with knowledge or good grounds of knowledge of its character, and that it was being sold for the benefit of the maker.

5. ——. **Bona fide Holders.**—Whether a *bona fide* purchaser of accommodation paper without knowldege of its origin, and that it was not created in the regular course of business, is affected by usury statutes, discussed and cases cited and course of decision referred to by Mr. Justice DAVIS.

The facts of the case appear in the opinion. A full report of the cause in the court below is given in 1 Dillon C. C. R. 141. The defendant appealed to the Supreme Court.

Mr. Knox for the complainant; *Mr. Gantt* for the defendant.

Mr. Justice DAVIS delivered the opinion of the court.

This is a bill in equity, seeking to recover from the defendant certain large sums of money which, it is alleged, were loaned to Darby at usurious rates of interest, in violation and fraud of the bankrupt act. The bill does not ask for a decree for the excess of interest reserved over the legal rates, but proceeds for the recovery of all the money loaned to Darby and repaid by him, on the theory that the contracts between the parties were illegal and void, and that this illegality affected all the notes, and that if equity will not enable Darby to recover back what he voluntarily paid, it will his representative, on the ground that the rights of the trustee are greater than those of the bankrupt. There are two transactions which are sought to be impeached. The first relates to a loan of $135,000, at the rate of ten per cent., made on the 4th day of October, 1868, on the security of certain jail bonds of the city of St. Louis. The other is predicated on the purchase by the defendant, at usurious rates, of certain notes given by Darby, and endorsed for his accommodation.

The circuit court did not consider, under the evidence, the last transaction unlawful, and decided that the complainant could only recover the amount of interest paid upon the note of $135,000 in excess of 8 per cent. per annum.

This decision, and the exclusion of certain evidence offered by the complainant, are the errors which are the object of this appeal. The general statute of Missouri concerning usury (chapter 89 of General Statutes of Missouri, 1865, p. 401) allows an individual to receive 10 per cent. per annum interest for the loan of money; but, if more be taken and suit is brought to enforce the contract, and the plea of usury be interposed, the whole interest is forfeited to the proper county for the use of schools. The debtor is not released from his obligation to pay, but the interest is diverted from the parties and appropriated for school purposes. If, however, the borrower suffers judgment to go against him without pleading usury, or if, without suit, he pays the usurious interest, he cannot, either at law or in equity, maintain an action for its repayment. This was settled in Ransom v. Hays (39 Mo. 448), and reaffirmed in Rutherford v. Williams (42 Mo. 35); and these decisions would be conclusive of this controversy, unless it is affected by the bankrupt law, if the legislature intended the general provisions of the interest act to apply to loans by artificial as well as natural persons, although the former might be restricted to a less rate of interest than the latter. It is contended by the defendant that this act was meant to apply to corporations, and that if a bank, discounting a note in the course of business, commit usury, it is subject to precisely the same consequences with an individual. On the other hand, the complainant insists that the legislature did not intend in this matter to place corporations on the same footing with natural persons, and cites in support of this position The Bank of Louisville v. Young (37 Mo. 406). But the facts of that case did not involve the construction of a contract made by a corporation created by an act of the legislature of Missouri. The point decided there was, that a note given to secure a loan made in foreign bank notes by a foreign corporation, doing business by an agent in St. Louis, contrary to the provisions of an act to prevent illegal banking, was void.

We have been cited to no case in the courts of Missouri, nor are we aware of any, in which the question has been directly presented whether the general law relating to usury applies to, and has the same effect upon, a contract made in violation of its charter by a bank as upon a contract made by an individual. The question is one of great importance to the business interests of that

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state, and may be far-reaching in its consequences, and as it is not necessary to decide it in order to dispose of this case in accordance with the principle on which the circuit court placed its decree, we prefer to leave its decision to the state tribunals. Assuming, then, that this defendant is not within the purview of the general usury statute of the state, what are the consequences that must attach to it for taking excessive interest from Darby? The bill proceeds on the idea that the provision of the charter being violated, all the loans to Darby were *ultra vires* and void, and as they were made to him within four and six months of his adjudication as a bankrupt, with the knowledge of the defendant during the whole course of its dealing with him that he was insolvent, the complainant has, in his character of trustee, the right to recover for the use of his trust all the sums of money paid to defendant by Darby, because paid in fraud of the bankrupt act.

The defendant is, by its charter, authorized to lend money on interest, but is forbidden to exact more than eight per cent. for the loan. No penalty is prescribed for transgressing the law, nor does the charter declare what effect shall be given to the usurious contract. This effect must, therefore, be determined by the general rules of law. The modern decisions in this country are not uniform on the question whether, if the bank takes more than the rate prescribed, the contract shall be avoided or not on these general rules; nor is this a matter of surprise, if we consider the growing inclination to construe statutes against usury so as not to destroy the contract. It is, however, unnecessary to review these cases, or the earlier ones in England and this country, which uniformly hold that the contract is avoided; because this court has, in the case of the Bank of the United States v. Owens, reported in 2 Peters, decided the question.

The bank in that case brought suit upon a promissory note that was discounted at a higher rate of interest than six per cent., which was the limit allowed by its charter upon its loans or discounts. The charter, like that of the Boatmen's Institution, did not declare void any contract transcending the permitted limits, nor affix any penalty for the violation of the law. It was contended in that case, as it has been in this, that a mere prohibition to take more than a given per cent does not avoid a contract reserving a greater rate, and that when a contract is avoided, it is always in consequence of an express provision of law to that effect. But the court held otherwise, and decided that such contracts are void in law upon general principles; "that there can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is illegal." Chief Justice TANEY, in the Maryland circuit, as late as 1854, in a similar case, held similar views, and supported them by the decision in this case. (Dill v. Ellicott, Taney's Circuit Court Decisions, p. 233.) It must, therefore, be accepted as the doctrine of this court, that a contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.

But it does not follow in cases of usury, if the contract be executed, that a court of chancery, on application of the debtor, will assist him to recover back both principle and interest. To do this would be to aid one party to an illegal transaction, and to deny redress to the other. Courts of equity have a discretion on this subject, and have prescribed the terms on which their powers can be brought into activity. They will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money loaned, with legal interest; nor, if the contract be executed, will they enable him to recover any more than the excess he has paid over the legal interest. (Story's Eq. Jur., 1 vol., 10th edition, by Redfield, sections 300, 301, 302.) In recognition of this doctrine the court below rendered a decree for the excess of interest over eight per cent. per annum exacted of Darby on the note for $135,000, and dismissed the bill as to all other claims. The six accommodation notes, which defendant claims to have been purchased from note brokers, were really taken on loans to Darby, and the illegal interest received above eight per cent. on them should, on the principle of that decree, be refunded, as much as that upon the larger note. It is true that usury is only predicable of an actual loan of money, and equally true that a negotiable promissory note, if a real transaction between the parties to it, can be sold in the market like any other commodity. The real test of the salability of such paper is whether the payee could sue the maker upon it when due. He could do this if it was a valid contract when made, otherwise not. Mere accommodation paper can have no effective or legal existence until it is transferred to a *bona fide* holder. It follows, then, that the discounting by a bank at a higher rate of interest than the law allows of paper of this character, made and given to the holder for the purpose of raising money upon it, and its origin only a nominal contract, on which no action could be maintained by any of the parties to it if it had not been discounted, is usurious, and not defensible as a purchase. The point was decided in New York at an early day (15 Johnson. 55), and this decision recognized and approved by this court in Nichols v. Fearson, 7 Peters, 103, and the general current of decision is in the same direction. (Munn v. Commission Co., 15 Johns. 55; Powell v. Waters, 17 Johns. 176; Wheaton v. Hibbard, 20 Johns. 289; Powell v. Waters, 8 Cowan, 669; Corcoran & Riggs v. Powers, 6 Ohio State, 37; 3 Parsons on Contracts, 6th edition, p. 144, and cases cited in note *s*.)

There are cases which hold that the purchaser of such paper is protected if he took it in good faith of the holder, without knowledge of its origin, and in the belief that it was created in the regular course of business. (3 Parsons on Contracts, p. 145, and cases cited in the note on that page.) Whether this limitation of the rule be correct or not, it is not important to enquire, as the decision of the question under consideration does not rest upon it.

The six notes which are the basis of the transaction complained of, were executed by Darby, solely for the purpose of raising money upon them, endorsed by Brotherton & Knox, for his accommodation, and delivered by him to Stagg and other street brokers, to be negotiated. This negotiation was effected with the Boatmen's Institution, and it is perfectly manifest that the cashier, in purchasing the paper, did not suppose that he was advancing the money for the benefit of the brokers who held them, or of Brotherton & Knox, who endorsed them. They were doubtless purchased because the security was deemed sufficient, but it is impossible to conceive that the cashier did not know the paper to be of that class called accommodation, as it is conceded that Brotherton & Knox were gentlemen of large pecuniary ability, and had no occasion to go upon the street to get paper held by them *bona fide*, against Darby or any one else, discounted. Indeed, Stagg says the notes were negotiated for Darby's benefit, and explains, in some instances, how it was done. Darby would apply to him for money on his paper, and he would go to the Boatmen's Bank to see if the cashier would take it, and if the reply was in the affirmative, the paper would be made, taken to the bank, and the money obtained on it. Can any rational person suppose, in the absence of any direct evidence, that the cashier in dealing with Stagg thought he was dealing with the owner of the notes? The presumption is that street brokers act for others, not themselves, and that the cashier was well acquainted with this course of business. If so, he knew, or ought to have known, that Darby wanted the money, and that the paper was made to enable him to get it. and for no other purpose.

This being the case, the transaction can be viewed in no other light than as a loan of money directly to Darby, and as he paid more than 8 per cent. for its use, the circuit court erred in not ordering the excess to be refunded.

The remaining question to be considered is, whether, in this case, the rights of the trustee are greater than those of Darby.

[Upon this point the court held that the assignee could claim

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nothing which Darby could not have claimed had he been a party to the suit. If Darby were suing, he could only recover the excessive interest paid to the bank]

The opinion closes as follows:

The case will have to go back for the purpose of enabling the circuit court to ascertain, in some proper way, the excess of interest over the charter rate paid on the six accommodation notes, and to enlarge the decree so as to recover that sum. In all other respects the disposition of this case by the circuit court was correct.

Injunction to Restrain Issue of Bonds by Public Corporations.

UNION PACIFIC RAILROAD COMPANY v. LINCOLN COUNTY.

Circuit Court of the United States, District of Nebraska, November Term, 1873.

Before DILLON and DUNDY, JJ.

1. **Public Corporations—Bonds—Injunction**—Upon proper application the issue of negotiable bonds by a public corporation will be enjoined, when the statute authorizing their issue only upon certain terms has not been complied with in matters of substance.

2. **Statute authorizing must be followed.**—An act of the legislature of Nebraska in respect to the issue of such bonds construed, and it is held, where the statute required such bonds to be paid in *ten* years, that a vote authorizing bonds to run *twenty* years was such a material departure from the statute that the court would enjoin the issue of the bonds.

This is a bill by the Union Pacific Railroad Company, as a large property owner and tax-payer in the county of Lincoln, in behalf of itself and other tax-payers similarly situated, to restrain the proposed issue of $30,000 of the bonds of the county, to borrow money to aid it in erecting public buildings therein. The county commissioners ordered an election to be held at the different voting precincts in the county, on the 25th day of May, 1872, to vote on the proposition to issue $30,000 in the bonds of the county to bear ten per cent. interest and maturing in twenty years, and also to levy annually a tax sufficient to pay the interest of said bonds and the principal at maturity, for the purpose of building a court house and jail. The proposition carried, and the bill is brought to restrain the issue of the bonds. The bonds proposed to be issued are negotiable in form, with interest coupons attached, for $500 each, payable August 1st, 1892, or at the option of the county, at any time after 1880. Each bond contains a recital that it is authorized by sections 19 and 26, and section 28 of chapter 9, of the Revised Statutes of the State, in pursuance of the vote of the 25th day of May, 1873.

O. P. Mason, T. F. Gantt, for the county; *A. J. Poppleton, E. Wakely* and *John D. Howe*, for the plaintiff.

DILLON, Circuit Judge:—Upon consideration, we hold:

I. That the act of the legislature of the state of Nebraska, of February 15, 1869, and the amendatory act of March 3, 1870, which authorize "any county or city to issue bonds to aid in the construction of any railroad, or other work of internal improvement," have no application to the issue of bonds by a county for the erection of public buildings therein; and, therefore, the legality of the proposed issue of bonds by the county in the case at bar can derive no support from these enactments.

II. That the only authority for the issue of such bonds in this state is that which is recited in the bonds here proposed to be issued, viz: Sections 19 to 28 of chapter 9 of the revised statutes of the state.

III. Section 19 gives the county commissioners "power to submit to the people of the county, at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings." The mode of submitting is prescribed in section 21, and section 22 provides as follows "When the question submitted involves the borrowing of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof in addition to the usual taxes, and no vote adopting the question proposed shall be valid unless it likewise adopts the amount of tax to be levied to meet the liability incurred." "Sec. 23. The rate of tax levied shall in no case exceed three mills on the dollar on the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, the rate shall be such as to pay the debt in ten years."

It is our judgment that the legislative intention here is to require the debt created to borrow money to erect public buildings to be paid in ten years, and the requirement expressly is that a rate of tax shall be voted and levied sufficient to pay the debt within that period. This provision is defeated if the county may vote to create a debt payable in twenty years, and to levy an annual tax during that period, and such was the proposition which was, in this instance, submitted to, and adopted by, the voters. If the tax is raised in ten years sufficient to pay the debt, the debt ought to be such an one as that the tax may be applied to its payment, for the tax is "specially appropriated and constituted a fund distinct from all others" for this purpose. A construction of this legislation is not admissible by which money to pay the debt may be raised years before the debt itself is payable.

As this is decisive against the right of the county commissioners to submit, or the people to adopt, the proposition for the issue of bonds to run twenty years, it is not necessary to notice the other grounds for the injunction presented in the bill. It may be that if these bonds were issued and in the hands of *bona fide* holders for value, they could be enforced against the county; but the issue of such bonds will be enjoined upon proper application, when the statute in matters of substance has not been complied with. An order will be entered denying the motion to dissolve the injunction heretofore allowed, and continuing it in force.

DUNDY, J., concurs. ORDERED ACCORDINGLY.

NOTE.—In the case of the same plaintiff, at the same term to restrain Merrick county from issuing railway aid bonds, under the act of February 15, 1869, the court, on demurrer to the bill, held, under section 21 of the revised statutes of 1866, even where the notice of the question submitted to the voters of the county was published in a newspaper, that it was essential to the validity of the vote that "a copy of the question submitted should be posted up at the places of voting." In this case, it was alleged that the notice was not thus posted at the place of voting, in a town, the vote in which controlled the result in favor of the proposition.

Federal Court Practice—Mode of Entitling Bills and Affidavits—Service of Copies.

CHARLES V. STERRICK v. JAMES W. PUGSLEY ET AL.

United States Circuit Court, Eastern District of Michigan, January 26, 1874.

Before LONGYEAR, District Judge.

1. **The Address of a Bill** to the "circuit court, etc., in chancery sitting," is sufficient.

2. **Entitling Bill in the Cause.**—A bill ought not to be entitled in the cause, because when it is filed there is no cause pending; but such an entitling may be rejected as surplusage.

3. **Affidavits Venue, how Stated.**—In affidavits taken before a United States circuit court commissioner, the venue should be stated thus: "United States of America, District of ——," and not "State of ——, County of."

4. **Entitling Affidavits.**—Affidavits made to be used in a suit not yet commenced should not be entitled as of any court or cause; and such an entitling is good cause for their rejection.

5. **Service of copies of Affidavits.**—The proper practice in regard to the service of copies of affidavits on the opposing counsel stated.

United States circuit court, eastern district of Michigan. In equity. Charles W. Sterrick v. James W. Pugsley and Arthur D. Smith. Opinion delivered January 26th, 1874. On the motion

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of complainant for a preliminary injunction to restrain defendants from using a deed of assignment of a patent by complainant to defendant Pugsley, and from claiming or exercising any rights thereunder.

Mr. Breese, for complainant; *Mr. H. H. Brown*, for defendants.

LONGYEAR, J.—Some preliminary objections will be first noticed. The defendants' counsel objected to the bill of complaint being read on the grounds:

1. That the entitling of the court is not "in equity," but of the "circuit court," etc., merely.

2. That it is entitled in the cause.

The address of the bill is to the "circuit court," etc., "in chancery sitting." This is sufficient, and if the entitling of the court were of any consequence the court would direct it to be amended by adding the words "in equity."

The bill is entitled in the cause. This is irregular, because until the bill is filed there is no cause pending. The bill, however, is complete without it, and the entitling as to the parties is rejected as surplusage.

The objections to the bill are, therefore, overruled.

Counsel for defendants also objected to the reception and reading of the affidavits annexed to the bill of complaint in support of the motion for injunction on the grounds:

1. That they have no proper venue.

2. That they are not entitled in any cause "in equity."

The affidavits are sworn to before United States circuit court commissioners, some of them before a commissioner for the eastern district, and some before a commissioner for the western district of Michigan. The venue of each is, "State of Michigan, County of Calhoun," or, "County of Kalamazoo," according, I suppose, to the county in which the oath happened to be administered. This was irregular. The proper venue of an affidavit taken before a United States commissioner is "United States of America, District of ——," naming the district and state for which the commissioner is such. In this case it should have been "Eastern District of Michigan," or "Western District of Michigan," as the case was. In the view taken by the court, however, upon the merits of the motion, admitting all the affidavits, it is unnecessary for the purposes of this case to decide what is the effect of the irregularity in the venue.

The objection to the entitling of the court is not tenable upon the ground stated. The affidavits were all made before the suit was commenced. Such affidavits should in no case be entitled in any court or cause. When they are so entitled it is a good cause for their rejection. Rex v. Jones, 1 Str. 704; Rex v. Pierson, Andr. 313; Rex v. Harrison, 6 T. R. 60; King v. Cole, 6 T. R. 640; 1 Dan. Ch. Pr. 891; Humphrey v. Cande, 2 Cow. 509; Haight v. Turner, 2 J. R. 370; Bronson v. Mitchill, 12 J. R. 460; Milliken v. Selye, 3 Denio, 54; Hawley v. Donnelly, 8 Paige, 415; 1 Barb. Ch. Pr. 600. See, also, the decision of this court made in the present term in The Blake Crusher Company v. Ward *et al.* But it was said at the argument, if there is no entitling how can it be known for what purpose the affidavit was made? This objection, if it be one, can be very easily obviated by stating the purpose for which it is intended in the affidavit itself.

The bill and affidavits having been read, defendants' counsel offered to read a sworn answer and accompanying affidavits in opposition to the motion. To this the complainant's counsel objected, on the ground that he had not been served with copies. Affidavits to be used in support of, or in opposition to, special motions, ought always to be served on the opposite counsel a reasonable time before the motion is brought on. Where this is not done the court may reject the affidavits, or, in its discretion, allow the same to be read, giving the opposite party the option to proceed with the hearing or to take time for the perusal and examination of the affidavits, and production of affidavits in reply where that is competent. The latter course was pursued in the present case. * * *

Effect of Express Company's Receipt limiting Liability where Value is not inserted.

The supreme court of Illinois has recently determined a point of interest to carriers and shippers, in the case of Oppenheimer v. United States Express Company, published in the Chicago Times of the 5th instant. The question presented was as to the validity of a clause in the express company's receipt, restricting their liability to $50, unless the value of the package was stated. The goods lost were claimed to be of the value of $3,800. But instead of inserting the value in the blank space left in the receipt for that purpose, the agent of the consignor had inserted a mark inexpressive of any value. It was held as a preliminary question that the consignors being merchants, and having dealt for several years with the company, using their printed books of receipts, in which the clause in question was inserted, must be presumed to have known of its existence. It was urged, however, that it was incumbent on the company to show, not only that the consignors had notice of the condition, but also that they *assented to it* and consented to be bound thereby. But the court thought otherwise. SHELDON, J., said:

"A distinction exists between the effect of those notices by a carrier, which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to ensure good faith and fair dealing on the part of his employer; in the former case, notice alone not being effectual without an assent to the attempted restriction, while in the latter case notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient. The rule in this case is thus laid down by the supreme court of New York: 'If he (the carrier) has given general notice that he will not be liable over a certain amount, unless the value is made known to him at the time of delivery, and a premium for insurance paid, such notice, if brought home to the knowledge of the owner (and courts and juries are liberal in inferring such knowledge from the publication of the notice), is as effectual in qualifying the acceptance of the goods as a special agreement, and the owner at his peril must disclose the value and pay the premium. The carrier in such case is not bound to make the enquiry, and if the owner omits to make known the value, and does not therefore pay the premium at the time of delivery, it is considered as dealing unfairly with the carrier, and he is liable only to the amount mentioned in his notice, or not at all, according to the terms of his notice.' (Orange County Bank v. Brown, 9 Wend., 115. See, also, 2 Greenleaf Ev., p. 215; Ang. on Carriers, p. 245; Farmers' and Mechanics' Bank v. Champlain Trans. Co., 23 Vt. 186; Moses v. Boston and M. Railroad, 24 N. H. 85.) The distinction above adverted to has been recognized by this court. (Western Transfer Co. v. Newhall *et al.*, 24 Ill. 466.) The common carrier is liable, as we find it frequently laid down, in respect to his reward, and the compensation should be in proportion to the risk. As the carrier incurs a heavy responsibility, he has a right to demand from the employer such information as will enable him to decide on the proper amount of compensation for the services and risk, and the degree of care which he ought to bestow in discharging his trust. (Hollister v. Nowlen, 19 Wend. 244.) And such a limitation of the carrier's liability as the one in question is held to be reasonable and consistent with public policy.

"But independent of the qualifying provision contained in the receipt, we should be inclined to sustain the defendant's claim of exemption from liability on the ground of a want of good faith in not disclosing the value of the goods. These consignors knew that there was a recognized distinction on the part of the company between valuable packages and ordinary freight; that they had their separate collectors of the two kinds, and the consignors were provided with signs to hang out to denote which one of the collectors they had goods for. They must have displayed the sign indicating that they had ordinary merchandise to be carried, as the box in question was delivered to that collector. In the blank receipts which they were so frequently filling out, there was a blank space after a dollar mark for filling in the amount the goods were valued at; this was a virtual request on the part of the company to state the value. There was an actual attempt here by the agent of the shippers to fill in this blank space, but instead of inserting $3,800 (the value) a mark or character was inserted in-

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expressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer, is asserted in the cases of the Chicago and Aurora Railroad Company v. Thompson, 19 Ill. 578, and American Express Company v. Perkins, 42 Ill. 459. Had the true value of the goods been disclosed there would have been an extra charge of $8.50, but increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved. The court below was justified in coming to the conclusion that the consignors elected to take the risk of the loss, rather than subject the plaintiffs to the enhanced charges that would have been made, had the value of the package been disclosed.

"It is unnecessary to consider the effect of that provision in the receipt which has been urged upon our attention by appellant's counsel, that the company are not to be held liable for any loss or damage except as forwarders only; as that provision and the one in question are distinct and severable, and one might be held to be obligatory upon a party where the other would not be. We are urged on behalf of the appellants to put this construction upon the receipt: that the limitation of liability to $50 in case of loss relates only to the duty of the company while acting as carrier. We do not regard the instrument as reasonably susceptible of any such interpretation. The plain reading as well as meaning of the limitation in question is that the company are not to be held liable for any loss or damage of any package for over $50 unless its value be stated. And the limitation is not liable to the objection urged by appellant's counsel, that it is invalid because the effect of it would be to relieve the company from all liability even in loss occasioned by its own negligence. The established legal construction of such condition is otherwise. They are not to be read as providing against losses or injuries occasioned by actual negligence. (Story on Bailm. § 570, 571; Sager v. Ports. S. & P. & E. R. R. Co., 31 Maine, 228). Numerous are the decisions where the validity of such provisions has been recognized and affirmed."

Judgment was rendered below for the defendants, and this the supreme court affirmed.

Notes and Queries.

GLASGOW, KY., February 12th, 1874.

EDITORS CENTRAL LAW JOURNAL:—In your paper of the 5th inst., you publish the case of Townsend, Assignee, etc., v. Leonard, Sheriff, etc., in the United States circuit court, district of Kansas, November term, 1873, before Judge DILLON, in which it was decided that property in the hands of a sheriff, under execution of *fi. fa.* from the state courts, before proceedings in bankruptcy were commenced, cannot, at the instance of the assignee in bankruptcy, be taken out of the possession of the sheriff by the federal court; that such sheriff has the right to satisfy the execution in his hands, and will only be required to surrender the residue of property, or money, after this has been done.

In a case like that of Townsend, Assignee etc. v. Leonard, etc., when the sheriff, under *attachments* from state courts, has seized property before the proceedings in bankruptcy have been commenced, will he (that is, the sheriff) be compelled by the federal court to surrender the property to an after-appointed assignee? or, will the state court, having obtained jurisdiction of the case, be permitted to go on, and, through its ministerial officers, dispose of the *attached* property and apply the proceeds to the satisfaction of the debts of the attaching creditors?

Please answer under "Notes and Queries," and give authorities.

Respectfully, L. M.

ANSWER.—The federal court will not disturb the *possession* of the state court or its officer. One remedy of the assignee if he claims the property, is to apply to the state court and set up his rights and *there* litigate them; and possibly he may bring in the federal court actions to test his rights, which do not look to the *possession* of the property. See Marshall v. Knox, 16 Wall. 551; Wilson v. City Bank of St. Paul, 1 CENT. LAW JOUR. 40; also, cases cited in Townsend v. Leonard, 1 CENT. LAW JOUR. 69; Johnson v. Bishop, 1 Woolw. 324; Cragin v. Thompson, 2 Dillon C. C. 513.

KANSAS CITY, February 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—On January 1, 1869, A. conveyed lot 1 to B. in trust for the benefit of C., to secure him in the payment of a promissory note. C., on July 1st, 1869, after the maturity of his note, for full value, assigned it to F., and shortly thereafter entered upon the margin of the record full satisfaction for the trust deed. On September 1, 1869, A., by deed of general warranty, conveyed said lot, for a valuable consideration, to H., who in every sense became a *bona fide* purchaser, and is now in possession of the lot. On January 1st, 1870, at the request of F., who was still the legal holder of the note, B. sold the lot under the trust deed and F. became the purchaser.

1. Had C., under Wagner's Statutes, p. 956, §. 14, legal capacity to enter satisfaction of the trust deed?

2. Can F. recover in ejectment?

3. Has F. in equity any ground for setting aside the entry of satisfaction as against H.? ——. ——.

ANSWER.—As a rule we must decline to answer questions depending upon local statutes, and which may be in actual litigation. We have not the benefit of arguments which are necessary to the formation of intelligent opinions. The questions put by our correspondent might depend upon whether it was the duty of F. to take and record an assignment of the mortgage or deed of trust, and this might be affected by the local registry laws. As to the general rules of law applicable to deeds of trust and sales and titles thereunder, see 2 Am. Law Reg. (N. S.) 641, 705; Ibid, 449.

As to the necessity of *registration* of assignments of mortgages, see the cases cited and stated by Mr. Hilliard in the fourth edition of his valuable work on mortgages, pp. 537, 579, 580, 581 and notes. As to release and discharge of mortgages, see Ib. ch. 17, pp. 473—529.

Book Notices.

A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES. By FRANCIS WHARTON, LL.D., author of "Conflict of Laws," etc. Seventh and Revised Edition. Phila.: *Kay & Bro.* 1874; 3 vols. §§ 3542. Sold by Soule, Thomas & Wentworth, St. Louis.

In 1846, James Kay & Brother published, in one comparatively small volume, the first edition of Wharton's American Criminal Law. The house of Kay & Brother have just published the seventh edition of the same work in three large and handsome volumes, revised by its learned author. To publisher and author alike, the proofs of the great and deserved popularity of the work cannot be other than exceedingly gratifying. More than three-and-twenty years ago we became practically familiar with the first edition, and have noted since then the gradual expansion and constant improvement of the work under the skilful and pains-taking care of its author. It is not probable that its structure will be hereafter changed; and when we consider that it has not been excogitated at once, but has been gradually *thought out* and constructed by its author during a period of over a quarter of a century, and that it embraces the entire domain of Criminal Jurisprudence, it may confidently be affirmed that it is destined to remain as one of the principal works upon the subject of which it treats.

The first volume of this edition is devoted to Principles, Pleading, and Evidence. The second volume treats of Specific Crimes, and the matter of the second and third volumes of prior editions is here compressed into one. This makes room for a third volume, which is substantially new, and is appropriated to Criminal Practice. Upon each of these departments the work constitutes a complete treatise. While Mr. Wharton's work does not supersede other useful treatises, English and American, upon Criminal Law and Procedure, yet it is at the same time true that there is no complete substitute for it.

It is useless to refer at length to a work so well known and in such universal use. We must content ourselves with a brief glance at what is peculiar to the present edition. The new arrangement of the work we have already indicated. In every part of this edition the careful presence of the author is observable. While the work retains its former character of *practical usefulness*, this edition is distinguished by its copious reference to the criminal jurisprudence of other countries, ancient and modern, and in this important respect the work has been so enriched by the researches and learning of the author, that it will hereafter rank as one of the legal classics in American law, and will be consulted, not only by the busy lawyer and judge in the press of trials, but by the philosophical student, who aspires beyond mere precedent, and wishes to attain those enlarged views which can come only from comparative jurisprudence, or an examination of those systems and principles of law which have prevailed among enlightened nations in successive periods of the world's history.

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Recent Reports.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT OF INDIANAPOLIS. By O. M. WILSON, official reporter. Judges: Hon. SOLOMON BLAIR, Hon. HORATIO C. NEWCOMB, Hon. FREDERICK RAND. Single copy, quarterly, $1; Vol. 1, four parts, with fifth part, making index, etc., $4.

The superior court of Indianapolis is organized on a plan similar to the supreme court of New York. The judges sit separately at *nisi prius*, or at "Special Term," and then meet in "General Term," and review causes appealed from "Special Term." These Reports, therefore, possess a value similar to Barbour's New York Reports. They will be of some value to the practitioner in Indiana; and outside of that state we suppose the cases contained in them will stand on their intrinsic merits, and will not possess less persuasive force because they are not decisions of the court of last resort. The reporter has annotated each case with a diligence which is commendable, and for which we fear he will never be adequately paid.

We notice the following cases as possessing general interest:

Assault and Battery—Aiding and Abetting.—Liability for *assault*, extends not only to persons committing the act, but as well to those who are present and encourage either its commission, or its continuance. Baldwin v. Biersdorfer, 1.

———. ———. Presence at the commission of an offence, and encouragement, either by words, signs, or gestures, or being sufficiently near, in pursuance of an agreement to assist, is *aiding and abetting* in the commission of the wrongful act. Ibid.

———. ———. *Conspiracy.*—Where the evidence discloses the presence of others in a situation to render aid, the jury may determine whether such persons were not there for the purpose connected with the assault, and from such circumstances and facts they may properly infer the formation of a *conspiracy* for its commission. Ibid.

Assignment of Debt—Collateral Security.—An assignment of a debt carries with it all collaterals given to secure its payment. Kemp v. Dickson, 42.

———. ———. An assignment of a note, "without recourse," will not release the collateral given to secure the payment of the note, unless so stipulated at the time of assignment, and without such agreement, the security passes with the note. Ibid.

———. ———. A person holding collaterals to secure the paymen of a debt, holds them simply as a special trustee. Ibid.

———. ———. *Admission of Agent.*—Where a statement is made by the assignor to the agent of the assignee, pending the negotiation for the note, that he held a certificate as collateral for the security of the payment of the note—held, that such an admission is competent evidence to show notice to the assignee of such security, when he purchased the note. Ibid.

Contracts—Presumption—Parol.—Where the complaint does not aver that a contract is in writing, the presumption is that it was by parol. Smith v. Indianapolis, Peru & Chicago Railway Co., 88.

False Imprisonment—Arrest of Insane Person.—If there is probable cause to believe that a person is insane, and is about to commit any mischief, which, if committed by a sane person, would constitute a criminal offence, an officer may detain the offender until it may reasonably be presumed that he has changed his purpose. Pætz v. Dain, 150.

———. Parties acting at the instance of any one assuming the duties of a ministerial office, are bound to know whether he is in fact such officer, and whether he in fact bears that authority. Thus, persons who, in obedience to the orders of one who claimed to be a "special constable," had imprisoned the plaintiff, were held liable in damages for a false imprisonment, it not appearing that the constable's appointment had been recorded on the justice's docket, as required by the statute. Schaw v. Dietricks, 153.

Innkeeper—Liability of, for Property Stolen from Guests.—The "rules" of a hotel requiring "money, jewelry, and other valuables" to be deposited in the safe of the office, do not apply to a watch which a guest has on his person, and keeps for his personal use, and which is essential to his personal comfort and convenience. Milford v. Wesley, 119.

———. ———. Where a guest is told by the innkeeper, or his servant, "not to lock the door; for other parties had to come into the room, to go to bed, and the door should be left unlocked for them;" or, "that he could either lock the door, and get up and let them in when they come"—*held*, that a lack of ordinary care can not be imputed to a guest, acting in obedience to such instruction—in leaving the door unlocked—and the innkeeper will be responsible for property stolen from such guest.

Mechanics' Lien—Conversion.—A mechanic may waive his lien by delivering the goods before payment, or accepting security for their price. His refusal to deliver on demand in the latter case, will not work a conversion of the goods manufactured, if such refusal was, by reason of his ignorance as to whether or not the debt was secured; nor can the person in such case making the demand, recover the price of the goods because of such refusal. Farman v. Ratcliff, 145.

———. ———. On a demand for goods, the payment of which has been secured at a distant day, the manufacturer, when he is not in a condition to know, will be entitled to a reasonable time to ascertain the character of such security, before delivering the goods. Ibid.

Municipal Corporation—Common Council.—The common council, so far as their administrative or ministerial duties extend, are agents of the city, and as such may contract, among other things, for street improvements. Sylvester v. Macauley, 19.

———. *Jurisdiction of.*—The jurisdiction of a common council is confined to that territory only which is within the boundaries of the city. Ibid.

———. ———. *Improvements beyond City Limits.*—The city council has no power to contract for improvements beyond the city limits, and no assessment will lie, therefore, against property-holders abutting such improvements. Ibid.

———. ———. ———. A person contracting for a street improvement has a right to presume that the council had used the proper diligence to acquaint themselves with the city boundaries. Ibid.

———. *Liability of Members of Common Council for Exceeding their Authority.*—Public agents exceeding, negligently using, or abusing their authority, are liable to the injured party, and members of the common council, as such, in carelessly authorizing improvements beyond their jurisdiction, become personally liable for the value of the work done in obedience to their authority and direction. It is not sufficient to show that they acted *bona fide* and in ignorance of the true city boundary. They are bound to the exercise of reasonable skill and diligence in acquainting themselves with the territorial limits of the city, and are supposed to know the limit of their power. Ibid.

———. *Liability of Mayor.*—But an affirmative participation in such unauthorized action of the council is necessary to attach responsibility for its acts. And therefore, the mayor of a city, under the laws of this state, who is *ex officio* president of the common council, and as such is required by law to attend their proceedings, and in case of an equal division, gives the casting vote, but in no other sense is he a part of the council; is not liable for the consequences of proceedings of the council in excess of its jurisdiction, simply because he signed the ordinance. Ibid.

———. *Improvement of Streets.*—The members of the common council of a city, in acting upon a petition for the improvement of a street, have a right to assume that the petition is made in good faith by the owners of real estate, who are willing to pay their share of the burden, and who desire the improvement, and that all the petitioners are uninfluenced by any combination by which a few, who are anxious for the improvement to be made, have agreed to pay a consideration, either directly or indirectly, to procure the signature of others to the petition. Maguire v. Smock, 92.

———. ———. *Good Faith.*—Good faith toward the owners of real estate, who are in the minority, and who are opposed to the improvement, and to having the burden imposed upon themselves, requires that the petitioners should all be willing to assume their due portion of the tax, and that they should not be paid a consideration for signing the petition. Ibid.

———. ———. An agreement by which a sum of money is guaranteed to be paid to certain persons, provided they will petition the common council of a city for the improvement of a street, is void, as against public policy, and cannot be enforced. Ibid.

———. ———. *Pleading.*—Where specific facts are set out in an answer, from which a legal inference arises that the agreement sued on is

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corrupt and void, as against public policy, it is not error to sustain a demurrer to a reply stating, in general terms, that the contract sued on was accepted, and the acts of the plaintiff in compliance with the agreement were done in good faith, without any desire or design to exercise a corrupt or fraudulent influence. Ibid.

———. *Liability for Injuries Caused by Defects in Sidewalks.*—All persons, in using the streets and sidewalks, have the right to assume that they are in a good and safe condition, and to regulate their conduct upon that assumption. Kenyon v. Indianapolis, 129.

———. ———. If a city permits the construction of a vault under a sidewalk, she must use due care and diligence to see that the vault is properly constructed, and the opening thereto securely and safely covered; and if constructed in a sidewalk, over which the city has exclusive control, the court will infer, in the absence of any allegations to the contrary, that it was constructed under a license from the city authorities. Ibid.

———. ———. *Negligence.*—Proof of the mere existence of a latent defect in a sidewalk in a city is not enough to charge the corporation with negligence; the corporation must in some way be in fault in connection with the defect; and if the defect does not originate in the construction, express notice of the defect, or negligence of duty in not ascertaining and remedying it, must be shown, else the city will not be liable to repair. Hence, it is not enough to entitle the plaintiff to recover, to prove that the covering was insecurely fastened at the time of the accident, and that, by reason thereof, and without fault on her part, she was injured. Ibid.

———. ———. ———. A liability only attaches to a municipal corporation where there has been a failure to remedy such defects as may be detected and removed by the exercise of ordinary care and diligence. Mere knowledge on the part of a few private citizens of a latent defect in a sidewalk, is not sufficient to charge the city with notice. Ibid.

Promissory Note—Release of Surety.—Defendant answered that plaintiff, without his knowledge, extended the time of payment for a consideration, and by so doing released him from further liability as surety. The plaintiff, in reply, declared: (1.) That no consideration was given for the extension; (2.) That defendant had received security from A. to indemnify him against loss on this note, and that he still held such security; (3.) That defendant, after extension of payment, consented to, ratified, approved, and confirmed such extension.

Held, on demurrer to these several issues—

(1.) That if the agreement to extend the time for payment was made without any valid consideration, it did not release the surety; (2.) That where the surety is fully secured by property in his hands, he is estopped from objecting to any extension of time made between creditor and principal; such security being, in effect, an appropriation by the surety of that portion of the effects of the principal to the payment of the debt. Bohring v. Root, 29.

———. *Same Persons Joint Obligors and Obligees.*—The firm of J. B. Randall & Co., which was composed of Randall, *Lawyer* and *Hall*, made their note to the order of the firm of *Lawyer & Hall*; said firm endorsed it to the First National Bank of Shelbyville, which bank was at the time aware of the relations the makers and endorsers have to each other. Said bank afterward sued Lawyer & Hall *as endorsers*, and recovered a judgment against them as such. Afterward, for a valuable consideration, said bank assigned said note to plaintiff, who instituted this suit against Randall, Lawyer and Hall, as makers. *Held*, That Lawyer & Hall could not maintain a suit at law on the note against Randall as maker, because the same persons cannot occupy the positions of both obligor and obligee: but they can endorse it to a third party, who can maintain such action against all the makers. [See 11 Metc. (Mass.) 398; 17 Pickering, 361; 18 Ohio, 305; 5 Cowen, 688.] Merchants' National Bank v. Randall, 166.

———. ———. *Merger.*—The doctrine of *merger* does not apply to such a case; the judgment in favor of the bank against Lawyer & Hall *as endorsees* did not merge the note so that suit cannot be maintained against Randall *as maker*.

Railways—Negligence.—Where a person approaches a line of railroad that for some distance is to be seen from, and in direction of, a highway which he is traveling, and the railroad crosses, and such person fails to use all reasonable means to ascertain whether a train is near, or that it would be safe to cross the track without stopping to look and investigate the probabilities of danger, and goes upon the track, and is injured by a passing train, he is guilty of negligence, and cannot recover damages. Stout v. Indianapolis & Saint Louis R. R. Co., 80.

———. *Contracts of.*—Where parties living adjacent to a railroad track made the grade, and furnished the cross-ties for a switch for neighborhood convenience, under a contract with the railroad company that the switch should remain permanently, etc., *held*: That after the road and franchises of the contracting company had been sold under a decree of foreclosure, the corporation purchasing the same might remove the switch, unless it assumed the original contract under sec. 3 of the railroad act of March 3, 1865. Smith v. Indianapolis, Peru & Chicago Railway Co., 88.

Taxation—Municipal Purposes.—A special school tax levied pursuant to section 12 of the school law of March 6, 1865, does not exempt bank stock by virtue of section 9 of the bank tax act, approved March 15, 1867, which provides that "Nothing in this or any other act shall be so construed as to authorize the taxation of stock in the Bank of the State of Indiana, or in any national bank, for municipal purposes." The term "municipal purposes," as used in that act, has no application to township taxes, nor to special school taxes levied by trustees of townships, or by school trustees of incorporated cities, as special school taxes, under the authority conferred by section 12, *supra*, of the act of 1865. Such taxes are levied pursuant to the general law of the state, and for purposes connected with the general internal administration of the state, or to carry out the general common school system, and do not come within the definition of municipal taxes. Root v. Erdelmeyer, 99.

Trade Mark.—A party purchasing part of a trade mark, and adopting the rest, will be protected in his title to the former as well as the latter. Sohl v. Geisendorf, 60.

———. The use of some word, letter or character of a trade mark, by different parties, without hindrance, will not work an abandonment by him in whom its right of use and title is vested. Ibid.

———. A trade mark composed of such devices as denote simply quality of an article, will be protected, especially if it is once established. Ibid.

———. It is an infringement of a trade mark, even though the imitation and original, when placed side by side, would not mislead, if the similarity is such that a difference would not be noticed when seen at different times or places. Ibid.

Trespass upon Realty—Adverse Possession.—Where no adverse possession is shown, a plaintiff in an action for trespass upon realty, may recover without showing previous possession. Carter v. Augusta Gravel Road Company, 14.

———. ———. *Complaint.*—A complaint in trespass, simply declaring for damages by adverse possession, and for removal of buildings, does not raise the question of title to the real estate. Ibid.

———. ———. *Justification—Pleading.*—Where the defendant in an action of trespass justifies by reason of some title or easement, which gives him a legal right to do the act which is the subject of the action, he must set forth the title or right to enjoy the easement specially. Ibid.

Adverse Entry—Presumption.—An adverse entry is not to be presumed, but must be proven. Ibid.

Witnesses—Competency—Husband and Wife.—A husband who acted as an agent for his wife, in the transaction of her business, is not a competent witness in a suit brought by the wife, to prove the transactions of such agency. Kemp v. Dickson, 42.

Legal News and Notes.

—THE house judiciary committee, through Mr. Butler, has reported adversely on the memorial asking for an acknowledgment of Almighty God and the christian religion in the constitution of the United States.

—THE Washington Chronicle contains a long "opinion" of Hon. Caleb Cushing, dated December 16, 1872, upon the obligations of the United States in the matter of public improvements in the City of Washington. Now let us get some western lawyer to write an opinion upon the obligation of the government to improve the navigation of the Mississippi river and its tributaries.

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THE CENTRAL LAW JOURNAL.

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, MARCH 5, 1874.

SUBSCRIPTION: $3 PER ANNUM, in Advance.

Bankrupt Act — Fraudulent Preference—Action of the San Francisco Merchants.

Soon after the decision of the Supreme Court of the United States in Wilson v City Bank, 1 CENT. LAW JOUR. 40, Judge HOFFMAN, of the federal district court for California, sitting in bankruptcy, rendered a decision holding in accordance therewith, that the simple fact that a debtor's property is attached by a creditor, is not sufficient ground for forcing the debtor into bankruptcy. We have not seen the decision itself, but the Alta California newspaper speaks of it as follows:

"It has been a recognized rule of law, that a debtor who allowed his goods to be attached, committed an act of bankruptcy. To prevent undue preference to any creditor, under that interpretation of the law, the San Francisco Commercial Association was formed. When a debtor was attached, he was put into bankruptcy by the Association, in which case all creditors shared alike, each receiving an equal share of the assets. This course often led to settlements, which proved alike beneficial to the debtor and creditors. It spoiled any attempt at collusion between an individual creditor and the debtor, by which the former would have a preference over the other creditors. But it sometimes happened that debtors were attached on disputed claims, and at the time of such attachment were solvent. In such a case it would be a great grievance to compel them to go into bankruptcy. There are other circumstances which may prompt the attachment of a debtor, and in any case, under the old law or rulings of courts, he was thrown into the bankrupt court, with the certainty of coming out bankrupt, even if solvent when the proceedings were commenced. The recent decision by which Judge HOFFMAN was governed in giving judgment in a case of bankruptcy is to the effect that a *bona fide* attachment—one in which there is no collusion between debtor and creditor—is not sufficient to obtain an order of adjudication in bankruptcy against the debtor. This view of the law is said to have been long entertained by Judge HOFFMAN, but he followed the opinion of the Supreme Court until that tribunal changed its views on the question.

The effect of this ruling appears to have been to reverse a course of practice which had obtained in that court for six years, according to which the levying of an attachment upon the goods of a debtor was almost universally followed by an adjudication in bankruptcy, in which all the creditors shared alike. It seems that this decision was the first intimation which the business men of San Francisco had had of the conclusion of the federal supreme court in Wilson v. City Bank, and as soon as it became known, it created a very general consternation among them. The secretary of their Commercial Association called a meeting of that body to take action in reference to the matter, at which much discussion took place, mostly of a temperate character, all the speakers agreeing that unless the decision could be obviated in some way, it would work great injury to the mercantile community. Several plans were proposed for this purpose, the chief one being that the merchants should agree to give credit only where the purchaser would give his note for the amount of the bill, payable one day after date. It was said that if this were done, and the debtor's goods should be attached by another creditor, demand could at once be made upon the note, and in case of non-payment the creditor would be able to commence proceedings in bankruptcy within fourteen days thereafter under the present law. This plan, as well as several others, was submitted to a committee, who at a subsequent meeting reported adversely upon them all. The final result of the deliberations of the merchants was to appoint a committee to employ counsel and memorialize the legislature of the state to so modify the attachment law, that upon one creditor's attaching the goods of a debtor, all other creditors may attach, and share *pro rata* in the distribution of the money realized from the sale of his assets.

The North Carolina Special Tax Bonds.

The telegraph states that suits were instituted on the 7th ult. in the supreme court of Wake county, North Carolina, by August Belmont & Co., bankers, of New York city, as plaintiffs, to compel the state auditor to collect the special tax bonds for the payment of interest for the years 1870, 1871, 1872, 1873 and 1874. The 20th day of February was set by Judge WATTS for hearing at chambers, in Raleigh, the motion for a peremptory *mandamus*. Hon. Reverdy Johnson, Walter J. Budd, and R. C. Badger were to have appeared for the plaintiffs. Should the state courts decide adversely to the plaintiffs, it is the intention of counsel to carry the case to the Supreme Court of the United States.

A correspondent of the New York Evening Post describes these securities as follows:

"The 'Special tax' bonds, of which there are outstanding $11,400,000, were issued during the years 1868 and 1869 to aid in the construction of certain railroads, and special taxes (hence their name) were imposed on all the taxable property in the state, by the several acts of the general assembly creating them to meet the interest as it accrued, and to create a sinking fund to provide for the payment of the principal at maturity. This feature of a special tax is peculiar to this class of bonds of the state, and was required to be embodied in the acts authorizing them by the constitution. A subsequent legislature repealed the special tax clauses, and directed the public treasurer to apply the money then in his hands, that had been collected to pay the coupons due the first year of their issue, to general governmental expenses."

The same correspondent states that "the suits of Self v. The Public Treasurer, argued at the November, 1873, term of the United States circuit court, held in Raleigh, were instituted to compel the defendant to replace to the credit of the special tax fund these moneys. Although the injunction prayed was refused, because it was not shown that any irreparable injury was likely to occur by reason of any proposed action of defendant, yet the counsel for the bondholders are confident of obtaining the replacement of this money at the final hearing. The question of the constitutionality of the

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bonds, involved in these suits, was raised and passed upon by the court. They were declared valid issues, and the repealing acts void, because obnoxious to that clause of the constitution of the United States which forbids a state to pass any law impairing the obligation of a contract."

It is scarcely probable that the judge could have "passed upon" the validity of these bonds on the hearing of an application for a preliminary injunction for the purpose above stated—at least without granting the injunction. The decision of the supreme court of North Carolina in the case of The University Railroad Co. v. Holden, 63 N. C. 410 (1869), is understood by some as affirming the validity of this series of bonds. That case was an application for a *mandamus* to compel the auditor of the state to issue $300,000 in bonds of the state to the directors of the railroad company, who had been created a corporate body for the purpose of building the railroad for the state. The application was refused, principally upon two grounds: (1) that the company was not *in esse* at the time of the legislative grant, and that consequently there was no grantee capable of receiving the donation; and (2) because the constitution of the state does not empower the legislature, without the sanction of a vote of the people, to authorize the issuance of the bonds of the state for the purpose of building *new railroads*, but only to aid in completing railroads already commenced. The five judges delivered separate opinions, in which they discuss at length the effect of the restrictions imposed by the new constitution of the state upon the exercise of the taxing power by the legislature. Whether this decision can be quoted as sustaining the validity of the series of bonds known as the "special tax bonds" would seem to depend upon the purposes for which the bonds were issued. If they were issued to aid in the completion of railroads which had been commenced at the time of the adoption of the present constitution of North Carolina (1868), the reasoning of a majority of the judges supports their validity. But if they were issued in aid of new railroad projects, where the question has not been submitted to a vote of the people, the reverse would seem to be true.

It had been previously decided in the case of Galloway v. Jenkins, 63 N. C. 147, by PEARSON, Ch. J., and RODMAN and DICK, JJ., but against the views of READE and SETTLE, JJ., that the legislature had no power, without the sanction of a vote of the people, to contract a debt to *aid* in the construction of a new railroad owned by private individuals. The University Railroad case (*supra*) goes further, and holds (the judges being divided in opinion in the same manner) that the legislature cannot contract a debt for the purpose of building a new railroad to be owned by the state. Judge SETTLE, however, states that although he dissented from the conclusion reached by the majority of the court in Galloway v. Jenkins, yet he regards that decision as *res judicata*, and does not seek to disturb it.

The questions involved in the causes pending in the federal and state tribunals, as above stated, possess peculiar interest, not only because of the great amount at stake, but also because of the fact that they involve what seems to be an attempt to coerce a sovereign state into the payment of its supposed obligations. We shall endeavor to acquaint our readers with the result at the earliest period.

Master and Servant — Fellow-servants — Negligence—Liability of Master to Servant.

We publish elsewhere in this number the opinion of the Supreme Court of the United States on the general subjects indicated in the title, which was recently given in the case of the Union Pacific Railroad v. Fort, and in a note thereto the opinion of the same court in the case of the Northwestern Union Packet Co. v. McCue. Both opinions were prepared by Mr. Justice DAVIS, and they will be read with great interest by the profession, who will not fail to approve the sound, salutary and liberal doctrine so clearly declared in Fort's case.

We avail ourselves of the occasion to make some editorial observations on the more important aspects of the general subject of the *Liability of Masters to Servants*. The courts of Great Britain and America have established the general doctrine of the non-liability of the employer for an injury to one servant caused by the negligence of another servant in the same common employment. In England this doctrine has been affirmed time and time again by every court in Westminster Hall, and finally by the house of lords after full argument by able counsel and upon the most deliberate consideration. Bartonshill Coal Co. v. Reid, 3 Macqueen App. Cas. 266. The first case was Priestley v. Fowler, 3 Mees. & W. 1. In Holmes v. Clarke (itself an important case on this subject), 7 Hurl. & N. 937, 947, 1862, Mr. Justice BYLES remarks: "The case of Priestley v. Fowler introduced a new chapter into the law, but that case has since been recognized by all the courts, including the court of error and the house of lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land."

In a very recent case this rule is said to be "conclusively settled." Feltham v. England, Law Rep. 2 Queen's Bench, 33, 1866. In this case MELLOR, J., says that "this rule is not altered by the fact that the servant to whom the negligence is imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey."

In another case it is said: "A foreman is a servant as much as the other servants whose work he superintends." Per WILLES, J., in Gallagher v. Piper, 111 Eng. C. L. 669, 1864. Further, as to who are "fellow-servants" within the rule, see Wigmore v. Jay, 5 Wellsby, Hurl. & Gord. 354, 1850; Skipp v. Eastern Counties Railway Co., 9 ib. 221; Wiggett v. Fox, 11 ib. 832; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266; Waller v. South, etc., Railway Co., 2 H. & C. 102; Gallagher v. Piper, 111 Eng. C. L. 669; Morgan v. Vale, etc., Railway Co., 5 B. &. S. 570, 736; Tunney v. Midland, etc., Railway Co., Law Rep. 1 C. P. 291; Lovegrove v. London, etc., Railway Co., 16 C. B. N. S. 669. See Murphy v. Smith, 19 C. B. N. S. 361, as to servant being considered as the master's representative in the establishment. On this last point see, also, remarks of Mr. Justice DAVIS in Fort's case to the effect that Collett, who had been entrusted by the railroad company with the care and management of dangerous machinery, was the representative of the company, which was liable "either upon the maxim of *respondeat superior* or upon the obligations arising out of the contract of service" for Collett's wrongful order to the plaintiff—that order relating to a duty within the scope of Collett's employment and outside the scope of the plaintiff's engagement, and wholly disconnected with it.

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In this country the *general rule* is recognized as the law by the courts of, perhaps, every state which has passed upon the question, except where it is changed by statute. The only dispute is as to the extent of the rule, or rather as to the cases to which it is justly applicable. It is not necessary to cite the American cases; they will be found mostly collected in the Treatise of Shearman & Redfield on Negligence. We do not recollect any case in the Supreme Court of the United States, either directly sustaining or rejecting the general doctrine. It is noticeable, however, that in the case of the Northwestern Union Packet Co. v. McCue, decided at the present term, Mr. Justice Davis, delivering the opinion of the court, remarks: "It is insisted on the part of the plaintiff in error, that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow-servant in the same general business;" but "*whether this general proposition be true or not*, it is not necessary to determine in the state of this record." And in Fort's case the same learned justice observes: "It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition, as stated, be true or not, we do not propose to consider, because, if true, it has no application to this case."

This language would lead to the inference that the Supreme Court may entertain doubts as to the soundness of the rule under discussion. But as the general doctrine is so firmly rooted by judicial decision in Great Britain and in the different state courts of this country, as it is one which pertains to general jurisprudence, and involves no question of *federal* law, it would seem that it is no more open to re-agitation in a federal court than in any other court of common law powers.

We next mention some exceptions to the rule, or cases which are not considered as falling within its reasons, and to which, therefore, it does not apply. We consider it to be settled, both in England and America, that the master is bound to use ordinary care to employ, or to retain in his employment, *none but competent servants*, and to use like care to *furnish and maintain suitable and safe machinery and structures*. Bartonshill Coal Co. v. Reid, *supra;* Tarrant v. Webb, 18 C. B. 797; Weems v. Mathieson, 4 Macqueen 215; Clarke v. Holmes, *supra;* and see cases next cited. We also consider that view to be correct, and regard it as quite conclusively settled by the courts, that this duty of the master is so far personal and inalienable that responsibility for injuries directly caused by the negligent discharge of it exists, although the master may for his own convenience act through other servants. On this subject see the following very recent cases in addition to those last cited: Brothers v. Cartter, 52 Mo. 372, 1873, and cases cited by WAGNER, J.; Gilman v. Eastern Railroad Co., 10 Allen, 233; S. C. 13 Allen 433, and cases cited by GRAY, J.; Laning v. N. Y. Central R. R. Co., 49 N. Y. 521, 1872. And the reason is that this duty of the master is direct and personal, and must be discharged in person or by others for him, for whose negligent acts and omissions he is responsible where these are the immediate cause of injury to his servants.

On this point we call attention to the following observations of Mr. Justice DAVIS in Fort's case: "It is apparent, from these findings, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and cannot receive our sanction."

In this connection an important practical question may be adverted to, and that is, as to the effect of knowledge on the part of the servant injured that the master had not discharged his duty in providing competent fellow-servants or fit and safe materials or machinery. The following are the more important cases on this point: Watling v. Oastler, Law Rep. 6 Excheq. 73, 1871; Senior v. Ward, 1 El. & El. 385 (102 Eng. C. L. 384); Dynen v. Leach, 26 L. J. 221; S. C. 40 Eng. L. and Eq. 491; Assop v. Yates, 2 H. & N. 768; Griffiths v. Gidlow, 3 H. & N. 648; Smith v. Dowell, 3 F. & F. 238; Laning v. N. Y. Central R. R., 49 N. Y. 521, 1872 (full discussion); Frazier v. Penn. R. R. Co., 38 Penn. St. 104; Davis v. Detroit, etc., R. R. Co., 20 Mich. 105, 127, 1870, where the cases are referred to and the subject fully examined by COOLEY, J.; Hayden v. Manufacturing Co. 29 Conn. 548, 1861; Buzzell v. Manufacturing Co., 48 Maine, 113; Jones v. Yeager, 2 Dillon C. C. 65, 68. They authorize the deduction of the general rule that if the plaintiff voluntarily continue in the master's service with full knowledge of the incompetency of the co-servant, or of the unfit and defective machinery, and of the danger thereby occasioned, this will be considered such "contributory negligence" on his part as to defeat his right to recover unless upon some special ground, as in Holmes v. Clark, (6 Hurl. and N. 349, affirmed 7 ib. 937), where the servant made complaint, and the master thereupon promised that the grounds of it should be removed. This rule, that knowedge by the servant injured of the danger will disentitle him to recover if he voluntarily remains in the service without complaint, clearly applies to a case where it is the duty of the servant himself to inform the master or superior of the co-servant's unfitness, or the unfitness of the materials or structures. The reason for this exemption of the master from responsibility, would not seem to apply where the servant injured could not reasonably be held to know the danger to which the mas-

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ter's neglect of duty exposed him. It seems to us that some of the cases have asserted rather too rigid a rule against the servant, arising out of his knowledge of the neglect of the personal duty of the master as respects co-servants and materials, and his supposed acquiescence in it; and there are aspects of this subject that need to be further discussed and decided before the law can be regarded as settled.

Execution Sales—Publication in Attachment Suits—Conclusive Effect of Attachment Proceedings—Sheriff's Deed—Opinions of Supreme Court—Obiter Dicta—Ejectment—Practice with reference to Dower and Quarantine where Defendant dies pending Suit.

KANE v. McCOWN, *et al.*

Supreme Court of Missouri, January Term, 1874.

Hon. WASH ADAMS,
" DAVID WAGNER,
" W. B. NAPTON,
" H. M. VORIES,
" A. T. SHERWOOD, } Judges.

1. **Execution Sales—Court House.**—Where the regular court house cannot be used and another building at the county seat is procured, in which the circuit court holds its session, execution sales made at such building are valid, and would be invalid if made at the deserted court house.

2. ——. **By Sheriff after Expiration of Term of Office.**—Where a sheriff who has made a levy of an execution goes out of office by reason of the expiration of his term, he has the power to retain the execution and proceed to advertise, sell and make a deed to the property levied upon, or he may turn the same over to his successor; and a sale made by either officer is valid.

3. ——. **If Court not held at Return Term.**—Where a sale is not made at the return term of an execution which has been duly levied, by reason of no term of court being held, the execution does not become *functus officio*, and the sale may be made at any subsequent term of court without any writ of *venditioni exponas*.

4.—**Attachment Suits—Publication.**—The statute (Revised Statutes 1855, page 246, section 23; Session Laws 1859-60, page 4) authorizes the clerk, in vacation, after the return term, to make an order for publication in suits by attachment where the court should have made such order in term time, but has omitted to do so.

5. ——. ——. **Failure to Designate Paper.**—The newspaper selected by the court, judge or clerk making an order of publication, in which to publish the same, need not be designated in the order, and a failure to designate such paper will not render the judgment void.

6. ——. **Validity of Judgments.**—In attachment suits against non-residents the court acquires jurisdiction by the seizure of the property under a valid writ. There is then a case in court, and if every point arising subsequently is erroneously decided, the judgment is nevertheless valid, and can only be questioned in a direct proceeding. (Freeman v Thompson, July Term, 1873, reviewed and affirmed.)

7.—**Sheriff's Deed—Amendment of.**—Where a sheriff's deed erroneously recites the date of a judgment the error may be corrected in open court, and in such case no new acknowledgment of the deed is necessary.

8. ——. **Delivery Presumed.**—Where a sheriff's deed is duly executed and acknowledged, and the title of the purchaser in such deed is vested in a third party by decree of a court of equity, a delivery by the sheriff to the purchaser will be presumed, and no formal delivery is necessary.

9.—**Supreme Court Opinions—Obiter Dicta.**—Although the decision by this court of a single point may be decisive of the whole case, still an opinion upon other questions presented by the record is not an *obiter dictum;* and this is the more satisfactory practice, as it tends to prevent repeated resort to the appellate court.

10.—**Ejectment—Practice upon Death of Defendant—Dower—Quarantine.** Where in an action of ejectment against a party whose title has been vested in the plaintiff by an execution sale, such party dies during the pendency of the action, and his widow, who is entitled to dower and quarantine, is made a party defendant, the suit may proceed to judgment for plaintiff, and the rights of the widow will be secured by ordering a stay of execution until dower is assigned.

The case is fully stated in the opinion.

Johnson & Botsford, for Kane; *Russell Hicks*, for McCown, *et al.*

NAPTON, J., delivered the opinion of the court.

This was an action of ejectment. The defendants are the widow and heirs of James McCown. The suit was originally against McCown, but, on his death, proceeded against his widow and children. It was revived against the widow as administratrix, and against the minor children, who filed answers by their guardian *ad litem*.

The defendant, Caroline McCown, set up her dower rights, and her right to remain in the mansion house of her husband until dower was assigned. There was a replication to the answer denying that McCown died seized of the premises, and also averring that his mansion house and the messuage and plantation adjoining embraced only a portion of the land sued for.

The title of the plaintiff is based upon two deeds made by the sheriff under sales made under six special judgments in attachment and executions thereon. One of the deeds is directly to plaintiff; the other is to one Calhoun, and is accompanied with a decree of the circuit court of Johnson county, vesting the title of Calhoun in plaintiff. The deed to the plaintiff recited a judgment in a suit by attachment in favor of H. C. Grove, rendered April 21, 1864, upon which a special execution was ordered and was issued Sept. 4, 1865; and a judgment in a suit by attachment in favor of Sarah Colburn, rendered April 21, 1864, upon which a special execution was ordered and issued Sept. 4, 1865; and a judgment in attachment in favor of one Marr, rendered April 21, 1864, and an execution ordered and issued as in the other cases; and a judgment in favor of Calhoun of the same date, and the execution dated as above.

These four executions, it is recited in the deed, were delivered to the sheriff on the 12th of September, 1865, and that after advertising the land levied on, said lands were sold to plaintiff on October 17, 1865, and that the sale took place before the court house door and while the circuit court was in session.

Objections were made to this deed on the ground that the sale took place at the door of a church or meeting house in the town of Warrensburg, where the circuit court was held, such building being then used as a court house, and the fact that the sale did so take place was proved.

It seems that the court house was occupied by federal troops, and was otherwise unfitted for holding court, and the court was held in a building distant some hundred yards or more from the court house.

The second deed offered by plaintiff was to Calhoun. It recited a judgment in an attachment suit in favor of one St. John, rendered April 21, 1864, upon which an execution issued September 15, 1864, and made returnable at the October term; and no October term being held, the execution was delivered to the sheriff on February 9, 1865; and a judgment in an attachment suit in favor of Colburn, rendered April 21, 1865, on which a special execution issued September 16, 1864, made returnable to the October term, 1864, and this term not being held, this execution was delivered to the sheriff February 9, 1865; and a judgment in a proceeding by attachment in favor of Sarah Colburn, rendered April 21, 1864, on which a special execution was issued September 16, 1864, returnable to the October term 1864, and as no such term was held, the writ was delivered to the sheriff Feb. 9, 1865; and a judgment in attachment in favor of John Marr, rendered April 21, 1864, upon which a special execution issued February 8, 1865, returnable to the April term, 1865; and a judgment in favor of William Calhoun, rendered April 21, 1864, upon which a special execution issued February 8, 1865, returnable April term, 1865. This deed further recites the levy, advertisement and sale, and purchase by plaintiff.

The principal objections to this second deed are that the executions on the judgments in favor of St. John and Colburn were issued in September, 1864, and were returnable to the October term, and not having been executed, were handed over to the successor of the sheriff to whom they were directed, and executed by said successor. The first officer had levied on land under the writs. It is claimed that these executions were dead in February, 1865. It is further objected to this deed that the deed had never

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been delivered to Calhoun. To sustain this objection, Calhoun was examined and stated that he knew nothing of the deed. To obviate this objection the plaintiff read the record of a proceeding in the common pleas court of Johnson county, in which the present plaintiff Kane was plaintiff and William Calhoun defendant, which resulted in a decree to transfer Calhoun's title to the said plaintiff.

The orders of publication in this case were made by the clerk in vacation, and are as follows:

H. C. Grove, plaintiff,
v.
James McCown, def't.

In the Circuit Court of Johnson County. In vacation, January 23, 1864.

Now, on this 28th day of July, 1862, comes the plaintiff in the above entitled cause, before the undersigned, clerk of the circuit court for the county of Johnson, in the state of Missouri, in vacation, and filed his petition and affidavit, stating among other things, that said defendant, James McCown, had absented himself from his usual place of abode in this state, so that the ordinary process of law could not be served on him, and that said defendant, W. H. Hart, is not a resident of this state.

It is therefore ordered by the said clerk, in vacation, that publication be made, notifying said defendants that an action has been commenced against them, by petition and attachment, in the circuit court of said county of Johnson, founded on a promissory note for the sum of seventy-five dollars, dated on the 10th day of November, 1860, and due sixty days after date, and made and delivered by said defendant to said plaintiff, and that the property of said McCown has been attached, and unless he be and appear at the next term of said court to be held at the court house in the town of Warrensburg on the 10th day of April, 1864, and on or before the 3d day of the term, if the term shall so long continue, if not, then before the end of the term, and plead to said petition, judgment will be rendered against him and his property sold to satisfy the same.

It is further ordered that a copy hereof be published in some newspaper printed in this state for four weeks successively, the last insertion to be at least four weeks before the commencement of the next term of this court.

S. P. WILLIAMS, Clerk.

The court, at the instance of plaintiff, declared the law to be as stated in the three following instructions:

1. If the court, sitting as a jury, finds from the evidence, that on the 21st day of April, 1864, certain special judgments were rendered in the circuit court of Johnson county, one of which judgments was in favor of H. C. Grove and against James McCown, one in favor of Sarah Colburn and against James McCown, one in favor of John Marr and against James McCown, and one in favor of William Calhoun and against said James McCown; and that the same were duly returned unsatisfied, either in whole or in part, and that afterwards *alias* special executions were issued upon the judgments aforesaid on the 4th day of September, 1865, and the same were duly delivered to the sheriff of Johnson county; and that in pursuance of the commands of said executions, the sheriff of Johnson county, after giving twenty days' notice of the time and place at which said real estate would be sold, afterwards, on the 17th day of October, 1865, exposed the same to sale at public auction, at the door of the building in which the circuit court of said county was then in session, and which building was then used and occupied as a court house in said county, and that at said sale the plaintiff, George Kane, became the purchaser of the land, to-wit (here the land is described): and that he has received a sheriff's deed to said land, duly executed and as read in evidence, then said sale and the deed so executed was sufficient to vest the legal title to said land in said Kane, and judgment for the possession of the real estate aforesaid should be found for the plaintiff.

2. If the court finds the executions recited in the sheriff's deed to William Calhoun, read in evidence on the part of the plaintiff, were issued as follows, to-wit: The one in favor of W. H. and G. W. Colburn, on September 16, 1864; the one in favor of Arthur St. John, September 15, 1864; and the one in favor of Sarah Colburn, in September, 1864; that the same were all made returnable to the October term of said court, 1864, and that the same were delivered to A. M. Christian, then sheriff of said county, and that he, on the day of September, 1864, levied the same on the real estate described in said deed, by endorsing his levy on the back thereof, and that for any cause said lands were not sold at the said October term of said court; and that afterwards, on the 9th day of February, 1865, said A. M. Christian delivered said executions to T. W. Williams, his successor in office, then said executions were sufficient authority for him to sell said land, at the time and in the manner stated in said deed, to said Calhoun.

3. If the court finds from the record in the case that this suit was brought against James McCown in his life-time, and that the said James McCown appeared and filed his answer herein; and that he, the said James McCown, afterwards departed this life, leaving Caroline F. McCown, his widow, and the other defendants herein, his heirs-at-law, and this suit was afterwards revived against the said Caroline F. McCown, as the administratrix of the said James McCown, and against the said other defendants as his heirs-at-law, then plaintiff is entitled to the like judgment for the possession of the premises as he would have been if the original defendant, James McCown, had not departed this life during the pendency of this action.

Defendants asked the court to make the following declarations of law, of which the 2d and 5th were given:

1. If the court finds from the evidence that the petitions and affidavits upon which the said several judgments recited in the said sheriff's deeds were rendered, were filed in the office of the clerk of the circuit court of said county in vacation, to-wit: In the case of W. H. and G. W. Colburn, June 14, 1862; in the case of St. John, June 20, 1862; in the case of Grove, June 28, 1862; in the case of Sarah Colburn, June 27, 1862; in the case of Calhoun, July 14, 1862; in the case of John Marr, July 14, 1862; and further find that a term of said court was held in October, 1862, at which time said papers were returned into said court; and that the only notices or orders of publication ever made or given in said cases to defendant, McCown, were made and issued by the clerk of said court in vacation, to-wit: In the case of Colburn, on January 22, 1864; in the case of St. John, on the same day; in case of said Grove, January 23, 1864; in case of Sarah Colburn, January 26, 1864; in case of said Calhoun, January 23, 1864; and in case of Marr, January 29, 1864, after said term of said court in October, 1862, then the clerk of said court had no authority to issue such orders of publication, and defendant was not legally notified of the pendency of said actions, or either of them; and the said several judgments afterwards rendered in said cases against said McCown, upon the proof of the publication of such notices, were and are null and void, and all subsequent proceeding were and are null and void; and the court should find the issues for the defendants.

2. If the court finds that said executions recited in the said sheriff's deed to Calhoun read in evidence, to-wit: That in favor of the Colburns was issued on the 16th of September, 1864; that in favor of St. John, September 15, 1864; that in favor of Sarah Colburn, September 16, 1864; and were all made returnable to the October term, 1864; that the same came into the hands of Sheriff T. W. Williams, on the 9th day of February, 1865, unexecuted by A. M. Christian, the former sheriff of said county, then said executions, and each of them, conferred no authority on Sheriff Williams to sell said land; and if the court so finds, then the executions in favor of said Colburn and Marr were the only ones that conferred any authority on the sheriff to sell the said land. And if the court finds that said sheriff sold said lands in the order of time in his said amended return specified, and that the sale of said southeast quarter of section 26, township 46, range 26, sold to said Union Bank for the sum of $680, the same was sufficient to satisfy and pay off said executions in favor of said Calhoun and Marr; and said sum so bid by the Union Bank and

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paid to said sheriff, was sufficient to pay said executions in favor of said Calhoun and Marr, as well as the judgments upon which they were issued; and all sales made by said sheriff after said executions were so satisfied, were and are null and void; and the sheriff's deed to Calhoun, for lands so sold after said executions were so satisfied, conferred no title on said Calhoun.

3. If the court finds from the evidence that the lands in controversy were sold by the sheriff of said county under executions, and that the said sales were made by the sheriff at the door of the church, some eighty yards or more distant from the court house, and that plaintiff claims title under such sales, then such sales were null and void, and the deeds made in pursuance thereof conveyed no title whatever.

4. If the court finds from the evidence and pleadings in this case, that said James McCown died possessed of the lands in controversy, and that the different tracts thereof were all contiguous to each other, and constituted the farm or plantation on which was situated the mansion house in which the said McCown some time before and at the time of his death, and in which Caroline F. McCown, one of the defendants, resided with him at the time of his death, as his wife, and where she since and now resides as his widow, and that her dower has never been assigned to her as the widow of said McCown, then the defendant Caroline is entitled to the possession of the lands in controversy, as against the claim of the said plaintiff Kane; and the court must find the issues for the defendant.

5. The court in this case declares the law to be, that according to the present condition of the pleadings it stands admitted herein, that the defendant, Caroline F. McCown, is the widow of James McCown, and that he departed this life about the 6th day of July, 1867; that at the time of his death the said McCown and his family, including the defendant, Caroline F. McCown, were, and for a long time had been, residing in the mansion house situate on the land in controversy; that the said defendant, Caroline, at the time of her said husband's death, resided with him at said mansion house; that the said Caroline, at the time of the death of the said James McCown, became, ever since has been, and now is, entitled to dower in the lands in controversy, and that dower never has been assigned or admeasured to her therein, or any part thereof.

6. The court declares the law to be, that if it finds from the evidence that the sheriff's deed, executed by Thos. W. Williams, sheriff of Johnson county, to the plaintiff, George Kane, purporting to convey part of the land in controversy, was by the said sheriff acknowledged in open court on the 20th day of April, 1866, and was thereafter delivered by said sheriff to said Kane, and was by him received on the 3d day of October, 1866, and was by him duly filed for record in the office of the recorder for Johnson county, and therein recorded; that afterwards said Thos. W. Williams, on the 17th day of October, 1871, at the instance and special request of said plaintiff, Kane, interpolated said deed by inserting over the ninth line of the third page of said deed, over and between the word "court" and the words "for the year 1864," so as to interpolate the year in which a judgment therein recited was rendered, which judgment was one under which said plaintiff claims title, and that said Thomas W. Williams, on the 17th day of October, 1871, at the instance and request of said plaintiff, Kane, interpolated said deed, by writing over the 21st line of the 6th page of said deed, over and between the word "court" and the words "for the year 1864," so as to interpolate the year in which a judgment recited in said deed was rendered in favor of William Calhoun, and under which judgment the plaintiff claims title; and that after said deed was so interpolated, the same was not thereafter acknowledged, then said interpolations were illegally made, and are a nullity, and the said deed is a nullity, and cannot convey any title to the lands n controversy, or any part thereof, to the said plaintiff.

7. The court declares the law to be, that if it finds from the evidence that the sheriff's deed, purporting to have been made by Thomas W. Williams, to William Calhoun, and under which the plaintiff claims title to a part of the land in controversy, was never ordered to be drawn or executed by the said Calhoun; that it was never delivered to said Calhoun; that it was never placed on record by the said Calhoun; then the deed cannot convey any title whatever to the lands in controversy, or any part thereof, to the said plaintiff, Kane.

The discussion in this case has embraced a variety of points, but they mainly depend on the following enquiries: 1st, whether the clerk had any power to order the publication which he did in January, 1864; 2d, whether the failure to designate the newspaper in the order rendered it void; 3d, whether the executions recited in the deed to Calhoun had expired before the sale, and if not, whether Williams, the successor of the sheriff, to whom they were directed, had power to make the sale; 4th, whether the sales at the door of the church, where the circuit court was being held at the time, were valid; 5th, whether the decree, in the case of Kane v. Calhoun, transferred Calhoun's title to plaintiff.

There were other points made and discussed, but they are minor and subordinate ones.

It will be seen that the order of publication in this case was made in January, 1864, upon a petition and affidavit filed in 1862, and it is insisted that under the 23d section of the attachment law of 1855, the power of the clerk to make an order in vacation ceased at the first session of the court after the issuance of the writ. This 23d section provides that if the plaintiff, or some one for him, files with his petition an additional affidavit, stating that all or a part of the defendants are non-residents or have abandoned, etc., the clerk, in vacation, shall order a publication. It further provides that when the defendant is not summoned, and the return of the sheriff shows that he cannot be, the court must order a publication. This section is very obscure and couched in terms scarcely intelligible; but the above is substantially its meaning, and it is insisted that after the term of the court which succeeds the filing of the petition, the authority of the clerk ceases.

It might be a question whether it did or not under this 23d section of the act of 1855, but in 1860, the legislature provided as follows: "If an attachment be obtained on either of the grounds specified in the first, third or fourth subdivisions of section 1 of the act to provide for suits by attachment, approved December 8, 1855, or if, after an attachment issued, an additional affidavit be filed alleging any fact embraced in these subdivisions, the clerk shall order a publication to be made as required in section 23 of article 1 of said act, and he may, in like manner, order publication, in any case in which, by said section, it is required to be ordered by the court."

Now this provision presents the anomaly of requiring a clerk to discharge the duties neglected by the court, and the clerk is to determine whether the court ought to have issued an order of publication or not. But the legislature clearly invests the clerk with the power to make orders of publication in all cases where the court should, in term, have made them, and this power is not limited to the vacation which precedes the first session after the filing of the petition. Whether the clerk, in this case, decided rightly or otherwise is of no importance, since he was invested with the power to decide, and did issue the order of publication.

A further objection to this order of publication is that the order does not designate the newspaper in which it was to be printed. The practice act of 1855 directed (Rev. Code of 1855, p. 1225) that "every order against non-resident, absent or unknown defendants, shall be published in some newspaper published in this state, which the court, judge or clerk, making the order, may designate as most likely to give notice to the person to be notified."

It is very clear that a designation by the court, clerk, or judge is required. But it is not clear that the designation must appear

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in the order of publication. If the court, or judge, or clerk should select a newspaper, manifestly designed to avoid giving notice to the party interested, or clearly proved to have been made with such a design, the order of publication would have no efficacy. In this case there was no proof as to the paper selected by the clerk, and although the order is objected to as not in itself specifying the newspaper, it is not attempted to be shown that the newspaper actually selected was not published within the state, or that it was not likely and most likely to give notice to the parties interested. In a collateral proceeding to nullify the judgment, and execution on it, presumptions are all in favor of the validity of the judgments and sales. The omission of the clerk to designate the particular newspaper was undoubtedly an error which may or may not have been fatal to the case in direct proceedings to review it, but cannot destroy the judgment in a collateral proceeding.

It is contended that the executions under which these sales were made had expired before they were executed. All the judgments were rendered in April, 1864, and the executions on them were returnable to the October term, 1864. No October term was held, the executions were levied, and as no sales could have been made in October, 1864, new executions, or writs *venditioni exponas*, were issued in February, 1865, returnable to the April term, 1865, or the writs were handed over to the sheriff elected and acting in 1865, to be completed after levy.

These objections have already been considered and decided in the cases of Stewart v. Severance, 43 Mo. 322, and Buchanan v. Tracy, 45 Mo. 437. The act of March 23, 1863, is considered as authorizing such sales after the return day of the writs.

The proper construction of the various sections of our execution law, which are substantially the same in the revised code of 1855, and that of 1865, from section 59 to section 63, is not entirely clear; but upon the whole we think the intention of the law was to require executions not completely executed to be handed over to and completed by the sheriff in office at the time of the sales. The 59th section does not prohibit this in the case of levies by a previous sheriff, although the 62d section undoubtedly authorizes the sheriff who levies the writ to go on and complete the various acts required under the original process. He is not required to do so, and the practice has been otherwise. This section is merely designed to give validity to, or rather to recognize the validity of, a title acquired in this way. The power of the officer, who makes the levy, to proceed with the advertisement, sale and deed is recognized. But the 59th section does not say that if the original officer who levies the writ hands it over to his successor, who proceeds to make advertisement and sale, and deed, such sale and deed are void.

Admitting that this section does not require the sheriff, who makes the levy, to hand over the writ to his successor, simply because his term of office has expired, and that the words, "not executed," have no application to a case where there has been a levy, still it does not prohibit the officer from so handing over to his successor writs which have been only partially executed; and in either event the sale is valid and the deed valid. The successor may adopt the levy of his predecessor and proceed with the advertisement, sale and deed; and so, if the original sheriff, who makes the levy, instead of handing over to his successor the writ, chooses to proceed under the 62d section, and make advertisement, sale, and execute a deed, it is also valid. And this seems to be the opinion of this court in Duncan v. Matney, 29 Mo. 368, and Merchants' Bank v. Harrison, 39 Mo. 438.

The clerical error made in the deeds in which the judgment in favor of Colburn was recited, as rendered April 21, 1865, was corrected. It was manifestly a mere clerical error, since the sales were made before the date of this recited judgment, and all the other judgments were recited as occurring on April 21, 1864. This correction was made by allowing the sheriff to amend his return, and by then correcting the error in dates in open court. It is insisted, however, that the corrected deed was never acknowledged; but as the correction was made in open court, there would seem to be no necessity for a formal acknowledgment of the deed thus corrected. It had already been once acknowledged and the record of the acknowledgment made.

But it is urged that all these sales having been made at the door of a church or meeting house, in which the circuit court at the time held its sessions, in the town of Warrensburg, were therefore void. The evidence established clearly that the sales were at the door of a building not usually used as a court-house, but at the time was so used, because the building regularly appropriated to these purposes was occupied by troops of soldiers, and was otherwise not in a condition to be used as a court-house. It is plain that a sale at the door of the deserted court-house, where no court was in session, would have been utterly against the spirit and meaning of the law. Whether the county court had failed to provide a suitable building for holding court, or whether the circuit court had selected the building for its sessions, is not material. It could not be maintained that the proceedings of the circuit court would be invalid, although its sittings were not in a building designated by the county court.

Both buildings were at the county seat of the county. And the obvious meaning of the execution law is to require sales at the door of the building occupied and used as a court-house.

Another objection to the plaintiff's title is that the sheriff's deed to Calhoun was not delivered. Calhoun had transferred his rights under his purchase to the plaintiff, and in a proceeding on the part of the plaintiff, against Calhoun, the court had decreed a transfer of Calhoun's title to plaintiff. The deed to Calhoun was executed, acknowledged and recorded, and this was equivalent to a delivery.

No formal delivery was necessary, as the law presumes a delivery under such circumstances.

The decree transferred Calhoun's title to plaintiff. Although the decree was rendered between parties other than those in the present suit, and was not, therefore, binding against persons not parties to it, the decree is simply offered to establish the title of plaintiff to whatever title Calhoun had. It was a fact in his chain of title, and it was competent evidence against all the world on this point, as much as a deed from Calhoun to the plaintiff would have been.

The decree simply transferred the legal title to the owner of the equitable title, and it was only used to show this.

The point that an order of publication, and publication, were essential to the jurisdiction of the court, in attachment cases, has been extensively discussed in this case. As the record recites that there was an order of publication, and an actual publication, according to law, it is obvious that no such question is presented by this case. In my opinion, the question is a mere abstraction.

The question was presented and discussed in the case of Freeman v. Thompson, decided July term, 1873, and the opinion of the court, or a majority of the court, was expressed on it. The question was, in that case, presented by the instructions, and though its decision might have been avoided, the opinion was not, therefore, an *obiter dictum*.

It frequently happens that the decision of a single point in a case will determine the affirmance or reversal of the judgment in that case, but it does not follow that the court may not proceed to examine and decide other points which the record presents; and indeed the latter course is most satisfactory to all parties concerned, and saves the necessity of again resorting to the appellate court.

That opinion had the unqualified approbation of three of the judges, and any view which I might entertain would be superfluous. Besides, it is difficult to see how this question has any practical importance. The statute requires an order of publication, and a publication, and prohibits the circuit court from entering a judgment until these prerequisites have been performed. It can

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hardly happen—I doubt if it has ever happened—that the courts have ever attempted to enter judgment unless, in their opinion and finding, an order of publication had been made, and a publication made in pursuance of such order; and further that the order and its compliance substantially conformed to the requisites of the statute.

The order of publication may be defective, and the mode of the publication made may not conform to the provisions of the statute; but whether the order or the publication is so defective that the court should not proceed to judgment, is a point decided by the court which tries the case, and its decision one way or the other is merely a matter for review in a direct proceeding to set aside the judgment.

There can be no doubt that the court has jurisdiction to decide such questions, when jurisdiction has already been acquired by service of the writ of attachment, which, of course, must be a valid writ, conforming essentially and substantially to the requirements of the act, and issued by the clerk in conformity with the power vested in him. There is then a case in court, and if every point arising subsequently is erroneously decided, still the purchaser, under a judgment, is not affected by such errors. This general principle is essential to the security of hundreds of titles, and though doubtless in many instances, probably in this, the property of the defendant is ruinously sacrificed by the sale under the execution, it must also be borne in mind that frequently the *bona fide* purchaser, at a fair price, may equally be subjected to the risks of future accessions of value to the property sold, which form so common a temptation for heirs to wish to set aside sales, years after they are made, upon merely technical grounds.

It is said, however, that where there is no publication, such as is required by law, the court has no jurisdiction over the persons of the non-resident, and can, therefore, pass no judgment on him, even so far as the property attached is concerned.

The judgment in such cases, it will be observed, can only affect the property attached; and when the record shows a finding of the court that there has been a legal order of publication, and a publication made in pursuance of such order, it is not apparent how this finding or determination of fact can be attacked collaterally any more than any other conclusion of the court in the course of its proceeding to final judgment. Its opinion on the sufficiency of the order of publication may be entirely wrong, reversible on review, but the error does not vitiate the title acquired under the udgment. In the language of Mr. Justice MILLER, in Cooper v. Reynolds (10 Wall. 321), to hold such judgments, sales and deeds void "would be to overturn the uniform course of decision in this court, to unsettle titles to vast amounts of property long held in reliance on those decisions, and to sacrifice sound principles to barren technicalities."

This judgment must be reversed, since it is conceded that Mrs. McCown was entitled to dower in the land, and there was no right of immediate possession; and it is therefore reversed, with instructions to enter the judgment with a stay of execution until the widow's dower is assigned.

The other judges concur.

JUDGMENT REVERSED.

Liability of Master for Injuries Inflicted upon One Servant through the Negligence of Another Servant.

UNION PACIFIC RAILROAD COMPANY v. JESSE L. FORT.

Supreme Court of the United States, No. 99; October Term, 1873.

Negligence—Servants in Common Employment.—A railroad company is liable for the negligent act of a foreman having charge of dangerous machinery, who, in the course and within the scope of his duties, orders an infant employee under him, upon a service hazardous to life or limb, and which was not within the scope of the ordinary or proper duties of the servant thus commanded to perform it. In such a case, the rule which exempts the emp oyee from liability to one servant for the negligence of a fellow-servant in the same common service, has no application.

Error to the circuit court of the United States for the district of Minnesota. The facts of the case and the special verdict will be found in 2 Dillon, C. C. R. 259.

Redick & Briggs, for the plaintiff (Fort); *Poppleton & Wakely*, for the railroad company.

Mr. Justice DAVIS delivered the opinion of the court.

It was assumed on behalf of the plaintiff in error, on the argument of this cause, that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury. Whether this proposition as stated be true or not, we do not propose to consider, because, if true, it has no application to this case.

The action was brought by the defendant in error to recover damages for an injury to his minor son, resulting in the loss of an arm, while in the employment of the railroad company. The boy was employed in the machine shop of the company as a workman or helper, under the superintendence and control of one Collett, and had been chiefly engaged in receiving and putting away mouldings as they came from a moulding machine. After the service had been continued for a few months, the boy, by the order of Collett, ascended a ladder to a great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt by which a portion of the machinery was moved, and while engaged in the endeavor to execute the order the accident happened. The jury, by a special verdict, find that the boy was engaged to serve under Collett as a workman or helper, and was required to obey his orders; that the order by Collett to the boy (in carrying out which he lost his arm) was not within the scope of his duty and employment, but was within that of Collett's; that the order was not a reasonable one; that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it.

It is apparent, from these findings, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption can not arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and can not receive our sanction.

The injury in this case did not occur while the boy was doing what his father engaged he should do. On the contrary, he was at the time employed in a service outside the contract and wholly disconnected with it. To work as a helper at a moulding machine, or a common work-hand on the floor of the shop, is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175

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to 200 revolutions per minute. The father had the right to presume, when he made the contract of service, that the company would not expose his son to such a peril. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger; or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy, of his age and inexperience, to do a thing which in its very nature was perilous, and which any man of ordinary sagacity would know to be so. Indeed, it is very difficult to reconcile the conduct of Collett with that of a prudent man, having proper regard to the responsibilities of his own position and the rights of others. It is charitable to suppose that he did not appreciate the danger, and acted without due deliberation and caution. For the consequences of this hasty action the company are liable, either upon the maxim of *respondeat superior*, or upon the obligations arising out of the contract of service. The order of Collett was their order. They can not escape responsibility on the plea that he should not have given it. Having entrusted to him the care and management of the machinery, and in so doing made it his rightful duty to adjust it when displaced, and having placed the boy under him with directions to obey him, they must pay the penalty for the tortious act he committed in the course of the employment. If they are not insurers of the lives and limbs of their employees, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so. The very able judge who tried the case, instructed the jury on the point at issue in conformity with these views, and we see no error in the record. (2 Dillon, C. C. R. 259.)

The judgment is affirmed.

Mr. Justice BRADLEY dissented.

NOTE.—Practically viewed, the foregoing case is one of unusual interest, and elsewhere in this number we make some observations respecting it, and upon the general subject of the Liability of Masters to Servants.

The Supreme Court recently decided another case upon the same general subject, which we print herewith in the form of a note. We refer to the case of the N. W. Union Packet Co., plaintiff in error, v. Mary McCue, Adm'x of Patrick McCue, deceased—from the eastern district of Wisconsin. The following is the opinion of Mr. Justice DAVIS:

"This suit was brought by Mary McCue, administratrix of her husband, Patrick McCue, deceased, to recover damages for injuries sustained by him on the 11th of July, 1868, through the negligence of the servants of the plaintiff in error, and which resulted in his death a few days thereafter. There can be no doubt from the evidence that McCue was without fault, and that the injuries which caused his death were owing to the improper conduct and reckless carelessness of the employees of the packet company; and the only question for determination is, whether the company is, under the circumstances of the case, responsible for the acts of its servants.

"The case is substantially this: Patrick McCue was a common laboring man, living in Prairie du Chien, Wisconsin, and employed in the railroad warehouse in that place. On the evening of the 11th of July, 1868, the steamer War Eagle, owned by the plaintiff in error, arrived at the landing in Prairie du Chien for the purpose of taking freight from the warehouse. Being short of hands, the officers of the boat employed McCue and four or five other persons to assist in carrying freight from the warehouse and putting it on board the boat. This employment continued about two hours and a half, at the end of which time McCue and the rest were requested to go to the office of the boat and receive their pay. They proceeded there accordingly, were paid, and then started to go ashore. The men on board the boat pulled in the gang-plank while McCue was on it, who was thus thrown down and injured, from which injury he died.

"It is insisted on the part of the plaintiff in error that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow servant engaged in the same general business. Whether this general proposition be true or not, it is not necessary to determine in the state of this record. It is conceded if the employment of McCue by the company terminated before the injury complained of was suffered, that the company is liable, and this the jury have found to be the fact. But it is said it was the province of the court, and not the jury, to determine the point of time at which the service was ended; that as the facts were undisputed, it was a question of law, and the court should have told the jury the relation of master and servant subsisted when the accident happened. We do not think so. One of the theories on which the suit was prosecuted was that McCue's special employment had ceased when he was injured. This theory was resisted by the defense, and the court, not taking upon itself to determine as an absolute proposition when the employment terminated, left it to the jury to find how the fact was. This ruling, in our opinion, was correct. It was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident. The point was submitted fairly to the jury, with no more comments than the evidence justified. It was argued by the plaintiff in error that the employment of necessity terminated on the land, because it was there McCue was engaged to do the work, and he had the right to be provided with the proper means of reaching it from the boat. On the contrary, the defendant in error contended the special service ceased when McCue had finished his work and was paid off; that after this he was not subject to the control or direction of the officers of the boat, but at liberty to stay on the boat or go off as he pleased. The jury took this latter view of the relation of the parties, and we cannot say that they did not decide correctly. At any rate, their decision on a question of fact is not subject to review in this court. The defense, at the best, was a narrow one, and, in our opinion, more technical than just.

"The judgment is affirmed."

We take pleasure in referring the reader to a very carefully prepared and valuable editorial article upon the "Liability of Master to Servant, for injuries sustained in the course of the employment," in 9 Albany Law Journal, 69, (January 31, 1874,) where the American exceptions to the general rule are clearly stated.

Taxation by Municipal Corporation — Vehicles — Drays.

CITY OF MEMPHIS v. BATTAILE & CO.

Supreme Court of Tennessee, Jackson, Special November Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY, }
" ROBERT MCFARLAND, }
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED, }
" THOMAS J. FREEMAN, }

1. **Municipal Corporation—Subjects of Taxation.** — It is competent for the legislature to authorize a municipal corporation to impose a tax upon occupations and privileges not taxed by the general law.

2. **Municipal Tax—Dray—Vehicle.**—A city ordinance imposing a tax upon "every owner of a wagon or *other vehicle*, kept or used for free delivery of goods to customers or others in the city," authorizes the imposing of tax on the privilege of using a dray within the city.

3. ——. ——. The fact that the dray is employed in doing the work of a rolling mill, which is situated outside the corporate limits, and the further fact that the owners reside outside the corporate limits, and that the drays and the animals which draw them are kept outside of the city, except when plying their avocation within it, do not make them any the less subject to such tax.

Opinion by SNEED, J.—The defendants were operating a "rolling mill" for the manufacture of bar iron, near Memphis, but outside the corporate limits of the city. They owned some drays, which were kept at the mill, but which were used in the free delivery of iron manufactured at the mill, to their customers and merchants within the corporate limits. The defendants themselves

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lived at or near the mill and without the corporate limits. They used their drays also in gathering up and transporting to the mill such scrap iron as they could from time to time obtain in different parts of the city. A license tax upon the privilege of thus using the drays was demanded of them by the city, which they finally paid under protest, and under an agreement that the question of their liability should be determined by the courts, and if determined in their favor, the amount should be refunded to them.

An agreed case was thereupon submitted to the judge of the 2d circuit court at Memphis, and judgment rendered in favor of defendants. The city appealed. The city claims the right to demand the license tax in question, under an ordinance in the words following: "Every owner of a wagon or other vehicle kept or used for free delivery of goods to customers or others in the city—for each vehicle per annum $10 00." The ordinance was adopted by the city council under the authority of the amended charter of the city, passed on the first of December, 1869, which gives the city the power to license and regulate *drays*, carts, hackney coaches and other vehicles *used in the city*." It is insisted that the words "other vehicles" used in the ordinance do not embrace drays; and in support of this view an argument is presented based upon the peculiar phraseology of certain preceding sections of the same ordinance upon the same subject. Thus, it is provided in one section that every owner of a cart, wagon or dray drawn by one horse, and not including carriers of passengers or baggage, running for hire, is required to pay a license tax of ten dollars a year. Another, and the section next following the above, imposes upon a two-horse vehicle, as mentioned in the last section, a license tax of twenty dollars *per annum*; the next, a license tax of thirty dollars a year upon a three-horse vehicle. The next provides that every owner of an omnibus, hack, carriage or other vehicle seeking custom upon the streets, or visiting the railroad depots or steamboat landing or other public places for the purpose of procuring custom, shall pay a license tax of twenty dollars for each vehicle; and the next, that every carriage or other vehicle kept exclusively for use at funerals, for hire, shall pay a license tax of ten dollars a year for each vehicle. Then comes the 25th section, now in judgment, providing that every owner of a wagon or other vehicle kept *or used* for free delivery of goods to customers or others in the city—for each vehicle ten dollars per annum. It is urged that the peculiar phraseology of these preceding sections show, by fair construction, that it was not the purpose of the council in adopting this ordinance to include drays in the words "other vehicles," and in support of this view the case of McGrath v. Logue, 6 Cold. 340, is cited. But that case, in our judgment, may be distinguished from this. It involved the construction of the revenue act of 1867–8, which imposed a privilege tax upon all hacks, carriages or vehicles running for hire; and it was held that the words in that section "or vehicles running for hire," did not include drays. But the decision in that case is rested expressly upon the ground that the statute undertakes in a subsequent clause to classify the particular vehicles intended to be taxed, and fixes the specific tax upon each by name, including drays. We think the case in judgment may be rested on other grounds without positive conflict with that case. When that case was determined, there was no law expressly authorizing the imposition of a privilege tax upon drays, and in a matter of state and county taxation it was held that in the absence of any positive statute, no such tax could be imposed. In the case before us, the amended charter authorizes the city to impose a privilege tax upon drays, and under this authority the tax in question was imposed.

It must first be considered, then, whether it be competent for the legislature to authorize a municipal corporation to impose a privilege tax upon any occupation or privilege not taxed by the general law. It was held in the case of Nashville v. Thomas, 5 Cold. 600, in regard to the taxation of bank stocks, that a municipal corporation could not levy taxation upon properties or privileges other than such as are taxable under the statutory law of the State. In that case the city of Nashville had adopted an ordinance taxing the stock in national banks, and this ordinance was adopted under the general taxing power of the municipal government, and not under any special charter privilege to tax that particular character of stock. In the case before us, the special power to tax drays used in the city is conferred by the amended charter; and we think the legislature, in the absence of any constitutional inhibition, clearly had the right to delegate this power to the city government. A city government is a peculiar polity. It is an *imperium in imperio*. Its necessities and its wants are distinguishable from those of the general public, and it has its sources of revenue, which, in the nature of things, do not belong to all the state alike. Its burthens also are different from those which rest upon the general public, and these burthens create the absolute necessity for the peculiar prerogatives which have always attached to municipal governments. It has never been questioned, therefore, that the chartered privileges of a city corporation, which distinguish it from the general law, are valid and constitutional, where they merely recognize or make effectual the police powers essential to maintain itself within itself. And among its first duties and burthens is to establish and maintain safe and agreeable streets and highways for the public, and they are answerable to the general law if they do not. It would seem, therefore, that the use by the owners of vehicles of the streets and highways thus established, would be a privilege upon which a tax might be most properly imposed; and especially that the employment as an occupation of any vehicle upon the streets, calculated to injure and wear them away, would be a legitimate subject of privilege taxation; and conceding that such taxation is not authorized by the general law as applicable to the whole state alike, yet if it be not forbidden, we can see no valid objection to the exercise of the power in a city government. Thus it has been said by this court that "the ordinances and modes of administration of municipal corporations are not invalid as partial laws, for the reason that they are applicable only to persons residing or being within the limits of the municipality." 6 Cold. 390. The constitution authorizes the legislature to create municipal corporations, and to confer upon them such powers as are appropriate to them. We hold there is nothing in the amended charter authorizing this tax which is objectionable.

We are next to consider whether the words "other vehicles" used in the ordinance include the vehicle commonly called a dray. It seems to us that the common sense of the proposition must be the law of it; and without further discussion, we hold that a dray being a vehicle other than the vehicle named in the ordinance, is necessarily embraced within its provisions and meaning, and that there is nothing in the section in question, or in the phraseology of the other sections referred to, which forbids this reasonable and natural construction of unambiguous words.

But the defendants insist that they are not living within the corporate limits, and that their drays and the animals that draw them are kept outside of the city, except when plying their avocation within it, and therefore they are not liable. We can not yield to this argument. The privilege is exercised within the city and along its streets, and this is the daily business of the draymen and their drays. The privilege tax is the use of the drays in the city, and it can certainly make no difference where the beneficiary of the privilege resides.

Reverse the judgment.

REVERSED.

—A BILL has passed the house of representatives providing that no person shall be prosecuted, tried or punished in any United States court for any offence not capital, or for any fine or forfeiture under a penal statute, unless indicted, or information shall be found or instituted within five years from the date of the crime or act, except in the case of persons fleeing from justice.

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A Bankrupt Cannot be Examined after he has Obtained his Discharge.

Judge WOODRUFF, of the United States circuit court for the southern district of New York, has decided an important point of practice, or rather of jurisdiction, in the case of Nathaniel Dole, recently adjudged a bankrupt. The New York Herald states the decision as follows:

"On the 25th of June, 1867, Dole filed a voluntary petition in bankruptcy, and on the 27th of the same month was adjudicated a bankrupt. Isaac M. Andruss was elected assignee on the 12th of October, 1867, and thereupon an assignment of the bankrupt's estate was made to him. Dole obtained his discharge, which was filed on the 9th of January, 1868. On the 27th of November, 1872, on the petition of the assignee and the affidavits of G. W. Lockwood, the district court made an order requiring Dole to appear before John Fitch, register in bankruptcy, on the 9th of December, 1872, for the purpose of submitting, under section 26 of the act, to an examination in regard to the bankruptcy proceedings had against him. Dole put in specific objections to the proposed examination, and on a certificate having been made to the court, Judge BLATCHFORD overruled most of the objections, and the proceedings were continued before the register. An appeal having been taken to the circuit court, Judge WOODRUFF considered the matter, and yesterday filed a long and elaborate written opinion. The substance of the opinion is this:—He says it seems extraordinary if congress intended that a debtor should continue subject to the power of the court after his discharge was granted and his liability for his debts had ceased. The latitude said to be given to the power of summary examination would tend to great abuse, against which it would be difficult, if not impossible, for the court sufficiently to guard, and the abuse of the proceeding, to great personal inconvenience, oppression, and even to extortion. This would be a very great evil. The judge comes to the conclusion that the order for the examination of Dole was improvidently made and was without jurisdiction, and that the proceedings must be dismissed."

Photographs of Papers in Existence not Admissible in Evidence.

In the case of the United States v. Louis Messman, formerly first lieutenant of a New York volunteer regiment, which has been on trial before Judge BLATCHFORD in the district court of the United States at New York city, an interesting point of evidence was decided. According to the Herald's report of the case, the action was brought to recover $253.79 on the following charge:—Mr. Messman, on the 20th of July, 1864, presented his pay-rolls for the months of January and February, 1864, and upon the presentation of that paper received $253.79. It is charged by the government that on March 18, 1864, he had received his pay for those months, and the inference raised by the government was that he had obtained double pay. Messrs. Yard and Furlong, counsel for the defence, set up that one of the pay-rolls was a forgery. The government had sent on photographic copies of those pay-rolls purporting to have been signed by Mr. Messman. Mr. Simons, United States assistant district attorney, offered to put those photographic copies in evidence, but Judge BLATCHFORD declined to accede to the offer, saying that as the defence was that one of these pay-rolls was a forgery, counsel for the government must put in the originals. Mr. Simons replied that the court of common pleas, in a case of this kind, had decided that where it was set up that a paper was forgery, a photographic copy of it could be received in evidence. Judge BLATCHFORD—I am not bound by the decision of the court of common pleas, and I shall not concur in its decision. To admit in evidence a photographic copy of a pay-roll would be acting contrary to well established rules of evidence—in fact, it would be monstrous. Upon the application of Mr. Simons, the trial was postponed until he could procure the original pay-rolls from Washington.

Book Notices.

REPORTS OF CASES ARISING UNDER LETTERS PATENT FOR INVENTIONS, DETERMINED IN THE COURTS OF THE UNITED STATES. By SAMUEL S. FISHER, Counsellor at Law. Vol. 5. Cincinnati: Robert Clarke & Co., 1874.

To that part of the profession which gives attention to patent cases Mr. Fisher's series of Reports are simply indispensable. It is useless to offer any remarks touching their well known general merits in this special department of the law. We scarcely know which most to admire, the superior paper and typographical excellence of the volumes, or the conspicuous skill and care with which the Reporter does his work. In the Life of TANEY by Mr. Tyler, the chief justice is stated to have made the observation that none but a good lawyer can make a good Reporter. It is true. The profession are, therefore, to be congratulated that one of the very foremost patent lawyers in the country feels sufficient interest in the studies and work, to which he gives his busy life, to furnish them with the excellent series of Reports known as "Fisher's Patent Cases." The present volume is perhaps superior to any of the preceding and is, as it should be, freely illustrated by engravings and diagrams. This feature of the work is expensive, and we cannot too highly commend the Reporter or Publishers (whichever may be entitled to the credit) for the enterprise and liberality to which it owes its origin.

A TREATISE ON THE LAW OF JUDICIAL AND EXECUTION SALES. By DAVID RORER, of the Iowa Bar. Chicago: Callaghan & Co., 1873.

Of the importance of the subject treated by Judge Rorer there can be no question. In this country, where so great a proportion of titles depend upon judicial sales, it seems to be remarkable that no work upon this subject has hitherto appeared. It has long been known to his friends that the present author was collecting data for a work of this character, and they are glad to welcome its appearance. The author is an able and experienced member of the Burlington bar, and he presents the profession with the result of his labors in a compact volume of 412 pages, which is printed with clear type, on excellent paper. We can well credit the author's statement that it has required additional labor to *condense* his materials so as to present the topics treated in the smallest practicable space. This is a merit well deserving praise. The work is not an exhaustive one in the sense of collecting *all* the cases upon the subjects considered, but the selection from the cases is judiciously made, and the work will tend to bring the subjects treated of into more harmony, by directing attention to existing differences of judicial views, and will be of great aid to the professional enquirer in lessening his labors and in guiding his investigations. We are glad to know that it has met with a warm reception; and we can safely recommend it as a useful volume.

It is dedicated to the author's friend—Mr. Justice MILLER—"as an expression of that respect and regard which are so eminently due to his great personal worth and legal learning."

THE NEW YORK SUPREME COURT REPORTS. Cases determined in the Supreme Court of New York, from June to November, 1873. Edited by ISAAC GRANT THOMPSON and ROBLEY D. COOK. Albany: John D. Parsons, Jr., 1874. Price $5.

We have already had occasion to notice (*ante*, p. 49) the coming of this new series of reports. The profession will not, we presume, regret the discontinuation of the series of Barbour, nor of that of Lansing, which this series supplants. What was bad in Barbour was made worse by the advent of Lansing as the *official* reporter of the same court; after which time we had the spectacle of one court—or one *series* of courts—with two reporters, the one a private, and the other the official reporter. According to a report of a committee of the New York Bar Association, appointed to investigate the abuses of law reporting in that state, it appeared that some of the judges were in the habit of giving their opinions to Mr. Barbour, while others gave theirs to Mr. Lansing. The result was that the opinions of different judges in the same case were sometimes distributed between the two reporters, and each reporter published the share which fell to him as the full report of the case. It sometimes happened from this cause, that dissenting opinions were published as the opinion of the court.

This state of things is remedied by the new series. It purports to give *all* the decisions of the supreme court of that state in its various departments sitting in general term. Concerning the plan of reporting all the decisions, the professional judgment will differ. Inside the state of New York the verdict will be in its favor, while outside of that state the reverse will probably be true. The evil of this plan is, however, in a great degree obviated by the method of giving only an abstract of the unimportant cases in an addenda.

At the same time there are those who believe, and never tire of asserting, that the decisions of a court not of last resort ought not to be reported at all. Whatever force this consideration may have with the bench and bar of the

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state of New York when applied to this series of reports, it is thought that it will not weigh much with the profession at large. Outside of that state, the opinions of its courts, whether highest or lowest, unless interpreting local laws, have only *persuasive* force; and every decision must stand or fall according to the strength of its reasoning and the apparent soundness of its conclusions.

We have examined this volume with considerable care; and whether we consider the work of the editors or of the publisher, we have found in it nothing that does not deserve commendation. We shall notice some of the decisions next week.

Notes and Queries.

SAVANNAH, GA., February 19, 1874.

EDITORS CENTRAL LAW JOURNAL:—A few days since I saw one of your papers, No. 4, and on page 48, under the head of "Notes and Queries," read a question from J. M. M., which you, being unable to answer from any decision at hand, requested any of your readers to do so. In our Georgia supreme court, held in September last, a question quite similar to J. M. M.'s came up for decision, and I have enclosed the brief of the report to you, which you may use, possibly, for the benefit of your querist. I think the position of the county court in the case I send you is exactly the same as that of the one in the question before referred to.

Very respectfully, J. G. R.

The following is the decision referred to, and for which we thank our correspondent:

COLQUITT AND BAGGS, *et al.*, v. P. H. OLIVER.

Motion to distribute money, from Sumter.

WARNER, C. J.—On the 20th of July, 1868, a verdict was rendered in the county court of Sumter in favor of Oliver against Adams. On the 24th of July, 1868, an appeal was taken by Adams, who executed his appeal bond before the county judge, with Foster as his security, which was entered on the record book of said court, and the case was transmitted to the superior court, in which a trial was had, and a verdict was rendered against Adams on the appeal trial, upon which judgment was entered against Adams and Foster as his security on the appeal. The property of Foster having been sold by the sheriff, and the money arising from the sale thereof being in the sheriff's hands, and on a motion to distribute the same, Colquitt and Baggs and others, being junior judgment creditors of Foster to Oliver's judgment, moved the court to set aside Oliver's judgment against Foster as security on the appeal for Adams, on the ground that the judgment was void to them inasmuch as the appeal from the verdict in the county court was taken and the appeal bond executed before the county judge after the county court was abolished by the adoption of the constitution of 1868, on the 21st day of July of that year. The court refused the motion, and ordered the money in the hands of the sheriff to be paid to Oliver's execution, which was the oldest. Whereupon the other judgment creditors of Foster excepted. The verdict against Adams was rendered before the county court was abolished by the constitution of 1868, and he then had the legal right to appeal therefrom within four days, by paying costs and giving security, which was done, and the case transmitted to the superior court, as provided by law. The taking the bond and security by the county judge on the records of that court was a mere ministerial, and not a judicial act—it was nothing more than a transmission of the unfinished business of the county court to the superior court, and in our judgment the appeal was not void, nor was the judgment rendered thereon in the superior court against the security on the appeal void, under the provisions of the constitution of 1868.

Let the judgment of the court below be affirmed.

W. B. Guerry, Hawkins, Guerry & Hollis, for plaintiffs in error; *G. T. Goode* and *N. A. Smith*, for defendant.

Legal News and Notes.

—A BILL to authorize the husband, wife or next of kin of a deceased person to draw from a savings bank any sum not exceeding $500, has passed the legislature of California.

—THE attorney general has decided that ale forfeited to a state, and taken before the United States tax is paid, from the manufacturer by the process of a state court seeking to enforce the forfeiture, cannot be seized by the United States officers for the non-payment of said tax while it remains in the custody of the state officers.

—HE has also decided that the phrase "state banking association" in section 6 of the act of March 3, 1865, providing for a tax of ten per cent. upon state circulation, includes all associations for banking by private agreement of parties as well as an association organized by a special act of the state legislature.

—HE has also decided that the secretary of the treasury may withhold from a railroad company compensation for transportation services when such company has received from the United States, to aid in the construction of its roads, bonds upon which it has not paid the interest, though the services were rendered upon another of its roads to which no government aid had been given.

—MR. FRYE, of Maine, from the house judiciary committee, has reported a bill providing that any person who shall be convicted of the crime of manslaughter in any United States court in any state or territory, or in the District of Columbia, shall be imprisoned for a term not exceeding twenty years and fined in a sum not exceeding $1,000. After an amendment providing that the bill shall not affect any case now pending in any court, the bill was passed.

—THE telegraph tates that W. Page McCarty, recently convicted of involuntary manslaughter for killing his antagonist in a duel, who has been in jail under sentence of six months' imprisonment, imposed by the court, in addition to the fine of $500, has been pardoned by Governor Kemper. The pardon set forth that the sole ground upon which executive clemency is extended is that his physicians certify that further confinement would be fatal to McCarty, he having been very ill since his incarceration.

—THE house judiciary committee has reported a bill giving defendants in all criminal cases in the United States courts and before courts martial and courts of enquiry, the right to testify in their own behalf. The bill passed the house. It is supposed that its object is to give General Howard the benefit of its provisions when his case comes before the court of enquiry; but whether this be so or not, it is a measure of common justice which has been too long delayed.

—THE Supreme Court of the United States met on Monday, the 2d instant, after its recent vacation. All the day was consumed with the delivery of opinions, and it was thought that Tuesday and Wednesday would be, as there were thirty-five to read. Chief Justice WAITE will not take his seat until they are all read. The opinions read on Monday were not generally of public interest. Mr. Justice FIELD delivered an opinion in the Minot, Philadelphia, Wilmington and Baltimore Railroad case, affirming the constitutionality of the tax imposed by the state of Delaware. Mr. Justice STRONG delivered an opinion in the case of the Dollar Savings Bank of the United States, in which the court held that all savings banks were obliged to pay internal revenue tax on their contingent fund, and that an action of debt would lie for the recovery of the tax, although the tax has never been assessed. Mr. Justice BRADLEY dissented.

—We take pleasure in publishing the following correction in the column where the mistake occurred:

"ATLANTA, GA., February 23, 1874.

"To the Editors of the CENTRAL LAW JOURNAL—GENTLEMEN: In the JOURNAL of the 19th inst., you give a list of cases disposed of in the United States circuit and district courts for Georgia, at the last autumn terms of these courts. The list was first published in a Savannah newspaper, and is, I think correct. In your notice you remark that it is a 'list of cases disposed of by the Hon. JOHN ERSKINE.' This is correct as to the cases in the district courts and at chambers; but as to those determined in the circuit courts, it is due to the circuit judge—the Hon. W. B. WOODS—to state (and I know you will take pleasure in doing so) that he presided in the circuit courts during the greater portion of the Fall terms, and, with but few exceptions, prepared and delivered the decisions of the court.

"With sincere respect, I remain your obedient servant,

"JOHN ERSKINE."

We have been favored by Judge ERSKINE with several important opinions delivered by him, one of which we shall endeavor to lay before our readers next week,

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, MARCH 12, 1874.

SUBSCRIPTION:
$3 PER ANNUM, in Advance.

Cases in this Number.

We publish in this number an opinion of Hon. JOHN ERSKINE, sitting in the United States circuit court for the southern district of Georgia, expounding a statute of limitation enacted by the legislature of that state, designed to cut off suits where the cause of action accrued before the war. The cases, two of which are disposed of in this opinion, are known as the "bank cases," and have excited great interest in Georgia. We also print the outlines of an exhaustive opinion of Hon. H. H. EMMONS, United States circuit judge for the 6th circuit, delivered at Detroit, upon questions of equity procedure, the importance of which will at once suggest itself to the reader. The syllabus was furnished, together with the opinion as we print it, by Messrs. Meddaugh & Driggs of Detroit, who were of counsel for the defendants in the case.

Our readers will thank us for thus preserving valuable opinions delivered by federal judges in whose circuits there is no regular system of reporting. We shall, from time to time, publish other federal court decisions not elsewhere published or to be published, except by the local press, so far as our space will permit. We shall publish next week a valuable opinion of Hon. ROBERT A. HILL, sitting in the circuit court of the United States for the southern district of Mississippi on an important question of life insurance.

Death of Hon. Nathan K. Hall.

Hon. NATHAN K. HALL, United States district judge for the northern district of New York, died suddenly at Buffalo on the 3d instant. Judge HALL was born in Marcellus, Onondaga county, New York, in March, 1810. He studied law in the office of Millard Fillmore, and subsequently became his partner, the style of the firm being Fillmore, Hall & Haven. Upon the accession of Mr. Fillmore to the presidency, he became Post Master General. Both he and Mr. Haven were the trusted advisers of President Fillmore, and, it is said, supported him in the policy of replacing Seward whigs with Fillmore whigs in such of the federal offices as he could reach. Mr. Fillmore rewarded his friendship with a life estate in the office which he held at the time of his death. Mr. Haven died some years ago; and with the death of Mr. Fillmore on Sunday last, the country has witnessed the final dissolution of a firm of lawyers which has filled a conspicuous place in its history. Judge HALL was an able and upright judge and a pure man. His dockets were always crowded, his duties constant and pressing, and he literally died in the harness.

The Installation of the Chief Justice.

Hon. MORRISON R. WAITE, the newly appointed Chief Justice of the United States, took the oath of office and entered upon his duties on the 4th instant. The ceremony, or rather the lack of ceremony, was such as becomes our republican simplicity. There was no "counting in dower," nor was the Chief Justice asked whether he would "move anything," according to the ancient ceremony which is still whimsically kept up by the English.

At noon precisely the crier of the court announced, "The honorable, the Associate Justices of the Supreme Court!"—when all in the court-room arose. From the north door then came the Associate Justices in full robes, Mr. Justice CLIFFORD in the lead, and closely following the Associate Justices, Chief Justice WAITE. The Associate Justices passed to their seats at once, the Chief Justice halting at the desk of the clerk of the court. The court was then opened by the crier, as usual, when Justice CLIFFORD handed the commission of Chief Justice WAITE to the clerk, who read the same aloud. It is in the usual form of commissions of federal officers, civil and military.

The clerk then arose and read aloud the following oath, adding at its conclusion, "So help you God," in which latter the Chief Justice joined, and was thereupon sworn:

"I, MORRISON R. WAITE, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Chief Justice of the Supreme Court of the United States, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

After subscribing to the above oath, the Chief Justice passed to the rear of the bench, and entering the door, took the vacant chair in the center, the Associate Justices standing and bowing as he assumed his seat.

Municipal Debts — Mode of Collection — Personal Liability of Inhabitants.

Holders of municipal railway-aid bonds in Wisconsin have in many instances met with trouble in collecting them. It has not been difficult to obtain judgments, but almost impossible to realize the money on them where the town corporations, supported by the citizens, were resolved not to pay. Writs of *mandamus* are issued, but before they are served the officials must make the necessary levies for ordinary purposes, and then enough of them resign at once so as to leave no quorum authorized to do the act which the writ commands, and thus attachments for contempt cannot be had or made effectual. There seems to be no authority in that state, as in Supervisors v. Rogers, 7 Wall. 175, for the appointment of the marshal by the federal courts as a commissioner to levy the taxes.

Under these circumstances the creditor in Morgan v. Beloit filed some years since a *bill in equity* against the town in its *corporate capacity* and its *inhabitants*, asking a decree subjecting the taxable property of the town and its inhabitants to sale by the marshal to pay the judgment creditor. The circuit court dismissed the bill. The Supreme Court of the United States, on an appeal, ordered a re-argument on this question: "Whether or not it is competent for the circuit court of the United States, on a bill filed for the purpose, to appoint a master or commissioner to levy and collect a tax upon the taxable property of the town sufficient to pay the plaintiff's judgment, in case of the refusal of the supervisors of the town to levy the same after service of a peremptory writ of *mandamus?*" At the December term, 1869, the decree dismiss-

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ing the bill was *affirmed by an equal division of opinion* among the eight judges then on the bench. The case is not reported. (See Dillon Munic. Corp., Sec. 693, note.)

Afterwards the circuit court of the United States for the western district of Wisconsin, in Rees v. Watertown, June term, 1872, dismissed a similar bill to the preceding, and the decree has just been affirmed by the Supreme Court of the United States. We have not yet seen the text of the opinion of the court, but it undoubtedly holds the doctrine that there is no *personal liability* on the part of citizens or corporators for the debts of the municipality or public corporation. The contrary doctrine in this country is exceptional and limited to the New England States. (Ib. Sec. 686, and cases cited; Cooley Const. Lim. 246, 247.)

We may remark that in the case of Hubbell v. Town of Waterloo, the circuit court of the United States for the eastern district of Wisconsin, in April, 1872 (present, DRUMMOND and MILLER, JJ.), in an application in a *mandamus* proceeding supplemental to a judgment against the town for the appointment of a commissioner to levy and collect the taxes, which the local officers evaded and refused (by successive resignations) to levy and collect, the judges were divided in opinion as to the power of the court to make the appointment, and the question was certified to the supreme court, where it is still pending. Since the decision in Rees v. Watertown, holding that *equity* would not give relief, the question of the right of the federal court to appoint commissioners of its own to levy and collect taxes to pay judgments thereon, on the refusal of the state officials to obey its mandate to that effect, becomes doubly important to the judgment creditor, and its decision in his favor seems to be his chief if not only reliance for effectual judicial compulsion of such corporations as are bent on not paying.

An Interesting Application of the Law of Fixtures.

The case of The United States v. A Certain Tract of Land in Monterey County, 6 Pacific Law Reporter, 62, furnishes an interesting application of the law of fixtures. The United States instituted the proceeding in 1870, in one of the state courts of California, to condemn a tract of land in Monterey county, for light-house purposes. It appeared that some time in the year 1854 the United States, by its agents, had entered, against the will of the owners of the rancho, upon the lands now sought to be condemned, and erected thereon a stone building, the foundations of which were set into the soil, and ever since then have occupied it and the surrounding premises, part of the rancho, against the will of the owners, for light-house purposes. At the trial the defendants claimed that this building having been tortiously erected upon, and thereby became part of their soil and freehold, its value rightfully formed an element to be considered in fixing the amount of damages to which they were entitled. They accordingly offered to prove its value, but the evidence offered upon this point was excluded, and the exception reserved upon this ruling of the court below was brought up for review by appeal.

The supreme court of California, however, took a different view of the question. WALLACE, J. (with whom CROCKETT and MCKINSTRY, JJ., concurred), said: "There can be no doubt that upon the general principles of law the defendants, as being owners of the fee, are also owners of the improvements and fixtures actually annexed to the soil, and these become part of it. If one erect buildings upon the land of another voluntarily and without any contract, he may not remove them. This is common learning. The law did not authorize the United States to take possession of these lands *manu forti*, and their agents in entering upon them and ejecting the defendants were mere tort feasors. This case is, in this important respect, wholly unlike that of the California Pacific Railroad v. Armstrong, decided here at the last April term. In that case the road track was constructed by the railroad company, *while its possession of the land of the defendant was rightful*, being held at the time in pursuance of pending proceedings for its condemnation; and these proceedings having been dismissed, after the construction of the track, we held that the owner of the land was not entitled to be paid the value of the track upon the subsequent renewal of proceedings of condemnation by the same company."

RHODES, J., said: "The principal facts on which the question in this case arises are substantially the same as those in California Pacific Railroad Company v. Armstrong, and I concur in the judgment in this case, because I am of the opinion that the doctrine on which it is based is opposed to and overthrows the doctrine of that case."

Liability of Railway Company for Breach of Contract to Carry a Passenger who is a Married Woman—Measure of Damages.

We find in 8 Irish Law Times Reports, 24, an interesting case determined in the Irish common pleas—Collier *et ux.* v. Dublin, Wicklow and Wexford Railway Co.—on the measure of damages to which a husband is entitled in case of the breach of a contract by a railway company to carry his wife from one station to another within a reasonable time; or rather, the damages to which a railway company is liable at the suit of the husband joined with the wife, where it sells a ticket to a married woman, and then does not delay its next train long enough to allow her to get aboard.

The plaintiffs, William H. Collier, and Mary Collier, his wife, complained, in the first count, that the defendants, the Dublin, Wicklow and Wexford Railway Company, being carriers of passengers, contracted with the plaintiff, William Collier, to carry his wife, the plaintiff, Mary Collier, from Booterstown to Lansdowne Road Station, within a reasonable time, but that they did not do so, whereby the plaintiff, Mary Collier, was obliged to remain during a whole night in a certain station of the defendants, without proper accommodation, and that by reason thereof she became seriously ill, and the plaintiff, William Collier, was deprived of her services. There were four other counts for assaulting and imprisoning the plaintiff, Mary Collier. The defendants pleaded, in addition to ordinary traverses, a special plea that the female plaintiff would not enter the carriage, whereby the defendants were unable to perform their part of the contract. The case came on for trial before MONAHAN, Ch. J., and a special jury, on the 19th of July. The facts appearing on his lordship's report were as follows:—The plaintiff, Mary Collier, took a second-class return-ticket from Dublin to Booterstown; she spent the day at her father's house at Booterstown; she returned to the station at Booterstown, with her daughter, about

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11:30 p.m., in time to catch the last train. She and her daughter got into a carriage, but when they had done so they found it was a smoking compartment, and got out in order to enter another compartment. The porter opened the door for them to get in; the daughter got in, but the train went off before Mrs. Collier could get in. After the departure of the train she entered the station-house, and complained to Mahony, the deputy station-master, and asked to have a cab sent for. This was refused. She then sat down in the station. When Mahoney was about to lock up the place for the night and go home, he informed her of it. She nevertheless remained sitting. He turned out the lights, locked the door, and went away, leaving Mrs. Collier inside, where she was found next morning, when the station was again opened for the day. It was not alleged that she contracted any illness, or sustained any personal injury from what had happened, beyond the fact that she had to lie in bed for a time, in consequence of having sat so long upon a hard seat. No medical advice was applied for. The plaintiff, William Collier, was absent from home on the night in question, on his business as a commercial traveller, and did not know of what had happened till afterwards. The defendants contended that they were not liable for the acts of Mahoney. In this view his lordship concurred, and directed the jury to find for the defendants on all the counts, except the first. In charging the jury his lordship said that it appeared to him that the guard should not have signalled for starting the train till the lady was provided with a seat, and that, therefore, some damages for a breach of contract should be given. His lordship declined to direct nominal damages, but directed the jury only to give such damages as were sustained by the husband in his own capacity. The jury found for the plaintiff on the first count £50 damages.

A conditional order for a new trial having been obtained on the ground of misdirection, and also that the verdict was against the weight of evidence, and that the damages were excessive, Purcell, Q. C., for the plaintiff, showed cause, and cited on the question of the measure of damages, Smeed v. Foord, 1 El. & El. 602, and Hamlin v. Great Northern Railway Company, 1 Hurl. & N. 408. Pierce White, Q. C. (with whom was Gibson, Q. C., and Seeds), for defendants, *contra*, cited, on the same question, Hadley v. Baxendale, 9 Exch. 341, and Hamlin v. Great Northern Railway Company, *supra*.

KEOGH, J., thought that the jury should have given nominal damages only. The plaintiff did not take a cab or get a doctor; and no injury had been sustained on the first count. LAWSON, J., said, when he looked at the only allegation of damages to the plaintiff, William, he could not see that a deprivation of services had taken place. He not having been at home that night, was not entitled to damages for his wife being kept out of her house MONAHAN, Ch. J., was of opinion that the damages were excessive, but thought that the jury should have considered the circumstances attending the whole case; and that if the plaintiff was kept out of the train, she was entitled to more than nominal damages. A new trial was granted.

It has been held in the United States, in an action against a railway company for an injury to a married woman, that the husband and wife can only be joined where the object of the suit is to recover for the personal injury of the wife alone. If the suit is brought for the expenses of curing the wife, and for damages for the loss of her society and service, the husband must sue separately. Nor can an action for damages for personal injuries to the wife, and also for loss of her service, society, etc., be maintained jointly by the husband and wife, because these two grounds of action arise in different rights and are incompatible with each other. Fuller v. Naugatuck Railroad Co., 21 Conn. 557, 571. So it has been held in a case where a married woman sued separately for damages in consequence of a personal injury, that she could not recover the physician's and nurse's bills as items of damage, without proof of a separate estate that would be chargeable with such expenses. Moody v. Osgood, 50 Barb. 628.

In the case of Hamlin v. The Great Northern Railway, *supra*, a tradesman took a ticket to go from London to Hull. On arriving at Grimsby, he found no train ready to take him to Hull the same night, as it should have been, according to the published time-table. He slept at Grimsby, and in the morning paid 1*s.* 4*d.* fare to Hull. In consequence of his delay, he failed to keep appointments with his customers and was detained for many days. It was held that, although he would have been entitled to perform the contract at the expense of the railway company, yet, not having done so, he could not recover more than nominal damages in addition to the 1*s.* 4*d.*, and perhaps the cost of his bed, etc., at Grimsby. See also, upon the general subject of the liability of carriers for unreasonable delays in delivering goods or carrying passengers, the authorities collected in 1 Redf. on Railw., 5th ed., p. 199, note 4, and p. 200, note 7.

The Georgia "Bank Cases"—Computation of Time under the Statute of Limitations—Limitation in Favor of Administrators.

WILLIAM N. MARSH *et al.* v. BURROUGHS *et al.* AND THOMAS R. MILLS, JR., ADMINISTRATOR WITH THE WILL ANNEXED OF GEORGE HALL, DECEASED.—SUIT IN CHANCERY.

LEVI H. B. SCOTT v. SAME.—ACTION AT LAW.

United States Circuit Court, Southern District of Georgia—November Term, 1873.

Before Hon. JOHN ERSKINE, District Judge.

1. **Statute of Limitations—Statute fixing Bar where Cause of Action has already accrued.**—On the 16th day of March, 1869, the legislature of Georgia passed an act providing that all suits of whatever nature, in which the cause of action accrued prior to the 1st day of June, 1865, should be barred, unless brought by the 1st day of January, 1870. The period thus allowed for bringing suits was nine months and fifteen days. This is held to be a reasonable period in ordinary cases.

2. ——. **Twelve Months' Exemption in Favor of Administrators.**—By the Georgia Code, § 2548, an administrator is not liable to suit until one year from the date of his qualification. It is held that this exemption is not repealed by the act of March 16, 1869. If the latter act had such an effect, it would probably be in contravention of the constitution of the United States; but as it does not, it is a valid enactment.

3. ——. **Computation of Time under the two Statutes.**—In computing the time which will bar an action, with reference to these two statutes, it is held that the administrator is entitled, first, to the one year's exemption allowed by § 2548 of the Code, and then that the creditor of the estate is entitled to the nine months and fifteen days of the act of March 16, 1869, added thereto, in which to bring his suit; although the time within which suit may be brought may thereby be extended beyond the 1st day of January, 1870

The case is stated in the opinion.

Messrs. *A. W. Stone* and *A. T. Akerman*, for plaintiffs; Messrs. *Hartridge* and *Chisholm*, for defendants.

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ERSKINE, J.—The questions presented being similar, the cases were argued in connection with each other. These suits are two of the numerous cases which have, under various phases, been pending here for years, and known as the "bank cases." Many of these cases have, from time to time, been disposed of by decrees, judgments, or compromises. But the question now presented is quite different from any which has hitherto come before the court for determination. No special statement of the contents of the bill or the declaration is necessary to an understanding of the questions given for decision. Suffice it to say that the bill prays a decree for seventy-five thousand dollars against the estate of the deceased for unpaid subscription upon his stock in the Merchants and Planters' Bank; and in the common law action, the plaintiff demands one hundred thousand dollars as due to him as a holder of notes or bills of this bank—the estate of the deceased being, as is alleged, liable for the same.

All questions except the precise one presented for adjudication may be left out of view. Two pleas in bar are before me: one to the bill, and the other to the declaration. They are substantially alike, and are based upon the act of the general assembly of this state, approved March 16, 1869. The statute is entitled "an act in relation to the statute of limitations, and other purposes." The complainant (Marsh) filed exceptions to the plea put in to the bill, and Scott demurred to the plea in bar to his action. The pleas allege that the supposed causes of action accrued prior to the 1st of June, 1865, and that they did not accrue subsequently to that period; and this allegation is not controverted by Marsh or by Scott in their pleadings.

The third section of the act is as follows: "That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations, under the statutes or acts of incorporations, or in any way by operation of law, which have accrued prior to 1st of June, 1865, not now barred, shall be brought by the 1st of January, 1870, or the right of the party plaintiff or claimant, and all right of action for its enforcement, shall be forever barred."

Sec. 4. "That all actions on promissory notes, bills of exchange, or other simple contracts in writing, and all actions upon open accounts, or for breach of any contract, not under the hand of the party sought to be charged, or upon any implied assumpsit or undertaking, which accrued on a contract which was made prior to 1st June, 1865, not now barred, shall be brought by 1st January (1870) next after the passage of this act, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred."

Section five relates to all actions against administrators, trustees, etc., which accrued prior to 1st June, 1865, and enacts that they shall be brought by 1st January, 1870; and section six declares that there shall be no recovery on any liability whatsoever which accrued prior to 1st June, 1865, where the action is not brought by 1st January, 1870. Section nine repeals conflicting laws.

Turning to section 2530 of the code, there it is declared that "the administrator shall be allowed twelve months from the date of his qualification to ascertain the condition of the estate."

Section 2548 enacts that "No suit to recover a debt due by the decedent shall be commenced against the administrator until the expiration of twelve months from his qualification."

Hall, domiciled in Connecticut, died there in the autumn of 1868, testate, leaving real estate in Georgia disposed of by his will. There was no representation here until the 8th of April, 1869, when the defendant, Mills, was appointed temporary administrator, and he held this office until the 7th of June, 1869, when permanent letters were granted to him as administrator with the will annexed. The bill in equity referred to was filed by Marsh against one Burroughs and others, on the 24th of September, 1868, but Mills was not made a party to the bill until the 7th of August, 1871. On the 30th of December, 1870, Scott brought the action at law against Mills, as administrator, as aforesaid.

Adverting to the act of March 16, 1869, it will be seen that from its date to the 1st of January, 1870, the time prefixed by the statute for the closing of the limitation is nine months and fifteen days, and this court has (per ERSKINE, J.) ruled, on more than one occasion, that this is a reasonable period of time within which a creditor, whose right of action accrued anterior to the 1st of June, 1865, and which was current on the 16th of March, 1869, may institute his suit.

Whether the general rule, as laid down by this court, is attended with exceptions, I will endeavor to indicate. As just mentioned, Mills received his permanent appointment on the 7th of June, 1869, two months and twenty-one days after the passage of the limitation act, and, consequently, nearly seven months before the 1st of January, 1870; and it was not until the 7th of August, 1871, that he was brought before this court as a defendant in the equity suit. This was two years and two months subsequent to the granting of the permanent letters, and fourteen months subsequent to the expiration of the time of exemption from suit given to an administrator by section 2548 of the code.

It was insisted by defendant that the twelve months' protection from pursuit by action, allowed to an administrator, was repealed by the act of March 16, 1869, but if not so, still the cause of complaint alleged in the bill against Mills was nevertheless barred on the 7th of August, 1871, the date on which he was made a defendant. Because, as was contended, the twelve months saved to the administrator expired on the 7th of June, 1870, and allowing nine months and fifteen days to be added to the twelve months, that still the complainant was not within time, for he did not proceed against Mills until the 7th of August, 1871, some four or five months after the bar had attached.

For the complainant it was argued that the twelve months' exemption was not repealed by the act of March 16, 1869; but if repealed, such repeal is ineffectual to bar the suit of complainant, for this would impair the obligation of contracts. And it was correctly said that no state constitution or statute had authority to impair the obligation of antecedent contracts.

I will first direct my attention to the constitutional question made by the counsel for complainant. As already shown, Hall was deceased when the act of March 16, 1869, was passed, and no administration was taken out until nearly three months after the date of this enactment. It cannot, I apprehend, be safely contended that when a party has a subsisting right of action which will be barred by a certain time, that he is compellable to institute proceedings to recover its fruits before the last day of the limitation. Assuming the legal correctness of this, it follows that Marsh had, at least, to the last day of 1869 in which to bring his suit against Mills. Now, suppose Hall had not died until, say, the middle of December, 1869, and the twelve months' exemption stood repealed, Marsh would be environed with unsurmountable evils and difficulties which he could not have foreseen, and so avoided. As no administrator could have been qualified by the Ordinary intermediate the death of Hall and the period fixed for the bar, Marsh's dilemma would have been this: The statute says, sue by the 1st of January, 1870, and the only reply he could make, is, there is no one subject by law to answer the writ of subpœna. If the case under consideration was like the suppositive one, I should be inclined to hold a state statute that produced such a consequence violative of the constitution of the United States; for, by thus depriving a party of all remedy, it works a forfeiture of his rights, without fault on his part. But there was a legal representative of Hall in Mills, the administrator with the will annexed, and who had qualified as such seven months or a little less, anterior to the 1st of January, 1870; and if the twelve months' exemption from suit has been repealed by the act of March 16, 1869, he could have been sued before the right of action would have been barred. This fact, however, in its result, would be very much like class legislation, so far, at least,

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as Marsh would be affected; for, as there was no representative of the estate of Hall for nearly three months after the passage of the act of March 16, 1869, the nine months and fifteen days allowed to sue in would be diminished to less than seven. (Constitution Georgia, article 1, section XXVI.) Moreover, whether this would be reasonable time in which to bring civil suits or be barred, I am not called upon to determine. But has the twelve months exempted to an administrator by section 2548 of the code been repealed? This is the prime question. Mr. Justice McLEAN, in delivering the opinion of the Supreme Court of the United States, in McCluny v. Silliman, 3 Peters, 270, said: "Under this statute" (24th section of the judiciary act of 1789) "the acts of *limitations* of the several states, where no special provision has been made by Congress, form a rule of decision in the courts of the United States; and the same effect is given to them as is given in the state courts."

The rule of action is formed in the different states as it may have been adopted and modified by legislation or a course of judicial decisions. The rule of decision must be found in the local laws, written or unwritten.

If the act of March 16th, 1869, does not repeal the twelve months' exemption from suit, allowed to administrators, and after a careful consideration of the entire statute, I think it does not repeal the exemption given to administrators; therefore, I am of the opinion that it is a valid law, and in consonance with the constitution of the United States.

The following case—Moravian Seminary v. Atwood *et al.*—was recently decided by the supreme court of Georgia, TRIPP, J., pronouncing the opinion: "An account was contracted and due in September, 1862. Administration was granted on the estate of the debtor in September, 1869, it not appearing on the record when he died. Suit was instituted on the account in October, 1871. Held, that the plaintiff was barred by the statute of limitations of March 16, 1869. Even though the plaintiff may not have been entitled to have brought suit against the administrator by the 1st of January, 1870, which we do not determine, the spirit and equity of the statute required that it should have been commenced within a period after twelve months from the grant of administration, which was equal to the time allowed by the statute for bringing suits on such debts, to wit: from the date of the passage of the act to the 1st of January, 1870."

Mills not having been made a party defendant to the bill filed on the 24th September, 1868, by Marsh against Burroughs and others, until after the expiration of the nine months and fifteen days immediately following the twelve months' exemption from suit given an administrator by the code, I overrule the exceptions filed by the complainant, and decree the plea to be a full bar to the bill; and it is further ordered that the bill be dismissed as to Mills at cost of complainant.

The common law action having been instituted by Scott against Mills on the 30th of December, 1870, and within the nine months and fifteen days immediately following the twelve months' exemption from action allowed to an administrator by the code, it is ordered and adjudged that the demurrer to the plea in bar be sustained.

—MR. CORNELIUS has introduced a bill in the Missouri house of representatives, which provides that hereafter, when any civil cause shall be submitted to any circuit judge, either upon a question of law, or as the trier of the facts in said cause, or both, it shall be the duty of said judge to state in writing, as a part of his judgment or finding in said cause, the grounds or reasons of his judgment or finding. That the provisions of the foregoing section shall be applicable to the circuit judges of St. Louis county as well when sitting in general as in special term.

—THE attorney-general has decided that the act of 1871 providing that money paid into courts shall be deposited with the assistant treasurers of the United States, does not apply to moneys in bankrupt cases, but those moneys are to be deposited according to the provisions of the bankrupt act and the rules of the court made under it.

Chancery Practice—Foreclosure—Rights of Prior Encumbrancers—Possession of State Courts—Suits in State Courts by officer of Federal Courts, etc.

JOHN L. SUTHERLAND, TRUSTEE, v. THE LAKE SUPERIOR SHIP CANAL RAILROAD AND IRON COMPANY, *et al.*

THOMAS V. McCARTER, TRUSTEE, v. SAME COMPANY, *et al.*

LUCIEN BIRDSEYE, TRUSTEE, v. SAME COMPANY, *et al.*

In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

Before Hon. H. H. EMMONS, Circuit Judge.

1. **Necessary Parties in Equity.**—To a bill by a junior mortgagee against a mortgagor or his assignee in bankruptcy, prior encumbrancers are necessary parties, where there is substantial doubt as to the amounts which are due them or as to the property covered by their liens

2. **Sales in Equity of Doubtful Interest.**—A court of equity will in no instance expose for sale an interest capable of being reduced to a certainty, where any doubt exists as to its character and extent.

3. **Chancery Practice—Foreclosure of Mortgage.**—Where a subsequent encumbrancer is already impleaded by a prior one, a subsequent original bill, on his parts will not be sustained to foreclose his mortgage. Full relief may be granted in the first suit, either with or without a cross-bill, as exigencies exist.

4. ——. **When Independent Suits will not be Permitted.**—When property is in the hands of a receiver, no party having interest therein, and much less will active parties, be permitted, without leave of court, to seek an enforcement of their right, by an original suit Such leave will in no case be granted where the relief sought is competent in the pending litigation.

5. ——. ——. **Separate Suit by Mortgage Trustee.**—Where a subsequent mortgage trustee, who had appeared and submitted to a receiver of the estate resigned his trust, *pendente lite*, and his successor, without leave filed an original bill of foreclosure, it was held to be unnecessary and unwarranted. Such suit would be permanently stayed on summary application, or, upon answer and proofs, dismissed at the hearing The rights of such successor need not be noticed in the original suit, as he would be bound by the decree.

6. **Sale of Mortgaged Premises.**—A court of equity may sell mortgaged premises free from encumbrances, remitting the lien holders to the proceeds at the suit of subsequent encumbrancers or other parties having rights in the equity of redemption. The power in this regard, so frequently exercised in bankruptcy, is but an application there of this principle.

7. **Practice of Federal Courts with Reference to Possession of State Courts—Power of Federal Court to order suit to be instituted in State Court**—The late decision in Marshall v Knox, 16 Wall. 551, denying the power of the district court to invade the jurisdiction of a state tribunal, where property is in its actual custody, under proceedings commenced anterior to the bankruptcy, does not deny the power of the circuit court to order all matters pending therein to be adjudicated in an original suit, subsequently commenced in such court, by an assignee in bankruptcy. It is a mere question of practice and convenience. That the property is in the hands of the court and receiver constitutes no exception to the rule.

8. **Assignee's Bill to sell Mortgaged Property.** - The circuit court will entertain a bill by an assignee in bankruptcy against several mortgages and other lienholders to ascertain the amounts due, and sell the property free from encumbrances.

9. **Chancery Pleading—Office of Cross-bill.**—Where matters are germane to and connected with the subject of a suit, they may be introduced by cross-bill, although new and not mentioned in the original bill.

Alfred Russell for complainants; *Meddaugh & Driggs* and *Ashley Pond*, for the assignees in bankruptcy, defendants.

The following is the substance of the opinion of Judge EMMONS, much abbreviated. The opinion was prepared by him through the aid of an amanuensis, owing to his own defective eye-sight, which prevented any examination of books, except by such assistance. This abstract of his opinion has been put in form by a member of the bar and submitted to the Judge. It has his approval as substantially correct.

The property involved amounted to several millions of dollars, consisting of lands granted by congress to aid in the construction of a canal, and of the canal itself and a large quantity of personal property.

July 1, 1865, the company executed a mortgage, of which John L. Sutherland is trustee, upon part of the lands and all the per-

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sonal property and the canal, to secure its bonds in the sum of $500,000.

July 1, 1868, it executed a mortgage, of which Lucien Birdseye is trustee, upon other lands and upon the canal and the personal property, to secure an additional issue of bonds in the sum of $500,000.

July 1, 1870, it executed a mortgage, of which Thomas N. McCarter is trustee, upon all the property covered by the two other mortgages, to secure a further issue of its bonds in the amount of $1,250,000.

May 1, 1871, it executed a mortgage to the Union Trust company of New York, upon the property covered by the several other mortgages, and some additional property.

May 25, 1872, a bill was filed in Sutherland's name, in this court, to foreclose his mortgage, to which the company, Birdseye and Frost (McCarter's predecessor in the trust) and the Union Trust company, were made parties defendant. The defendants all appeared and answered.

June 13, 1872, a receiver was appointed in the Sutherland case, of the entire property of the company, and authorized to create an indebtedness of $500,000, to be a first lien on all the property. This was by consent of some, and without opposition from any of the defendants.

July 3, 1872, a bill was filed in this court, in McCarter's name (he having been duly appointed Frost's successor), to foreclose his mortgage. The mortgagor and the Union Trust company of New York were made parties.

July 5, 1872, a bill was filed in this court, in Birdseye's name, to foreclose his mortgage. The mortgagor, McCarter, and the Union Trust company of New York were made parties.

August 27, 1872, the mortgagor was adjudicated bankrupt.

December 3, 1872, George Jerome and Fernando C. Beaman were duly appointed assignees, and by supplemental bills were made parties to said several foreclosure suits.

The entire property was then in the custody of the court, through its receiver in the Sutherland case, when the subsequent bills were filed, without leave of the court being asked or obtained.

Subsequently the Union Trust company of New York filed its bill to foreclose its mortgage in the bankruptcy court.

In reference to the amount due upon each of these successive securities, and more especially in reference to what the certificates of the receiver cover, whether all or a part only of the property of the corporation, the widest differences exist at the bar.

The assignees, after their appointment, appeared in the Sutherland, the Birdseye and the McCarter suits, without setting up in either the pendency of the others, though the pendency of the Sutherland suit is expressly set up in the bills of complaint in both the Birdseye and McCarter cases, and in each it is stated that the complainant therein is made defendant in the Sutherland case, and that a receiver of the property had been appointed.

In these circumstances it was insisted by the assignees that neither Birdseye nor McCarter (being subsequent encumbrancers and already impleaded in the Sutherland suit, they might have had their liens adjusted, and the property which they covered sold) had a right to file either of the subsequent bills without leave of court, and thus necessitate a triple litigation. They insist further that as doubts exist in reference to the amount of the prior liens, which was put in issue by the pleadings, and as to the property which the dominant one covered, it was impossible to make a proper decree under the Birdseye or McCarter bills. As the facts upon which these equities rested were not contained in the answers and could not be administered as the pleadings in the foreclosure cases then stood, an original bill was filed by the assignees in this court making Sutherland, Birdseye, McCarter and the Union Trust company parties, which had for its object a sale of the mortgaged premises free of liens and an ascertainment of the rights of the various parties interested in the proceeds, and their distribution accordingly. Upon this bill a motion was made to stay the proceedings in the foreclosure cases, which was granted. Whether this bill should be entertained, and the rights of all the parties interested in the several mortgages named should be administered in this suit, and in the meantime the foreclosure suits permanently stayed, or whether the equities should be worked out in the foreclosure suits—in one or all of them—was the general subject discussed upon the argument and submitted for decision of the court.

The motion for stay was originally made before the circuit judge, who then expressed a strong preference for the amendment of the pleadings in the Sutherland suit, in which he intimated an opinion that all the rights of the parties could be effectually secured.

Full reference was made by his honor to the written judgment delivered by him some months since, when the stay of proceedings was originally granted. That opinion announced fully all opinions expressed in this. It emphatically declared the gross impropriety of suffering Birdseye or McCarter to sell the equity of redemption while prior liens existed, the extent of which was disputed both in amount and as to the property which they covered. A strong preference was then expressed for continuing the entire working of these causes in the hands of the mortgagees, who seemed to have interests so much more extensive than any other parties upon the record. The high character of their equities and the obligation of great diligence to speed the cause on the part of the assignees, were therein fully recognized.

On the point of whether all the prior mortgagees might have been made parties to the McCarter bill, his honor said: "We deem it entirely clear that the prior encumbrancers, under the circumstances of this case, are necessary parties to the McCarter bill if it were proper, as it was not, to file it at all after the property which it seeks to sell was already *in custodia legis*."

To sustain the right to sell the equity of redemption without making prior lien holders parties and ascertaining their rights, the counsel for the mortgagees, he said, had referred to the following and numerous other cases: 2 Barb. Ch. Pr. 174; 1 Dan. Ch. Pr. 373; 2 Spence Eq. Jur. 605, 704; Ld. Langdale, 6 Bev. 557; Hobart v. Abott, 2 P. Wms. 643; Williamson v. Probasco, 4 Halst. Ch. 571; Gibson v. McCormick, 10 Gill & J. 65, 109. "We have," he said, "examined them all. They show only that subsequent encumbrancers must be parties. There is nowhere an intimation that prior ones may not and should not be impleaded whenever it is necessary to ascertain the amount which is due to them, or there is a substantial doubt as to the property covered by their liens. A mortgagor who insists that he has paid a prior encumbrance cannot be subjected to the injury of a sale while this question is in dispute."

In the 11 Wheaton, 304, Finley v. Bank of United States, MARSHALL, C. J., says: "It cannot be doubted that Coleman (the prior mortgagee) ought regularly to have been a party defendant, and, that had the existence of his mortgage been known to the court, no decrees ought to have been pronounced in the cause until he was introduced into it."

This was not understood as declaratory of a universal rule. It is correctly limited in 14 Howard, 29, Hagan v. Walker *et al.*, where CURTIS, J., reviews the authorities, and lays down the doctrine as announced by this court some months since at the first hearing of the motion.

He says: "On the other hand, there are cases in which it has been declared that all encumbrancers are necessary parties. Many are collected in Story's Eq. Pl. 178. But we consider the true rule to be that, where it is the object of a bill to procure a sale of the land, and the prior encumbrancer holds the legal title and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense and for this purpose he may be correctly said to be a necessary party, that is, necessary to such a decree. But it is in the power of the court

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to order a sale subject to the prior encumbrances—a power which it will exercise in fit cases. And when the prior encumbrancer is not subject to the jurisdiction of the court, or cannot be joined without defeating its jurisdiction, and *the validity of the encumbrance is admitted*, it is fit to dispense with his being made a party." The 11th of Wallace, 459, Galveston Railroad v. Cowdrey, fully authorizes every matter litigated here to be determined in either one of the pending suits. A bill was filed by bondholders in successive mortgages in behalf of themselves and all others, the court holding that holders under either of the securities might intervene by cross-bill to contest the priority of anterior mortgages.

To show the necessity in many cases of making prior mortgagees parties, he cited the following cases: Barbour's Ch. Pr. 174; Story's Eq. Pl. 8th ed., par. 193; Clark v. Prentiss, 3 Dana, 468. In McGown v. Yerks, 6 Johns. Ch. 450, Chancellor KENT refused a decree without making prior encumbrancers parties, in a case where the reason for bringing them in was far less than that presented by the facts in the case before us.

In Western Ins. Co. v. Eagle Ins. Co., 1 Paige, 284, the court, in overruling a demurrer interposed by a prior encumbrancer to a bill filed by a junior mortgagee, declined to decide the point whether in all cases the court would decree a sale of the property free from encumbrance against the consent of the prior lien holder, but overruled the demurrer, holding that the bill was clearly maintainable for the purpose of making a better title and ascertaining the amount due.

The judge observed that there was no such difficulty as this in the case now under consideration, as all the bills on file ask a sale for the full amount secured by their mortgages. They not only consent to, but are all demanding, decrees for immediate sale. The only question is, shall there be four lawsuits instead of one?

The counsel for the mortgagees cited Rose v. Page, 2 Sim. 471; Delabere v. Norwood, 3 Swanst. 144, and other cases, to the position that when a second mortgagee files a bill against a third mortgagee and the mortgagor, such case constitutes an exception to the rule that a *prior* mortgagee must be made a party, even where there is a doubt as to what the prior mortgage covers, or the amount due thereon. Respecting these cases his honor said, these two cases, together with the others referred to by counsel for complainants in this connection, are cited by Barbour on Parties, who on page 449 uses the language quoted in the counsel's brief in reference to this point, as does Mr. Justice STORY in his Equity Pleadings.

It is manifest, however, that neither of these authors mean, nor do the cases which they refer to justify the conclusion, that it constitutes an exception to the universal rule that a prior encumbrancer must be made a party when his lien is in contestation. None of the long list of books referred to by counsel, either English or American, has the slightest tendency to even qualify the rule that no sale should be suffered to take place in a court of equity where the extent and the amount of prior liens are disputed. Every elementary work referred to by counsel for mortgagees announces in the most explicit terms, rules of pleading and practice which forbid the anomalous decree he asks in the McCarter and Birdseye cases. Cases, too, have been cited and especially commented on, which incidentally say that the holder of a prior admitted mortgage need not be made a party. Every one of them undeniably negatives the doctrine sought to be deduced from them. They clearly show that what is meant by the word *admitted* includes what is due upon the lien and what it covers. There is nowhere in judgment or in elementary books the slightest warrant for the unjust and impolitic doctrine that Birdseye and McCarter in their respective suits can sell in mass some millions of property, capable of division into suitable parcels for more judicious sale, and subject to liens uncertain in amount and as to the property which they cover. Had the proofs disclosed such a case at the final hearing the court would, of its own motion, have ordered the pleadings to be amended and the proper parties brought in. It would be a gross fraud on the part of the assignees to consent to such a decree. In no other way could the court accomplish what was so well expressed by JOHNSON, J., in 4 Peters, 190 (9 Curtis, 49), Caldwell v. Taggart:

"It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decree should terminate and not instigate litigation. Its sales should tempt men to sober investments and not to wild speculations. Its process should act upon known and definite interests and not upon such as admit of no medium of estimation. It has the means of reducing every right to certainty and precision, and is therefore bound to employ those means in the exercise of its jurisdiction."

On the question of the propriety of commencing the Birdseye and McCarter suits, under the circumstances, his honor, among other things, said:

The bills by Birdseye and McCarter were not only defective for want of proper parties to enable the court to make such a decree as would expose the property for sale in such conditions as would authorize purchasers to bid, but they had both been unnecessarily and improvidently commenced *pendente lite*, without leave of court. Birdseye and Frost (who was the predecessor of McCarter) were both impleaded and actually appeared in the Sutherland suit and were bound by the receivership.

Similar action has been frequently discountenanced by courts of the highest respectability. In 3 Paige Ch. 509, Wendell v. Wendell *et al.*, where the subsequent encumbrancer was made a party to a bill to foreclose a prior mortgage, and he without leave subsequently filed a bill to foreclose his own mortgage, Chancellor WALWORTH charged costs against the party thus proceeding, and this where the objection was not taken in the answer. He said the whole property might have been sold and all the rights adjusted in one suit, as all the parties were before the court. To this familiar truth, cases and elementary books are numerous. The doctrine is applicable to the case before us. It is true that in this case there is some property in the Birdseye mortgage not covered by that of Sutherland; but so long as all are a common lien upon the canal and its franchises, and all have alike consented to the receivership which creates a dominant lien over all the property, this can work no practical legal consequence. If there is any doubt as to the power of the court without cross-bills to sell the additional assets mentioned in the subsequent mortgages, such bill would be directed to be filed.

16 Wallace, 203, Davis v. Gray, elaborately reviews the doctrine in regard to receivers in courts of equity, and lays down the undoubted rule that no party having interest in the estate, whether impleaded or not, can properly commence an original suit without leave of court. Had such leave been asked in this instance, beyond all controversy it would not have been granted, from the fact that such suits are wholly unnecessary and can tend only to make costs. Indeed, it is not perceived how it is possible to make a complete decree in either the Birdseye or the McCarter suits, and to settle the amounts due upon the previous encumbrances in such circumstances as to give all parties proper review in the court of last resort, without making them parties in each suit where those facts are to be settled. At great length and with much earnestness counsel for the mortgagees has argued that there is no objection whatever to selling property so circumstanced, subject to the rights of Sutherland and the receiver. This position is directly answered in the very full opinion of NELSON, J., Wiswall v. Sampson, 14 Howard, 52. It is there stated in express terms that it is no answer to the objection that the sale is to be made subject to the rights of the receiver; that the court will not suffer a hostile claimant to be created, whose rights are to be subsequently settled in another tribunal. It is fallacy to argue that a receiver holds subject to the rights of the mortgagees only. He holds alike for

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all. He represents just as fully those of the assignees, of the shareholders, and the creditors as the prior lien holders; and if a sale should be ordered which was in hostility to and would dispose of the rights of those interested in the equity of redemption, this sale would be directly in hostility to the rights of the receiver who holds possession for them. To illustrate the completeness of the jurisdiction in the Sutherland suit, and how the rights of all parties might be adjusted therein, cases, 24 Howard, 450, Freeman v. Howe; 16 Wall. 203, Davis v. Gray; 10 Wall. 327, Jones v. Andrews, and others, were referred to and commented upon. They show that suits in reference to property *in custodia legis* are deemed auxiliary only to the principal cases.

His honor said it was wholly unnecessary for Sutherland in any way to notice the trustee, McCarter. He had become trustee *pendente lite*. It seemed extravagant to say that, while his predecessor, Frost, was impleaded in the Sutherland suit and bound by the order granting a receiver, his successor could file an original bill without leave of court to sell the equity of redemption without impleading the prior parties. Story's Eq. Pl. 156. "Generally speaking, an assignee *pendente lite* need not be made a party to a bill, or be brought before the court; for every person purchasing *pendente lite* is treated as a purchaser with notice, and is subject to all the equities of the persons under whom he claims in privity. And it would make no difference whether the assignee *pendente lite* be the claimant of a legal or of an equitable interest, or whether he be the assignee of the plaintiffs or the defendants. Still, however, it is often important to bring such assignee before the court as a party by a supplementary bill, in order to take away a cloud hanging over the title, or to compel the assignee to do some act, or to join in some conveyance. So that such assignee, although not a necessary party, may at the same time be a proper party at the election of the plaintiff. And an assignee after the bill was filed, but before subpœna was served, has been held to be a necessary party."

It is only in cases where the *complainant* parts with his interest and where defendant's rights are transferred by death or by operation of law, as by bankruptcy or the insolvent laws, that a transfer *pendente lite* need be noticed by litigants in court.

His honor said that among the positions taken by mortgagees' counsel which surprised him most, and to sustain which he had found the least learning, whether in judgments or elementary books, was that there exists no power in an American court of chancery to sell property covered by successive mortgages free from encumbrances, upon bills filed by junior mortgagees, by judgment creditors, or by the owner of the equity of redemption.

It had been argued that Sutherland and Birdseye were not proper parties to the suit by McCarter, because if they were brought in, there was no power on the part of the court to make any other decree than the mere one to sell this vast estate in mass, subject to prior liens which were uncertain in amount and extent. The broad ground had been taken that prior encumbrancers were not necessary parties, for the reason that there was no power to sell free from encumbrances. This power, he said, is fully conceded in Hancock v. Hancock, 22 N. Y., 568; in Gibson v. McCormick, 10 Gill & Johnson, 65. The latter quite fully asserts and justifies the rule. It cites Elliott v. Pell, 1 Paige, 263, and Chamley v. Lord Dunsaney *et al.*, 2 Sch. & Lef., 710 and 718, as sustaining such right. The only doubt is where a prior mortgagee opposes the sale because his claim is not due, or he would be injured by it; but, as before said in these cases, they all demand a sale. In Vanderkemp v. Shelton, 11 Paige, 28, a bill was filed to foreclose a junior mortgage and the prior mortgagee was made a party. The chancellor says:

"The complainant's bill is properly framed for that purpose; as this is a bill for the foreclosure and sale of the equity of redemption in the mortgaged premises to satisfy the several encumbrances thereon according to their respective priorities, and is not a mere bill to redeem. In England the court does not decree a sale of mortgaged premises, but merely allows the second encumbrancer to file a bill to redeem from the first encumbrance, and that the junior encumbrancer may redeem both of the prior ones or be foreclosed. And the complainant there is in all cases required to offer to redeem the first encumbrance. But where the *puisne* creditor has the right to a sale of the estate to satisfy his debt after applying so much of the proceeds of the sale as may be necessary to pay the debt and costs of the prior encumbrancer, he is not required to offer to pay the first encumbrance. All the prior encumbrancer has a right to ask, even when he is in possession under his encumbrance, is that he shall not be subjected to useless costs, when the proceeds of the sale will not probably be sufficient to pay the amount of his debt with interest and the costs of foreclosure."

In Hagan v. Walker *et al.*, 14 Howard, 29, Justice CURTIS, after very fully considering the subject, says: The court will exercise its discretion whether to sell free from or subject to prior encumbrances.

The power exercised by the court of bankruptcy, to sell free from encumbrances, is but an instance of a similar one familiar to the court of chancery. We should wholly, irrespective of the bankrupt law, if the facts ultimately presented warranted it, sell the entire estate free from encumbrances; it may appear that in no other way can the various interests in the equity of redemption be in the slightest degree protected.

Respecting the power of the court in exercising the functions conferred upon it by the bankrupt act, when these functions should be called into operation by proper proceedings on the part of the assignees, his honor said:

"The reading of the statute which has been given by the learned counsel for the mortgagees comes too late. The numerous instances in which the district courts, originally by summary proceeding, and latterly, since that has been pronounced to be irregular, by bill, have sold property free from encumbrances, remitting lien holders to the fund in court, would upon every rule of propriety constrain this court to consider it as settled law, until a superior tribunal shall pronounce the practice unlawful." The following cases are some only of the instances of its exercise: *In re* Sacchi, 10 Blatchford, 29; Alabama and Florida R. R. Co., B. R. 100; *in re* Kirtland, 10 Blatchford, 515; *in re* Salmons, 2 B. R. 19; *in re* Stewart, 1 B. R. 42; Foster v. Ames, 2 B. R. 147; *in re* Barrow, 1 B. R. 125; *in re* Rahley, 4 B. R. 124; *in re* Columbian Metal Works, 3 B. R. 18; *in re* N. Y. Kerosene Oil Co., 3 B. R. 31; *in re* Schnepf, 1 B. R. (Supp.) 41; Markson v. Keavey, 4 B. R. 165; *in re* McClellan, 1 B. R. 91; Davis v. Anderson, 6 B. R. 145; *in re* Mebane, 3 B. R. 91; Houston v. City B'k N. O., 6 How. 486; Fowler v. Hart, 13 How. 373.

In a proper case he thought the circuit court would, under this act, entertain a bill in equity to ascertain the extent of liens and to sell free of encumbrances. That a lien-holder is an adverse claimant, and that an ordinary debtor is such, was several times decided under the act of 1841, the language of which, so far as affects this question, is identical with that of the present law. See Mitchell, Assignee, v. Great Works Co., per Judge STORY, 2 Story, 648; Pritchard v. Chandler, 2 Curtis, 488, by Judge CURTIS. In Forsyth v. Woods, 11 Wallace, 484, jurisdiction to recover a debt was assumed without question; and see Morgan v. Thornhill, 11 Wall. 65. In McLean, Assignee, v. Lafayette Bank *et al.*, 3 McLean, 415, it is said that an assignee in bankruptcy, having a right to discharge encumbrances on the bankrupt's estate, may file his bill in chancery against all encumbrancers to ascertain the validity, priority, and amount of the encumbrances.

But all this history, it is said, is rendered wholly inapplicable by the late decision in Marshall v. Knox, 16 Wallace, 551, in which it was decided that property in the custody of a state sheriff, by process anterior to the bankruptcy, could not be interfered with by a district court.

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But for that case, after a good many perusals of the judgments in 3 Howard, 292, ex parte Christy; Peck v. Jenness, 7 How. 612; Orton v. Smith, 18 How. 263; Taylor v. Carryl, 20 How. 583; Freeman v. Howe, 24 How. 450; Buck v. Coldbath, 3 Wall. 334; and the many judgments in which their doctrine has been applied and limited—he would have confidently held with so many of his brethren of the circuit and district courts, that the bankrupt law did intend to create a complete system and enable the district court to administer all the assets of the bankrupt, irrespective of the accident of whether litigation might be pending in state tribunals concerning portions of his property. They who have so held did so in no want of familiarity with the rule which these cases affirm. It was thought that congress had exercised its undoubted power to create a complete bankrupt system, and draw instanter into the district court every right of the bankrupt. When it dissolves attachments, notwithstanding the custody of the state courts, and abrogates assignments when the property is in the hands of the assignees under state insolvent laws, and full jurisdiction is expressly given to arrest all pending suits *in personam*, at law in state tribunals, no matter when commenced, it would seem that but a small additional power is necessary to complete the wholesome and beneficial system which ought at least, he thought, to have been established by the statute. And when it is considered, what Marshall v. Knox seems to concede, that where judgments are confessed and levies made by way of preference in the state courts within four months preceding the bankruptcy, they may be declared void, and the property seized by the bankrupt court; the remaining domain of state tribunals which cannot be interfered with is so trivial and exceptional as to leave the inference a strong one that it was not intended to be protected by congress His honor remarked that it was difficult, many times sitting in the midst of exigencies which demand a more extended power in order to secure an efficient and protective administration of right, at first to appreciate the wisdom of decisions which seemingly without necessity limit and cramp our jurisdiction. It was only when we take into consideration a series of decisions made in a long course of years that their wisdom could be fully appreciated. They have established a principle, which experience had found to be beneficent, of leaving every assumption of jurisdiction on the part of federal tribunals to be expressly authorized by congress. Nothing was to be taken by implication, unless it was that necessary inference without which the law could not be administered. Notwithstanding the ingenious criticism of the assignee's counsel, he did not see why Marshall v. Knox does not decide that, excepting cases where a fraud upon the bankrupt law is charged, property *in custodia legis* by a state court was beyond the jurisdiction of the district court. The decision in this case, he said, goes upon the supposition that Marshall v. Knox so holds. The doctrine, however, he thought, has no application where the pending suits are in our own tribunal, and the property in the hands of our own receiver. Here no comity is to be violated. A large mass of property worth millions, encumbered by successive and doubtful liens, some upon one portion and some upon another, with bills unnecessarily and irregularly filed, he thought, within principles entirely familiar to courts of equity, and especially to the federal tribunals, a bill by the assignees, setting forth the entire history of the case, might be authorized by the court. He did not think it necessary in this case to resort to the doctrine of ancillary or cross-bills. He had, however, had his request answered which was made during the argument, that he might be referred to a few cases sustaining a bill in the nature of a cross-bill, in which both new parties and new matters might be added, irrespective of any power derived under the bankrupt act. The following cases were then cited and commented upon: Brown v. Story, 2 Paige, 594; Jones v. Smith, 14 Ill. 229; Blodgett v. Hobart, 18 Vt. 414; Fletcher v. Holmes, 25 Ind. 458-68. That the time in which this may be done is within the discretion of the court, see Story's Eq. Pl. 396.

A reading of all the judgments upon this subject with attention to the facts involved in each will show with entire clearness that all which is meant when it is said that new parties and new subject matter cannot be introduced into a cause by cross-bill, is that it cannot be done when they are foreign to and not necessarily connected with the matter of the original bill.

His honor, in the progress of the opinion, indicated his intention to make an order directing future proceedings in the several foreclosure cases. Such an order, however, was not made, but subsequently an order was entered in each of the cases vacating the previous orders staying the proceedings, leaving the counsel for the assignee to take such action, in the light of his honor's opinion, as they should deem best. It is understood that an immediate application will be made by them for leave to amend their answers, and to file a cross-bill in the Sutherland case.

Railway Negligence — Killing Cattle — Fencing Track within Corporate Limits.

FLINT & PERE MARQUETTE RAILWAY CO. v. LULL.

Supreme Court of Michigan, January Term, 1874.

[Through the courtesy of Henry N. Chaney, Esq., of Lansing, Michigan, editor of Chaney's Quarterly Digest of Decisions of the Supreme Court of Michigan, we are permitted to extract from advance sheets, embracing the decisions rendered at the January Term, 1874, the interesting case of Flint & Pere Marquette Railway Company v. Lull.]

Lull's cow, while passing over the track to go to the river for water, was killed at one side of the highway crossing where there was no cattle-guard. Lull owned the land on both sides of the track between the crossing and the river. He sued for the value of the cow under Act 43 of 1872 (now repealed, but substantially re-enacted so far as cattle-guards are concerned, in Sec. 15 of Art. 4 of Act 198 of 1873—Sess. Laws of 1873, Vol. 1, p. 538), and obtained a verdict. The company urged that the statute obligation to fence the track and put in cattle-guards did not apply to so much of the road as lay within the limits of a city or village, and supported itself by reference to Lafayette, etc., R. R. Co. v. Shriner, 6 Ind. 141; Indianapolis, etc., R. R. Co. v. Kinney, 8 Ind. 402; Davis v. Burlington, etc., R. R. Co., 26 Iowa, 549; and Durand v. Chicago, etc., R. R. Co., 26 Iowa, 558. The judgment was, however, affirmed with costs.

The following are the rulings made, and the authorities by which they are supported:

Fencing Track within Corporate Limits.—The more satisfactory rule relating to statutes requiring the fencing of railroad tracks, holds that they do not apply where it would be illegal or improper that the road should be fenced, as at the crossings of streets and alleys in a city or town, or at mills, etc., where public convenience requires the way to be left open. This, however, is the limit of the exception, and the track within the corporate limits of a city or town, at points where no such reasons apply, is as much within the statute as the track elsewhere. Indianapolis, etc., R. R. Co. v. Parker, 29 Ind. 471; Jeffersonville, etc., R. R. Co. v. Parkhurst, 34 Ind. 501. Any exceptional case must be proved by the railroad company, and cannot be inferred.

Fencing at Depot.—No statute can be held to require depot grounds to be fenced, without a very clear declaration to that effect, not only because such fencing is unusual, but because the convenience of the company, as well as of the public in transacting business with it, would be very seriously incommoded by such fencing, and the track of the company can be better protected, and with less impediment to business at such points, by other methods than fencing.

Contributory Neglect.—In case of injury to cattle, the owner's contributory negligence would be a defence in a common-law action. Lake Shore & Mich. Southern R. R. Co. v. Miller, 25 Mich. 274; Corwin v. N. Y. & Erie R. R. Co., 13 N. Y. 46. But in cases rising under statutes, the purpose of which is not merely to compensate the owner of destroyed property, but to enforce against the company an obligation they owe to the public, it is almost uniformly held that the plaintiff's negligence in case of his property can constitute no defence. Indianapolis, etc., R. R. Co. v.

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Townsend, 10 Ind. 38; Indiana Central R. R. Co. v. Leamon, 18 Ind. 173; McCall v. Chamberlain, 13 Wis. 637; Horn v. Atlantic, etc., R. R. Co., 35 N. H. 169. If it could, the purpose of the statute might be defeated by virtually allowing the neglect of the company to constitute its own defence, since that neglect alone would render the conduct of the plaintiff negligence, in permitting his cattle to be at large in the vicinity of the road, even on his own grounds.

Fencing, a Police Rule.—Statutes requiring the fencing of railroad tracks are police regulations, as much for the security of passengers as for the protection of property. Indianapolis, etc., R. R. Co. v. Marshall, 27 Ind. 302; Jeffersonville, etc., R. R. Co. v. Nichols, 30 Ind. 321.

Removal of Causes from State Court to Federal Court—Construction of Acts of Congress.

CRANE v. REEDERS.

Supreme Court of Michigan, January Term, 1874.

[We are also permitted to select this important case from advance sheets of Chaney's Michigan Digest:]

The supreme court having thrice reversed judgments obtained by the Reeders in an action of ejectment brought against them by Crane, and having each time remanded the cause for new trial, the Reeders alleging that they were British subjects, and that they believed that owing to prejudice or local influence they could not obtain justice in the court below, petitioned said court to transfer the cause to the United States court. The court below granted the petition, and Crane brought error on that decision. His opponents moved to dismiss the writ; the motion was denied, and when the case came up on the merits their counsel declined to argue it. The Supreme Court reversed the judgment with costs.

The following are the points ruled and the authorities referred to:

Construction of the Federal Transfer Acts.—For the meaning of the acts of congress relating to the transfer of cases from state to federal courts, see Ackerly v. Vilas, 24 Wis. 165; Home Life Ins. Co. v. Dunn, 20 Ohio St. 175; Bryant v. Rich, 106 Mass. 180; Adams Express Co. v. Trego, 35 Md. 47; Burson v. Nat. Park Bank, 40 Md. 174.

Retaining Jurisdiction.—In construing statutes affecting the continuance of jurisdiction in courts of original and general authority, the law has always favored its retention. Cates v. Knight, 3 T. R. 442; *ex parte* Heath *et al.*, 3 Hill, N. Y. 42; Parsons v. Bedford, 3 Pet. 440.

Construction of the Federal Transfer Acts.—Of the federal transfer acts, that of 1789 literally limits the application to remove a case from a state to a federal court to the time of the defendant's appearance in the state court, and expressly gives the right to alien defendants, and to citizen defendants residing in a state other than that in which the suit is begun; that of 1866 cures an abuse of the former act, by which it came to be held that alien and non-resident citizen defendants could not take steps to remove a case when impleaded with citizens of the state in which the suit was brought, so that plaintiffs resorted to impleading or joining resident citizens solely to preclude the right of removal; and that of 1867 literally applies to citizens, and does not apply to cases where the ground of removal is the alienage of the defendants. The last law contemplates a class of cases arising from the civil war, when the suit is between citizens of different states and the abuse or denial of jurisdiction is apprehended in the state tribunal. The three acts all relate to the same general subject, but contemplate distinct grounds on which the right to remove is made to depend; and if any case has only in part the elements which assign it to one class, and in part the elements for another, it is not removable. It wants the precise composite character predetermined by congress as indispensable.

The Transfer Act of 1866.—The federal transfer act of 1866 requires the application to remove a case from a state to a federal court to be made before the "trial." It covers cases at law and in equity, and the term "trial" is uniformly applied to the actual litigation of the merits in an action at law as contradistinguished from the debate on the merits in equity; while the term "hearing" is more precisely applied to equity cases, and others savoring of civil law forms, rather than to proceedings grounded in common law, or shaped by analogy to its forms and methods. Parsons v. Bedford, 3 Pet. 440; United States v. Wonson, 1 Gall. 5; United States v. Goodwin, 7 Cranch, 108.

Wording of Acts of Congress.—Congress must be presumed to be acquainted with the course of judicial action and of the prevailing practice, and to understand the meaning of words they employ in their enactments as that meaning has become generally settled. Parsons v. Bedford, 3 Pet. 440; Robinson v. Campbell, 3 Wheat. 212; King v. Judd, 2 T. R. 255; Beaden v. King, 9 Hare, 499; Pollard v. Patterson, 3 Hen. & Mun. 67; Lowenburg v. People, 27 N. Y. 336; Com. v. Churchill, 2 Metc. 118; Merchants' Bank v. Cook, 4 Pick. 405; Snell v. Company, 24 Pick. 296; Thornby v. Fleetwood, 1 Strange, 318, 377.

Notes of Recent Decisions of the Supreme Judicial Court of Massachusetts.

[Courtesy of Henry N. Sheldon, Esq., of Boston.]

Life Insurance—Restrictions as to Employment.—Defendant insured the life of plaintiff's intestate by a policy which acknowledged the receipt of the first annual premium, and provided among other things that the insured should not act as an engineer, but for five dollars additional gave him permission so to act for one year. The first premium was paid in part by notes which were not paid when due; and the insured acted as engineer for more than one year. *Held*, that the policy was avoided. Ayer v. New England Mutual Ins. Co.

Contract to Compromise Indebtedness—Effect of Breach.—Defendant's intestate gave to plaintiff his note for $45,000. Simultaneously therewith, plaintiff agreed under seal to receive in full payment therefor $10,000 to be paid in quarter annual payments. The intestate died insolvent, and his administrator suspended the quarterly payments. *Held*, that the whole amount of the note, less payments actually made, could be proved against the decedent's estate. Blake v. Blake.

Property in Church Pew—Forfeiture by joining another Society, etc.—Petitioner was a pewholder in the respondent corporation, under a deed of a pew containing the condition that it should be forfeited if he should leave that meeting-house without first offering his pew to the corporation for a fixed price. Petitioner joined another church, not having so offered his pew; and respondent entered the pew for breach of condition, and excluded him from meetings of the pewholders. *Held*, that he could not be restored by *mandamus*, although the entry was not made for four years after he had so left the church, and he had in the meantime been recognized as a pewholder by the respondent. Crocker v. Old South Society.

Travelling on Sunday.—A person travelling in a horse-car on Sunday, to go to a spiritualist camp-meeting, being herself a spiritualist, is not travelling unlawfully. Feital v. Middlesex R. R. Co.

Negligence—Common Carrier.—In an action by a passenger for injuries alleged to have been sustained by reason of the carrier's negligence, the plaintiff need not show what particular acts of negligence caused the injury. Feital v. Middlesex R. R. Co.

———. ———. *Where Fare has not been Paid.*—A person who gets upon the front platform of a horse-car, by invitation of the driver merely, not paying and not intending to pay any fare, and while there is injured by the carelessness of the driver, can maintain an action for such injury against the horse-railroad company, if she is otherwise in the exercise of due care; and this is a question for the jury. Wilton v. Middlesex R. R. Co.

———. ———. *Injury to Passenger in leaving Horse-car.*—A passenger injured while leaving a horse-car in motion, without having requested either conductor or driver to stop the car, is not in the exercise of due care, and cannot recover damages for such injury. Nichols v. Middlesex R. R. Co.

Constitutional Law—Municipal Corporation—Slaughter-houses, etc.—A statute forbidding the future establishment of slaughter-houses, rendering establishments, &c., without the consent of the selectmen of the town in which the business is to be carried on, is constitutional. Watertown v. Mago.

Expert Testimony—Health.—A witness, though not an expert, may testify to the comparative health of a person at different times. Parker v. Boston & Hingham Steamboat Co. [Compare Ashland v. Marlborough, 99 Mass. 47.]

Municipal Corporation—Influencing Legislation—Taxation.—No duty is by law imposed upon a town to resist, before the legislature or a commit-

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tee thereof, a change in its boundaries, or its annexation to another city or town; and therefore a town has no authority to tax its inhabitants for expenses incurred in such proceedings. Coolidge v. Brookline.

Varying Written Receipt by Parol Evidence.—Although a receipt is signed with full knowledge of its purport and effect, without fraud, deductions being made *bona fide* and under a claim of right from the demands of the receiptor, and after some objection acquiesced in by him, yet he may, after receiving the amount named therein, control it by parol evidence that such deductions should not have been made. Nelson v. Weeks.

Notes and Queries.

NASHVILLE, Tenn., February 21st, 1874.

EDITORS CENTRAL LAW JOURNAL: — Availing myself of a liberty treated by you with some leniency, I propound in the form of a query what may be regarded as more properly a suggestion. What would be a reasonable recompense to the reporters of several of our states whose vanity leads them to persist in pasting their own instead of the name of their state upon the backs of the volumes of reports with which they so copiously afflict the country, as an *inducement* to a change? If this is not a proper query for a law journal to answer, would a *mandamus* lie, at the instance of the profession *et als*, to compel a recognition of the propriety of at least allowing the name of the state to appear *in conjunction* with their own; so that text writers and others who are to cite and be cited to such reports, may know at once, without having to expend valuable time and labor in ascertaining, where Smith's or Jenkins' reports come from?

W. H.

ANSWER.—The evil complained of by W. H. is a grievous one, and with the multiplicity of law reports, is becoming more so every day. We have Hill, New York, and Hill, South Carolina; Greene, Iowa, and Green, New Jersey; Metcalf, Massachusetts, and Metcalfe, Kentucky; Munroe, and B. Monroe; A. K. Marshall, J. J. Marshall, Marshall, English; and so on through a catalogue of infinite perplexity. The responsibility does not rest entirely with the reporters. The habit has become inveterate in some states, and new reporters do not like to take the responsibility of changing it.

There was an excellent opportunity to correct the mischief in Tennessee when Mr. Heiskell came into office as reporter; and if the supreme court of that state had made an order, or the legislature had passed an act providing that the series of reports commencing with the present bench should be cited as the Tennessee State Reports, the evil would have been obviated so far as that state is concerned, and probably for all time. In many of the states, Connecticut, Alabama, Michigan and Iowa, for instance, after several volumes had been published entitled after the reporters, the style was changed so as to make the series "run in the name of the state." Nearly all the states have now adopted this plan, and there would seem to be no reason why Tennessee, Virginia, Kentucky, Delaware and the United States should not wheel into line.

Apropos of this subject, the writer would state that he has derived more benefit in the way of becoming familiar with the various reports and acquiring the habit of citing them correctly, from Mr. Bishop's First Book of the Law, than from any other book he has used. We must, however, protest against Mr. Bishop's manner of citing Mississippi as "Missis.," and Missouri as "Misso." The proper and becoming abbreviations of Mississippi is *Miss.*, and that of Missouri is *Mo.*

AUSTIN, Minn., February 24, 1874.

EDITORS CENTRAL LAW JOURNAL:—A., B. and C were members of the common council of the village of A., and as such contracted with D. *verbally* to do a certain piece of work for the village. The village charter required that all contracts of that nature should be in writing, and that the minutes of the common council should show that such a contract was entered into. Now, in the absence of any written contract, and of any record of this proceeding, can A., B. and C. show by parol evidence that they contracted as public agents, in an action brought by D. against them as individuals? And are they liable individually? An early answer through the JOURNAL will oblige yours,

C. & F.

ANSWER.—In Dillon on Municipal Corporations, Sec. 176, note, will be found collected the cases on the subject of the rights and liabilities of public officers. As to records of such corporations, ib. Chap. XI. Mode of Contracting, Chap. XIV. By consulting the cases here referred to, the views of the courts on questions similar to the above will be seen, and the principles they recognize can be easily applied.

BOONVILLE, Ind., February 26, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. mortgages to B. a growing crop (tobacco) in August, to secure the payment on the first of the following March of certain indebtedness (note). The mortgage is an ordinary short form Indiana real estate mortgage, the proper changes being made, and is duly recorded. In January, A. loads his tobacco and starts to Kentucky to sell it.

Now is the mortgagee entitled to possession at any time after the mortgage is made? or must he wait until default in payment before he can maintain replevin? The mortgage is silent as to possession. G. & P.

ANSWER.—Assuming that the mortgage is silent as to possession, and that the local statutes contain no provision restricting the mortgagee's rights, he is entitled to possession and may maintain replevin before default in payment. See. 2 Hilliard on Mortgages, Ch. 38 and cases cited.

Book Notices.

DECISIONS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND THE SECRETARY OF THE INTERIOR, UNDER THE MINING STATUTES OF JULY 20, 1866, JULY 9, 1870, AND MAY 10, 1872, WITH APPENDIX OF CIRCULAR AND FORMS. By HENRY N. COPP, General Land Office, Washington, D. C. San Francisco: A. L. Bancroft & Co. 1874 pp. 351.

The title accurately indicates the scope and purpose of this work. It seems to be prepared with care, and is undoubtedly a useful compilation to whomsoever desires to be acquainted with the provisions of the mining enactments of congress, and the official construction which they have received. The full Index and Table of Contents make the book easy of reference.

THE PRINCIPLES OF EQUITY: A Treatise on the System of Justice administered in Courts of Chancery. By GEO. TUCKER BISPHAM. Philadelphia: Kay & Bro., 1874. pp. 540.

This is an elementary work on Chancery Law. The plan is the same as Mr. Spence's treatise, but in the scope and general character it resembles Mr. Adams' excellent work. It is mainly devoted to a discussion of *principles*, and the occasional cases specially mentioned in the text are introduced by way of illustration. Our examination satisfies us that, all things considered, it is probably the best book to be first placed in the hands of American students of equity law. It should precede, in a course of reading, the more elaborate works of Story, Spence and Daniell. It has its value also to practitioners in the great attention which the author has bestowed upon the recent equity decisions of the house of lords and chancery courts of Great Britain. This is a marked feature of the work, and gives it an especial value, as many of these decisions are of general and great importance, and have not yet found their way into the text books in common use.

United States Supreme Court — Decisions Last Week.

[Compiled from the New York Herald.]

Presumptive Proof of Guilt—Burden of Proof. — In the case of Chaffee v. The United States, brought to recover the penalty prescribed by the forty-eighth section of the internal revenue act of June 30, 1864, against the plaintiffs in error for having in their possession certain distilled spirits for the purpose of sale with design of avoiding the duties imposed thereon. This court reverses the judgment of conviction on various grounds of evidence and for the following error in the instructions to the jury: The court, in substance, instructed the jury that in this class of cases the government need only prove the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt. On this point it is held the error is palpable. All the authorities condemn it. It sets at nought established principles and justifies the criticism of counsel that it substantially withdrew from the defendants their right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction. Mr. Justice FIELD delivered the opinion.

Lien of National Bank upon Shares of Stockholders.—In the case of Bullard, trustee, v. The National Eagle Bank of Boston, the court held that a national bank organized under the act of 1864 cannot acquire

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a valid lien upon the shares of its shareholders by virtue of the articles of association or by-laws. This re-affirms the decision in The Bank v. Lanier (11 Wall. 369). Mr. Justice STRONG delivered the opinion. Mr. Justice CLIFFORD dissented.

Railway Aid Bonds—Defences—Absorption of Aided Road by Another.—No. 620. Nugent v. Board of Supervisors of Putnam County Ill. Error to the circuit court for the northern district of Illinois. In this case the county issued bonds in aid of the construction of the Kankakee & Illinois River Railroad Company, but before they were delivered that road was consolidated with another. Meanwhile, Nugent purchased some of the bonds in the market for value, and payment being refused, this action was brought to recover upon them. The court below held that the bonds were invalid, because before their delivery the road to which they were issued had ceased to be a distinctive corporation. That judgment is here reversed, the court holding that the plaintiff being a *bona fide* holder, should recover. In purchasing in the market he was not bound to enquire further than to ascertain if the bonds were authorized by law, and if their issue had been approved by popular vote, nor did it make any difference that the road had been consolidated. Mr. Justice STRONG delivered the opinion. Dissenting, Justices DAVIS and MILLER.

Savings Banks—Taxation of Contingent Fund.—No. 203. The Dollar Savings Bank v. The United States. Error to the circuit court for the western district of Pennsylvania. The question in this case was. whether the contingent fund authorized by the charter of the bank to be retained from the accumulated earnings to the extent of ten per centum of its deposits, for the security of its depositors, is liable to the five per cent. tax imposed by chapter 182, section 9, of the act of 1866. The court sustains the decision below that it is, and the judgment is affirmed. Mr. Justice STRONG delivered the opinion. Mr. Justice BRADLEY dissented, holding that an action will not lie for a tax of this kind unless it be first entered on an assessment roll.

Land Law—Controversy upon Fact.—No. 188. Carpenter, *et al* v. Bonnels. Error to the supreme court of Missouri. This is the affirmance of title to 200 arpens of land in the county of St. Louis, being formerly of the district of New Madrid under the French. The questions were of fact only, and drawn from documentary evidence. Mr. Justice SWAYNE delivered the opinion.

Bankruptcy—Set-off.—No. 478. Rollo, assignee in bankruptcy. Appeal from the circuit court for the northern district of Illinois. This was an affirmance of a decree below, refusing to allow Gray to set off an indebtedness due from him to the assignee against an equal amount of indebtedness due from the assignee to the firm of Gray Brothers, of which he was a partner. Mr. Justice BRADLEY delivered the opinion.

Municipal Bonds—Mode of enforcing Payment after Judgment—No Relief in Equity.—No. 219. Reese v. City of Watertwon. Appeal from the circuit court for the western district of Wisconsin. This was an action on municipal bonds issued by the city of Watertwon. There was no dispute about the validity of the bonds, and judgment was for Reese. Afterwards he sought to compel payment by *mandamus* to enforce a levy for that purpose; but a quorum of the board of aldermen resigned, and several subsequent writs were defeated by the evasive conduct of the corporation officials. This suit was then commenced to subject the taxable property of the city to the payment of the bonds. The court below dismissed the bill, taking the view that its prayer could not be enforced in equity. That decree is here affirmed, the court holding that where the remedy at law is adequate and complete, as in this case, the fact that its execution is frustrated by fraud, violence crime, does not entitle the party to the extraordinary aid of a court of chancery. Mr. Justice HUNT delivered the opinion. Justices CLIFFORD and SWAYNE dissented, asserting that a court of equity will not suffer a trust to be defeated on account of the refusal of the trustee to administer the fund, and because the effect of the decree of the court below, if affirmed here, will be to give judicial sanction to a fraudulent repudiation of an honest debt. [See editorial on another page.]

Removal of Suits from State Court—Mandamus.—*Ex parte* State Insurance Company of Missouri. Motion for a *mandamus*, to compel the circuit court to try the cause of removal thereto, denied. Mr. Justice MILLER delivered the opinion.

Removal of Causes from State to Federal Court, where there is one Resident Party.—No. 451. Grover & Baker Sewing Machine Company, Wheeler & Wilson Sewing Machine Company and the Singer Manufacturing Company v. Florence Sewing Machine Company. Error to the supreme judicial court of Massachusetts. This was an action by the Florence Company, a Massachusetts corporation, against the other companies to recover back certain moneys alleged to be due from them by reason of over-payments made by the Florence Company as patent rent, under an agreement providing for a reduction in the rent in case of the granting by the other companies of any additional licenses. The suit being brought in the supreme judicial court of the state, motion was made to remove it to the circuit court of the United States. The Grover & Baker Company was a Massachusetts corporation also, but the other two were foreign corporations—one of Connecticut and the other of New York. The court below held that where one of the defendant corporations was of the same state with the plaintiff where the suit was brought, removal was not authorized, and the trial proceeded and resulted in favor of the Florence Company. The question presented here was whether the court was right in this decision of the question of removal. Mr. Justice CLIFFORD delivered the opinion of the court at considerable length, affirming the judgment below. At the conclusion it is said: "Either the non-resident plaintiff or non-resident defendant may remove the cause under the act for that purpose, provided that all the plaintiffs or all the defendants join in the petition, and all the parties petitioning are non-resident, as required under the judiciary act; but it is a great mistake to suppose that any such right is conferred by that act, when one or more of the plaintiffs, or one or more of the petitioning defendants, are citizens of the state in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right, unless all the plaintiffs or all the defendants are non resident and join in the petition." Dissenting, Justices MILLER and BRADLEY.

Railway Aid Bonds—Bona Fide Holders—Defences.—No. 207. Town of Queensbury v. Culver. Error to the circuit court for the northern district of New York. This was an action on interest warrants attached to bonds issued by the town in aid of the construction of a railroad from the village of Glenn's Falls to intersect the Saratoga and Whitehall Railroad. The bonds were purchased by the defendant in error, without notice of any defence. On the trial the unconstitutionality of the law authorizing the subscription and various irregularities were urged as rendering the bonds invalid, but the judgment was for the complainant and is here affirmed on the authority of the numerous decisions by this court in similar cases. Mr. Justice STRONG delivered the opinion.

Legal News and Notes.

—JUDGE DRUMMOND of the United States circuit court decided, on Friday last, in Milwaukee, in the case of Flanders, assignee, v. Brigham and others, that it was the right of a bankruptcy court to have possession and control of the property of the bankrupt for the purpose of paying debts, and that the fact that there was a suit in a state court, and that the property of the parties was in the hands of a receiver, did not prevent the filing of a petition either by or against them.

—The trial of the Tichborne claimant on charges of perjury committed during the trial for the possession of the estate, which has been in progress upwards of 180 days, was brought to a close on the 28th ult., and resulted in the conviction of the accused. The jury, after being out a short time, brought in a verdict of guilty of the charges, and the claimant was sentenced to fourteen years' penal servitude. There was great excitement over the verdict. The newspapers issued extras, and several foolish people lost their lives in firing cannon in honor of the result. The press and popular sentimeut seem divided as to the propriety of the verdict. It is said that Dr. Kenealy will move for a new trial, and, if this is denied, make application to the house of lords on behalf of his client. Some of the democratic journals deplore the verdict, and denounce the chief justice for unfairness in the conduct of the trial.

—EDWIN LYLE has recovered a judgment of $10,000 in the supreme court of Cleveland, Ohio, against the Cuyahoga lodge of Odd Fellows of that city, for posting him as a swindler in some of the Cleveland papers, and publishing him as such in a circular to other lodges. The defendants offered in mitigation, to prove the truth of the charges against Lyle, but the court ruled that their truth or falsity did not affect the merits of the case. The lodge, unlike a newspaper, was not in the business of publishing news, and the jury must judge of their motives from an entirely different standpoint. It was also urged for the defense that the lodge was simply a benevolent organization, without stockholders, and consequently not liable; but the court decided that its charter by the state gave it a responsible existence.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. }
S. D. THOMPSON, Ass't Editor. }

ST. LOUIS, THURSDAY, MARCH 19, 1874.

{SUBSCRIPTION: $8 PER ANNUM, in Advance.

The Law of Religious Societies and Church Corporations.

The February number, 1874, of the American Law Register, has the third chapter on the above subject from the pen of the Hon. Wm. Laurence, of Bellefontaine, Ohio. The learned author is exhausting the subject, and his notes display an amount of research and careful discriminating labor which are seldom witnessed in articles contributed to the press. We trust the series will, when completed, be collected and published in book form.

Conclusiveness of Judgments of Sister States.

The unsatisfactory state of the authorities on the question as to the conclusiveness of the records of judgment in other states is well known. The act of congress passed under the authority conferred by the constitution, art. 4, sec. 1, declares that records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law and usage in the courts of the state from whence said records are taken. The subject was before the Supreme Court of the United States, in the case of Knowles v. The Logansport Gaslight Company, decided on the 4th instant. An action was brought in the United States circuit court for Minnesota, on a judgment rendered by a court of record of Indiana. The record of that judgment recited that the defendant "had been duly served with process to appear," and the record of the cause contained a summons, with the return of the sheriff thereon endorsed, showing a personal service of the writ on the defendant. On the trial the defendant was offered as a witness to prove that he had not been personally served with process.

The Supreme Court, applying the principle of Thompson v. Whitney, decided by it at the same term, hold that the proposed evidence was admissible, although according to the opinion of the courts in Indiana, such a judgment would seem to be conclusive between the parties in that state. ——— v. Pratt, 23 Indiana, 628; Wescott v. Brown, 13 Indiana, 83; Bigelow on Estoppel, 237.

Is a Person Responsible to the Municipal Tribunals of one Country for Acts committed while acting as the Executive head of another Government?

BUENAVENTURA BAEZ, ex-president of the republic of Santo Domingo, was recently arrested in a civil action brought in the supreme court at Brooklyn, New York, by one Davis Hatch, and held to bail in the sum of $25,000. The substance of the complaint was, that the defendant, while acting as president of Santo Domingo, illegally arrested and imprisoned the plaintiff, and confiscated his property. On the 4th instant the case was heard before Judge PRATT, on a motion to vacate the order of arrest. Mr. Choate, for the defence, said that so far as the question here involved was concerned it was immaterial whether the acts of Baez were a stretch of power or not. He contended that in a case like this it was not legal to come into a municipal court like the present to get grievances redressed. Resort must be had to higher and diplomatic channels. He argued that for what was done by the head of another government by virtue of his official power he could not be called to account, even after he had ceased to be the head of the government, by the municipal courts of another country; that it all laid within the domain of the law of nations exclusively, and that if this plaintiff had suffered wrong thereby he had either one of two means of redress. First, if, as he said, there was an extension of the power of the president, a going beyond the constitutional limits of the president, he (plaintiff) could apply to that government which the president had offended—that was the Dominican Republic. Second, if a citizen of the United States, as he claimed to be, he had his remedy, as all other citizens had, through the intervention of his own government.

Mr. Maxwell, for the plaintiff, argued that the defendant was sued as a private person, as the so-called president of a so-called republic, and he claimed to be able to show that he was president over no existing nation. He was responsible to this court as a private individual.

Judge PRATT took the papers, and the next day issued an order vacating the order of arrest, with costs.

Another suit has been commenced against Baez, the plaintiff being Mr. Julius M. Columbani, of New York. His counsel applied to Judge PRATT for an order of arrest against the defendant. The application was based on a lengthy affidavit, setting forth that in 1870 the plaintiff was imprisoned by Baez illegally, and that his health, commercial credit and reputation were greatly impaired thereby. He claims damages in the sum of $200,000. The application was denied. It will probably be renewed before some other supreme court judge in New York or Brooklyn.

Bankruptcy—Illegal Preference—Possession of the State Courts.

The ruling of the Supreme Court of the United States, in Wilson v. City Bank of St. Paul, 1 CENT. LAW JOUR. 40, was applied and followed in Appleton v. Bowles *et al.*, 6 Daily Register, No. 49, determined in the supreme court of New York, first department in general term.

The proceeding was commenced by attachment in the state court, and after a receiver had been appointed and had taken possession of the property attached, a petition in bankruptcy was filed against the defendants in the federal court for Massachusetts. Thereupon the receiver applied to the state court for an order directing him to deliver the assets in his hands to the assignee in bankruptcy, but the court instructed him to hold them until further order. The attorney for the plaintiff afterwards made a similar motion, which was denied. Meanwhile another creditor, Alvah Miller, having obtained a judgment against the defendant Bowles, applied to have it satisfied out of the assets in the hands of the receiver, which was done.

Appeals were severally taken from these orders to general

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term, and they were severally affirmed. DONOHUE, J., delivering the judgment of the court (with whom DAVIS, P. J., and DANIELS, J., concurred), said: "The first ground of the appeal would seem to be that the bankrupt court, having taken possession of the estate under proceedings, takes from this court all further authority in the matter, and that all the assets must be handed over to such assignee, no matter what may be the question litigated here. This is a mistake. This court and its receiver first obtained the possession of the property and the control of the litigation, and has the right to finish its proceedings before being interfered with by any other jurisdiction. (Taylor v. Carryl, 20 How. 583, and cases there cited.) If the assignee has rights, or is entitled to the fund, his title and right can be, and will be, disposed of by this court as the law shall direct.

"The next ground on which the appeal is pressed is, that the levy on the attachment is void under the bankrupt act, and that this court will not give to the petitioner, Miller, a preference prohibited by that act. If the case presented facts showing such prohibited preference, this court would be bound to protect the assignee against it. Whatever may have been the opinion or course of decisions heretofore on that point, we suppose the case Wilson v. The City Bank of St. Paul, decided by the Supreme Court of the United States at its present term, is decisive on the question. In the opinion of the court, delivered by Mr. Justice MILLER, in which he thoroughly examines the point, he holds that liens by attachment or execution, obtained prior to the proceedings in bankruptcy in state courts, are valid, and take preference to the claims of the assignee, unless an intent to evade the bankrupt act is shown, and that the fact of taking steps to obtain satisfaction by the ordinary course of law, with a knowledge on the part of the creditor that the debtor is insolvent, is not evidence of such improper intent, and that in the absence of any further facts, the party who obtains such preference can hold it. As on this point the opinion is conclusive on this court, it follows that the preference obtained by Miller was valid, and the order directing payment to him out of the fund obtained from the property he attached, must be affirmed."

Removal of Causes from State to Federal Court.

The judiciary act limited the right to remove a cause from the state to the federal court to the *non-resident defendant* when sued by a resident plaintiff (sec. 12); and if there were several real defendants all must be non-resident to entitle any of them to a removal. In other words, if the cause was not removable as to all of the defendants, it was not removable as to any. But by the act of July 27, 1866, the *non-resident defendant*, in a case where he is joined with a resident defendant, may have the cause removed as to himself, where there can be a final determination of the controversy without the presence of the resident co-defendant. This leaves the cause to proceed in the state court as between the resident plaintiff and the resident defendant, and to proceed in the federal court as between the plaintiff and the non-resident defendant. This is the first and only statute which in any event authorizes a *portion* of the defendants to remove a cause from the state to a federal court.

On the 2d of March, 1867, an act was passed professing to be an *amendment* of the act of July 27, 1866, which gives the right of removal to the non-resident party, *plaintiff or defendant*, at any time before final hearing or trial, on the ground of prejudice or local influence. This is the first act that in any event extended the right of removal to a plaintiff who had elected to bring his suit in a state court. Johnson v. Monell, Woolw. 390. The effect of the act of 1867 upon that of 1866, and the relation of the two acts to each other, have occasioned no little difficulty of construction. One important point under the act of 1867 has recently been set at rest by the decision of the supreme court (March 5th) in the case of the Grover & Baker Sewing Machine Company, Wheeler & Wilson Sewing Machine Company, and the Singer Manufacturing Company v. Florence Sewing Machine Company, in error to the Supreme Judicial Court of Massachusetts.

The action was brought by the Florence company, a Massachusetts corporation, against the other companies, to recover back certain moneys alleged to be due from them by reason of over-payments made by the Florence company as patent rent, under an agreement providing for a reduction in the rent in case of the granting by the other companies of any additional licenses. The suit being brought in the supreme judicial court of the state, motion was made to remove it to the circuit court of the United States. The Grover & Baker company was a Massachusetts corporation also, but the other two were foreign corporations—one of Connecticut and the other of New York. The court below held that where one of the defendant corporations was of the same state with the plaintiff, where the suit was brought, removal was not authorized, and the trial proceeded and resulted in favor of the Florence company. The question before the United States Supreme Court was whether the state court ruled the question of removal correctly, and its view was sustained. Mr. Justice CLIFFORD, delivering the opinion of the court, says: "Either the non-resident plaintiff or non-resident defendant may remove the cause under the act for that purpose, provided that all the plaintiffs or all the defendants join in the petition, and all the parties petitioning are non-residents as required under the judiciary act; but it is a great mistake to suppose that any such right is conferred by that act when one or more of the plaintiffs, or one or more of the petitioning defendants, are citizens of the state in which the suit is pending, as the act is destitute of any language which can be properly construed to confer any such right, unless all the plaintiffs or all the defendants are non-resident and join in the petition." MILLER and BRADLEY, JJ., dissented.

This seems to support one point ruled in Allen v. Ryerson, 2 Dillon, C. C. R. 501, that where a case for the removal of a cause is made under the act of July 27, 1866, the petitioner therefor is not obliged to make an affidavit such as is required by the act of March 2, 1867.

Railway Consolidation—Effect on Municipal Bonds—Decision of United States Supreme Court in Putnam County v. Nugent.

A new and important point has recently been decided by the Supreme Court of the United States, in Putnam County v. Nugent, touching municipal liability on railroad-aid bonds. The case went from the northern district of Illinois, and the judgment of the circuit court in favor of the county was reversed. The opinion of Judge BLODGETT is reported in full

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in 5 Chicago Legal News (August 23, 1873), p. 533. The material facts were these: In June, 1869, an *Illinois* corporation existed, known as the Kankakee and Illinois River Railroad Company, and counties along its line were authorized to subscribe for its stock and issue bonds therefor, provided the project was sanctioned by a vote of the people. In July, 1869, and again in February, 1870, the people of Putnam county voted to subscribe for stock in the above named railroad corporation, but no subscription to that company was in fact ever made. On and before the 21st day of October, 1870, there existed in *Indiana* a corporation known as the Plymouth, Kankakee and Pacific Railroad Company, with power to construct a road from the easterly line of Illinois to Plymouth, Indiana. On the 21st day of October, 1870, the corporate rights, stock, powers and franchises of the two corporations above named *were consolidated*, and the consolidated company became known as the Plymouth, Kankakee and Pacific Railroad Company, with a largely increased capital. It was printed in the articles of consolidation that the stockholders of the original companies should be stockholders in the consolidated company.

After the consolidation, and without any new election, the bonds previously voted were issued by the county of Putnam (whose officers assented to the consolidation) and delivered to the consolidated company. The bonds thus delivered were, however, *made payable*, not to the consolidated company, but to the company in existence when the vote was taken and in whose favor the vote was had. Accordingly the bonds recited that they were "issued for the subscription to the stock of the Kankakee and Illinois River Railroad Company, in pursuance of a resolution of the board of supervisors of said county." The plaintiff was a holder for value. The Kankakee and Illinois River Company had power by its charter to consolidate with another company; and the articles of consolidation were on file in the proper office. Following the principle of Clearwater v. Meredith, 1 Wall. 25, the court below held that the corporate existence of the Kankakee and Illinois River Railroad Company ceased when the consolidation was effected, and that its franchises became merged in the consolidated company, which was a corporation with a more extended line of road, with larger capital stock, with a different directory, and under the control of the legislature of two states instead of one, and therefore the authority to issue bonds which had been voted, ceased absolutely on the legal demise of that company. Assuming this to be true, the court below held that the doctrine of the well known case of Marsh v. Fulton County, 10 Wall. 676, applied to and controlled that case. The Fulton county case asserted the principle where a popular vote was necessary, and the vote was to one corporation, and the bonds under that vote were made and delivered to another corporation into which the original corporation had been changed by legislative act subsequent to the vote, that even a *bona fide* holder of bonds thus issued could not recover. We have not yet seen the text of the opinion of the supreme court in the Putnam county case, but inasmuch as there was legislative authority to the county to subscribe to the stock of the railroad company to which the bonds of the county were made payable, and they were issued by the officers of the county after after a popular vote had in fact been had, the court probably considered the case to fall within the principle so often declared as the law of this class of securities, viz: "that when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such a holder than any other commercial paper." Per CLIFFORD, J., in Lexington v. Butler; 14 Wall. 282.

The judgment in the Putnam county case is one which possesses great interest in Missouri, where many bonds voted to companies before consolidation have been issued without a new vote to the consolidated company; but some of these cases differ from the Putnam county case in the circumstance that the bonds were issued to the consolidated company instead of the original company, and the history of the transaction was displayed on the face of the bonds by way of recital. How important this difference is, remains to be judicially determined. We shall publish the Putnam county decision at an early day. MILLER and DAVIS were the only judges who dissented, from which it would appear that FIELD, J., who delivered the opinion in the Fulton county case, considered the two cases to be distinguishable.

Can a Married Woman living apart from her Husband be adjudged a Bankrupt?

IN RE JULIA LYONS.

District Court of the United States, District of California, January 29. 1874.

Before Hon. OGDEN HOFFMAN, District Judge.

1. **Bankruptcy—Married Women.**—In a state whose statute law makes a married woman living apart from her husband liable to be sued in all actions as f *sole*, she may be proceeded against under the bankrupt law.

W. H. Fifield, for petitioning creditors; *Whiting* and *Naphaly*, for respondent.

HOFFMAN, J.—The question raised by the demurrer in this case, is whether the respondent, being a married woman, is liable on a contract to pay rent, and, if she has committed an act of bankruptcy, can be adjudged bankrupt. It appears that the husband of the respondent has long since renounced and abandoned all his marital rights and duties. For twelve years Mrs. Lyons has lived separate and apart from him, supporting herself and her minor children by her own exertions. In the course of her business as keeper of a lodging-house, she has contracted an indebtedness for rent, and being so indebted, and in contemplation of bankruptcy and insolvency, has made, as is alleged, an assignment of her property in fraud of the bankrupt act.

It is urged by the respondent's counsel that the contract of a married woman for the payment of money is void, and that the petitioning creditor has no debt which the court can recognize. On this point numerous authorities are cited; but as they, for the most part, are decisions under the act of April 17, 1850, and the amended act of May 12, 1862, no examination of them is necessary. The decision of the question before us turns upon the force and effect to be given to the act of March 9, 1870. (Laws of 1870, p. 226.)

The first three sections of that act are as follows: Section 1. "The earnings of the wife shall not be liable for the debts of the husband." Section 2. "The earnings and accumulations of the wife and her minor children living with her, or being in her custody, while the wife is living separate and apart from her husband, shall be the separate property of the wife." Sec. 3. "The wife, while living separate and apart from her husband, shall have the sole and exclusive control of her separate property, and may sue and be sued without joining her husband, and

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may avail herself of, and be subject to, all legal process in all actions, including actions concerning her real estate." The fourth section prescribes the mode in which she may convey her real estate.

The object of these enactments is apparent. It was to secure to the wife, when abandoned by her husband, the fruits of her own industry, and to enable her to support herself and her children out of her earnings and accumulations, free from his interference or molestation. For this purpose her earnings and accumulations, which at common law belonged to her husband, are declared her separate property, and her rights in respect of such property are carefully defined. She is to have the sole and exclusive control of it; she may separately sue or be sued, and may avail herself of and be *subject* to *all legal process* in *all actions*. That the principal intention of the legislature was to protect deserted wives in their just rights, and not to impose upon them additional liabilities, is admitted. For this purpose they were placed in the position of *quasi femes sole*, and were granted all the powers necessary to enable them to earn their own livelihood, and to retain and enjoy the fruits of their industry. But to accomplish this object, it was evidently necessary to create new liabilities as well as to confer new rights. The ability to sue for moneys earned by or due to her was clearly indispensable to enable the wife to attain the object contemplated by the law.

Justice and reason, and even her own interests, demanded that she should herself be liable for all debts contracted by her. For without such liability how could she obtain the credits usually necessary in the conduct of any business; and what could be said of the morality of a law which should announce to a woman that for all debts and demands due her she shall have the right to sue and enforce payment, but as to debts due by her she may plead her coverture as a conclusive bar to the action?

The separate property of a married woman has, on general principles of equity, been held liable for debts contracted in respect to it or in and about its management and improvement. The act of 1870 created a new species of separate property in the earnings and accumulations of the wife while separated from her husband.

The equitable principles already adopted by the courts, and usually enforced by statute, required this new species of separate property should be liable for debts incurred in its creation or management, and in the course of the business, the proceeds of which the statute enables the wife exclusively to enjoy. Further discussion, however, is needless, as the language of the act is too explicit to be mistaken. It enacts that the wife separated from the husband "may sue and *be sued*, and that *she* shall be subject to all *legal process in all actions*." This language is obviously inconsistent with any exemption from liability to suit for a just debt on the pretext that, being a married woman, her contracts for the payment of money are void.

The respondent being thus found to have incurred a valid indebtedness and a liability to be sued therefor as if a *feme sole*, she may, if she has committed an act of bankruptcy, be adjudged a bankrupt. Hilliard on Bankruptcy, p. 49; Avery and Hobbs on Bankruptcy, pp. 33-4; *in re* Kinkead, 7 N. B. R., p. 439.

The demurrer is overruled and the respondent allowed ten days to answer the petition.—*Pacific Law Reporter.*

NOTE.—Whether a married woman may be proceeded against under the bankrupt act, would seem to depend, in each particular case, upon her power of making contracts, or of engaging in trade or other business independently of her husband. The general rule of the common law is that a married woman possesses no such power; but that if she enters into contracts or engages in trade or other business with her husband's consent or ratification, she acts simply as his agent; and hence that the fruits of such contracts, or the accumulations of such trade or business, belong to him and not to her. Bish. Mar. Wom., § 733; Switzer v. Valentine, 4 Duer, 96; Jenkins v. Flinn, 37 Ind. 349. Wherever this rule of the common law obtains in full force, it is clear that she cannot be adjudged a bankrupt. *In re* Goodman, 8 N. B. R. 380.

But this rule admits of exceptions, and these may be arranged into two classes: 1. Exceptions created by local custom or by local law. 2. Exceptions growing out of a temporary cessation of the coverture.

Under the first of these exceptions is the case of frequent occurrence in the English books, where a married woman acts as a *sole trader* according to the custom of London. *Ex parte* Carrington, 1 Atk. 206; Lavie v. Philips, 3 Burr. 1776; s. c. 1 W. Black. Rep. 570. See also in Pennsylvania, Burke v. Winkle, 2 Sergt. & Rawle, 189; in South Carolina, Newbiggin v. Pillans, 2 Bay, 162; in Louisiana, Christensen v. Stumpf, 16 La. An. 50; Spalding v Godard, 15 La. An. 277; Bowles v Turner, 352 ib.; in California, Melcher v. Cuhland, 22 Cal. 522; Abrams v. Howard, 23 Cal. 388. Under the same head would fall those cases like *re* Lyons, *supra*, where by statute in particular states, a married woman may, under certain circumstances, contract liabilities, carry on business and sue and be sued independently of her husband, and as a *feme sole*. In these cases there would seem to be no doubt that she is amenable to the bankrupt law. As in New York: *In re* O'Brien, N. B. R. Sup. 38; Graham v. Starks, 3 N. B. R. 92. Or in Illinois: *In re* Kinkead, 7 N. B. R. 439. Thus it was held, in the last case in the United States district court at Chicago, by BLODGETT, J., that where a husband and wife carried on a business in partnership, their status was such, under the statutes of Illinois relating to married women, that the *firm* might be proceeded against in bankruptcy; and hence that the partnership creditors were entitled to a preference in the distribution of the assets, over a creditor of the husband, whose demand had accrued prior to the organization of the firm. And it was intimated that the wife would be separately adjudicated a bankrupt if it should be found necessary in the course of the proceeding to do so, in order to reach any individual property she might have. In the case of *Re* Rachel Goodman, 8 N. B. R. 380, determined in the United States district court for Indiana, before GRISHAM, J., the principle above stated is fully recognized; but when applied with reference to the statutes of Indiana relating to married women, as interpreted by the supreme court of that state, the case resulted in a dismissal of the petition. It was found under the Indiana statutes, as expounded by the state supreme court, (1), that a married woman cannot engage in any kind of trade or business on her own account unless she have separate property; (2) that if a married woman, not having separate property or means of her own, engage in and carry on business, the profits, if any there be, belong to the husband as the earnings of the wife; and (3), that a married woman in Indiana, possessed of no separate estate, is relieved of none of the disabilities imposed upon her by the common law. The petition failed to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, and it was held to follow that she could not be adjudged a bankrupt. So in the case of *Re* Slichter, 2 N. B. R. 107. in Minnesota, where the statute allows a married woman, under certain circumstances, to engage in trade in her own name, upon obtaining a license from a probate justice, in which case the business and profits become her separate property, and she is bound by her contracts as a *feme sole*, NELSON, district judge, held that a married woman who had been engaged in business as a member of a partnership firm, but without complying with the statute, could avail herself of the plea of coverture to defeat the bankruptcy proceedings against her.

Under the second head, which embraces the question whether a married woman may be adjudged a bankrupt where the marriage relation has been temporarily interrupted, the books furnish many instructive decisions defining the circumstances under which, independently of local custom or statute, a married woman may be separately sued. These decisions embrace cases where a married womam lives apart from her husband on a separate maintenance; in which case it has been held and afterwards denied, in England, that the wife may be sued at law as a *feme sole*. Corbet v. Poelnitz, 1 Term R. 5. *Contra*, Compton v. Collinson 1 H. Blacks. 350; Clayton v. Adams, 6 Term R. 604; Marshall v. Ratton, 8 Term R. 545. And Chancellor KENT states (2 Com. 161) that the rule of Corbet v. Poelnitz has never been adopted in this country. It has also been held in England that a wife may be sued at law whose husband is an absent alien enemy, and is under an absolute disability of returning. Derry v. Duchess of Mazarine, 1 Ld. Raym. 147. Or where he had been transported. Sparrow v. Caruthers, 2 W. Black. 1197. Or had been banished or had abjured the realm. Lady Belknap & Wayland, 1 Co. Lit. 132 b, 133 a. So it has been held in Massachusetts that a married woman who had been divorced *a mensa et thoro* might sue and be sued as a *feme sole* in respect of property acquired or debts contracted by her subsequently to the divorce. Dean v Richmond, 5 Pick. 461; Pierce v. Burnham, 4 Metcf. 303. And it has been held in the same state that a *feme covert*, whose husband had deserted her in a foreign country, and who had thereafter maintained herself as a single woman, and for five years had lived in that commonwealth, the husband being a foreigner and having never been within the United States, was competent to

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sue and be sued as a *feme sole*. Gregory v. Paul, 15 Mass. 31. And the question is now said to be settled in Massachusetts, as a necessary exception to the rule of the common law, placing a married woman under a disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name as a *feme sole*. "It is," said SHAW, Ch. J., "an application of an old rule of the common law, which took away the disability of coverture where the husband was exiled or had abjured the realm." Gregory v. Pierce, 4 Metcf. 478. And within the meaning of this principle, the residence of the husband within another of the United States is held to be equivalent to his residence in a foreign state. Abbot v. Bayley, 6 Peck, 89. "But," said SHAW, Ch. J., in Gregory v. Pierce, *supra*, "to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm." In Love v. Moynehan, 16 Ill. 277, 282, the supreme court of Illinois, after reviewing many modern cases, hold the law to be "that where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent and without expectation of again living together, and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a *feme sole*, during the continuance of such condition."

So it has been held in a recent case in Georgia, that, on general principles, a married woman whose husband has deserted her and resided in another state, has the right to contract and be contracted with, to sue and be sued, as if *sole*. Clark v. Valentino, 41 Ga. 143. See also as supporting the same view, the following cases: Rhea v. Rhermer, 1 Peters, 105; Cornwall v. Hoyt, 7 Conn. 427; Arthur v. Broadnax, 3 Ala. 557; Jones v. Stewart, 9 Ala. 855; Roland v. Logan, 18 Ala. 307; Rose v. Bates, 12 Mo. 47; Starrett v. Wynn, 17 Serg. & Rawle, 130; Bean v. Morgan, 4 McCord, 148; Valentine v. Ford, 2 P. A. Brown, 193.

It would seem to follow, by reasonable analogy, that where a married woman is, for any such reason, liable to be sued as if *sole*, at least in an action at law, she may, if otherwise amenable to the provisions of the bankrupt act, be proceeded against thereunder. Accordingly it was held in England in *ex parte* Franks, 7 Bing. 762, that the wife of a convict sentenced to transportation was liable to be made a bankrupt, she having become a trader, although her husband had not been sent out of England. The sentence of transportation against her husband rendered her liable to suit generally; and the fact that she had become a trader brought her within the provisions of the English bankrupt law.

Life Insurance—Right of Insured to notice of Premiums Falling Due—Duty of Company to furnish Agent with Receipts.

SARAH L. MOREY v. NEW YORK LIFE INSURANCE COMPANY.

In the Circuit Court of the United States for the Southern District of Mississippi, November Term, 1873.

Before Hon. ROBERT A. HILL, District Judge.

1. **Life Insurance—Representations of Agent that Notice of Accrual of Premiums will be Given.**—Where the local agent of a life insurance company, on receiving payment of the first premium due on a policy, represented to the assured that the company was in the habit of giving thirty days' notice to its policy-holders of the time when each premium falls due, and promised that he would give such notice, and the assured died two days after the second premium fell due, no such notice having been given to him, and the proof failed to show that the agent had any authority to make such an agreement, it was held that the beneficiary could not recover on the policy.

2. ——. **Payment of Premium to Local Agent—Failure of Company to forward Receipt to Local Agent.**—Where the company's receipt for the premium was not received by the local agent to whom it was to be paid, until two days after the death of the insured, it was held, under the circumstances above stated, that the beneficiary could not recover on the policy; otherwise if the premium had been tendered before it fell due.

3. ——. ——. ——. Where by express agreement, or by the course of business between the parties, it is understood that payment will be made to the local agent, and no notice has been given in sufficient time that payment shall be made at the office and principal place of business stipulated in the contract, a tender of payment to the local agent, whether received by him or not, will excuse the policy-holder and prevent a forfeiture.

The facts are stated in the opinion.

HILL, J.—This action at law was brought in the circuit court of Madison county, and removed into this court, to recover the amount of a policy of insurance issued by the defendant on the first day of April, 1871, for the sum of five thousand dollars, payable to plaintiff upon the death of her late husband, John B. Morey, upon the payment of $197.90, then made, and the same amount to be paid thereafter on the first day of April of each year during the continuance of said policy, with the usual condition annexed, that if said premium should not be paid on or before the first day of April of each year, the policy should become void, and all payments theretofore made become forfeited to defendant.

The plea is that the policy became void under this stipulation by reason of the non-payment of the premium due on the first day of April, 1872; to which the plaintiff replies: First, that when said John B. Morey made application for said policy it was to one Morey, a local agent of defendant, doing business for defendant in the city of Canton; that at the time he stated to said agent that he feared he would forget the time when the premiums would become payable and fail to make them in proper time, and thereby the policy would become forfeited; that the said agent stated, as an inducement to said John B. to take said policy, that the company was in the habit of giving thirty days' previous notice of the time, and that he would give the notice and save the forfeiture; and, secondly, that it was understood that payment would be made to the local agent in Canton; that, at the time the premium fell due, the agent at Canton had not been furnished with the printed premium fell due the agent at Canton had not been furnished with the printed premium receipts, without which he was not authorized to receive payment; that the failure to give the notice and to furnish the receipt was a waiver of the right to a forfeiture of the policy.

A jury being waived, the questions of both law and fact are submitted to the court.

The only facts shown by the proof, and necessary to be stated for the application of the rules of law, are as follows:

Morey, the agent of the defendant, did make the statements to John B. Morey, at the time the application for the policy was made, as stated in the pleadings; the advance premium was paid on the delivery of the policy; no notice of the time the premium fell due was given; John B. Morey died on the 3d day of April, two days after the premium fell due, without having paid or tendered the same to any one. On the 5th, payment of the premium was tendered to the agent at Canton, and refused, for the reason that John B. Morey had died on the 3d.

That the premium receipt was not forwarded to the general agents at Vicksburg until the 4th, and not forwarded to the local agent until the next day.

The question upon the pleadings and proof is, did the want of notice of the time of payment, and the absence of the receipt in the hands of the local agent, excuse the payment of the premium upon the day it became due, and thereby avoid the forfeiture stipulated in the contract?

The policy, and the conditions annexed to it, constituted the contract, and must be held binding on both parties to it, unless its conditions have been waived by some act or omission of the party against whom it is sought to be enforced, or by the authorized agent of such party.

The proof fails to show that the agent, Morey, had any authority to engage that notice should be given; indeed, none such is claimed; but it is claimed that, being the agent, it was a fraud in him to make such a promise, as it misled the assured, and induced him to take the policy, which he would not otherwise have done

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but it is apparent from the proof that he did not make the promise as agent, or pretend to bind the defendant, but only made it as a friend and relative of John B. Morey; it was a mere personal promise, for the fulfillment of which he could only look to him who made it; Morey, the agent for this purpose, was more the agent for the assured than the insurer; so that upon the facts, this want of notice cannot avail the plaintiff.

The remaining question is, did the failure to place in the hands of the agent at Canton the premium receipt on or before the time of payment, waive and excuse payment on that day? The conditions of the policy require payment at defendant's office in the city of New York, unless a different place is stipulated for in writing between the parties, or to an agent having for delivery a printed receipt, signed by the president of the company, or other officer mentioned.

The advance payment was made to the local agent in Canton upon the delivery of the policy. The fact that the premium receipt for the second payment was forwarded to the local agent in Canton shows that that was the place where payment was expected to be made, and where it doubtless would have been made but for the death of said John B. Such evidently being the understanding between the parties, I am satisfied that had the tender of the amount due been made to the local agent at Canton on the day and within the time stipulated, the forfeiture claim could not have been maintained; but, unfortunately for the plaintiff, this was not done. I cannot accept the position as correct that nothing can avoid the forfeiture but an agreement of waiver of payment made by the principal officers of the company in New York, or by actual payment or tender of payment there, or to a local or other agent having the premium receipt, signed as provided for. Where, by an express agreement or by the course of business between the parties, it is understood that payment will be made to the local agent, and no notice has been given in sufficient time that payment shall be made at the office and principal place of business stipulated in the contract, a tender of payment to the local agent, whether received by him or not, will excuse the policy-holder and prevent the forfeiture. To hold otherwise would open the door to the grossest frauds upon the part of these foreign insurance companies. The policy-holder who had been depriving himself and family of the comforts, if not the necessaries of life for years, to provide, as he supposed, something for his helpless family when he shall have been laid in the grave, and when the company's coffers shall have in part been filled with his hard earnings, the company can withhold the receipt; and when he comes, perhaps, on the last moment in which payment can be made, he is for the first time informed that he must pay in New York, or all he has paid will be forfeited—a thing which it is impossible for him to do, and which would be gross injustice. It is said, and is in proof, that these receipts are furnished to the local agents through the general agency for the state, and if the agents' accounts at the principal office are not satisfactory, the receipts are withheld. The answer to this is, that it is a thing about which the policy-holder is not presumed to know anything; it surely cannot be held that he is responsible, or to be affected by dereliction in duty of the company's agent, over whom he has no sort of control. John B. Morey is not presumed to have known of the absence of the receipt, and its absence could have had no influence upon his unfortunate aeglect; and however much it is to be regretted that the widow and orphan shall be deprived of the maintenance and support a kind husband and father intended for them, the rules of law must be applied to the facts, which being done, necessarily results in favor of the defendant.

JUDGMENT FOR DEFENDANT.

NOTE.—Upon the question how far the agent of an insurance company may waive the conditions of the policy in regard to the payment of premiums, and make engagements independently of the policy which shall bind the company, see May on Insurance, § 360, and the cases there cited. The question does not seem to be involved in this case, since the learned judge seems to have concluded that the promise which the agent made, that he would give the insured notice of the falling due of the successive premiums, was merely the tender of a friendly office in his personal capacity, and was not an engagement made in his character of agent, such as might possibly bind his principal.

Under the facts surrounding the contract of life insurance in litigation in Hamilton v. New York Mut. Life Ins. Co., 9 Blatchford, 234, 251-3, it was held that the insurer was bound to provide, in the state where the defendant resided at the time the policy was taken out, and continued afterwards to reside, an agent to receive the premiums which should accrue, appointed and qualified according to the statute law of such state on the subject, and that the insurer was not obliged to pay the premiums elsewhere. Substantially the same ruling was made in view of the Virginia statute, in Manhattan Life Ins. Co. v. Warwick, 20 Grattan, 614. Extending these principles to the principal case, and supposing a similar statute to exist in Mississippi, the conclusion of the learned judge would seem to be well warranted, that a tender to the local agen would be sufficient, and that the assured would not be obliged to make payment elsewhere, whether such agent had been provided with the proper receipts or not.

Railway Aid Bonds—Defences.

CHARLES H. KEANE v. FORT SCOTT (CITY OF).

In Circuit Court of the United States, District of Kansas, November Term, 1873.

Before DILLON, Circuit Judge.

Defences where Vote Embraces two Propositions.—When there is legislative authority to a municipal corporation to issue negotiable bonds, it cannot defend against them in the hands of a *bona fide* holder for value, on the ground that the question submitted to the voters embraced two distinct propositions, or for non-compliance by the railroad company to which the bonds were issued with the terms of the ordinance authorizing their execution and delivery.

This is an action upon coupons attached to bonds issued by the city of Fort Scott, dated December 1, 1870, in payment of a subscription to the stock of the Missouri, Kansas and Texas Railway Company.

The case is submitted to the court upon an agreed statement of facts, consisting of the charters of the Union Pacific Railway Company, southern division, incorporated February 20, 1868, and the change of its name, February 3, 1870, to the "Missouri, Kansas and Texas Railway Company." Also the charter of the Labette and Sedalia Railroad Company, and of the Missouri, Kansas and Texas Railroad Company.

On July 25th, 1870, an ordinance of the city of Fort Scott was enacted submitting the question of subscribing $75,000 to the capital stock of the Missouri, Kansas and Texas Railway Company, and $25,000 for the purpose of procuring the right of way for the road of said company through the corporate limits of the city, and the purchase of grounds for depot and machine shops to be donated to the company. Ballots to be "for" or "against" the stock and donation.

The proposition carried, and the city was authorized to subscribe $75,000 to the stock of the M. K. and T. Railway Company, on the following fundamental conditions:

1. The company within six months to cause to be constructed and completed its road from Sedalia, Missouri, to Fort Scott, Kansas, and as soon thereafter as practicable, southwesterly.

2. The said company shall make said line from Sedalia the "great through line by the way of Fort Scott to the southwest," etc.

3. Fort Scott to be the end of a division of the road, at which engine houses and machine shops shall be erected before they are at certain other points, and as soon as the road needs them.

4. Bonds shall be issued by the city for the $75,000.

5. These bonds are to be placed with a trustee chosen by the parties, "to be kept by the trustee until such time as said company shall have constructed and put in practical operation its road from Sedalia to Fort Scott, when he shall deliver them to the

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company," said trustee to give bond to the city for $150,000 for a faithful performance of his duties.

6. The stock of the city to be sold and assigned for a nominal consideration to the Land Grant Railway and Trust Company of New York. (Stated to be a Pennsylvania corporation in New York.)

7. Depot grounds, etc., to be procured by the city and donated to the company.

On December 5th, 1870, an ordinance of the city of Fort Scott was passed, reciting the previous ordinance, and that the proposition submitted received 523 votes for, and 3 against, and "that the terms and conditions upon which the said subscription, and the issue and delivery of said bonds [were made], have been complied with by said company," and ordaining,

1. That the city subscribe for the $75,000 of stock, and it appoints John G. Stuart its agent to make the subscription.

2. For one dollar the city assigns its stock to Parsons, trustee for the capitalists who constructed the road.

3. The city attorney is ordered to prepare the bonds of the city to bear date December 1, 1870, etc., to be signed, etc., and delivered to the company; and these are the bonds to which the coupons in suit were annexed.

Grant & Smith, for the plaintiff; *Stewart & McComas*, for the defendant.

DILLON, Circuit Judge.—Upon the agreed statement of facts, the court holds:

1. That the plaintiff is presumed to be a holder for value, and without notice of the coupons in suit, and is entitled to recover unless there is some defence available to the city as against such a holder.

2. The only defence open to the city against such a holder of its bonds, is want of power to issue them; mere irregularities in the exercise of the power will not avail.

The defence that the bonds are void because the stock was never subscribed, if true as matter of fact, is not available to the defendant. The bond recites that "it is issued under the laws of Kansas, and in pursuance of an ordinance of the city of Fort Scott, approved July 22, 1870—$75,000 subscription to the Missouri, Kansas and Texas Railway Company." This recital estops the city to make this defence, and hence it is not a good defence against a holder of the bonds for value before due and without notice.

The same observations hold in reference to the provisions of the ordinance, that the stock issued for the bonds should be transferred for a nominal consideration by the city, and the failure of the company in respect to the erection of machine shops. It is contended that the submission to the voters was not according to the statute authorizing "the city council of any city of the state to subscribe for the stock of any railway company of the state upon such conditions as it may prescribe, provided there is a majority vote in favor of the subscription." (General Laws, 1868, chap. 23, sec. 51.)

The objection is that the ordinance submitted a proposition to vote $75,000 to the stock of this railway company, and $25,000 for another purpose, and that a joint subscription is unauthorized. But the vote was taken in this manner, and carried by 523 votes against 3 votes, and the bonds have been issued. Now a defect or irregularity in the manner of making the submission will not invalidate the bonds in the hands of innocent holders for value; and under the decision of the Supreme Court of the United States it is doubtful, if there had never been an election, but the bonds were nevertheless issued and in the hands of innocent holders for value, whether the defence of want of election would avail the municipality which issued them. But here this point does not arise; for there was an election and the proposition carried, and the ordinance authorizing the issue of the bonds so recites. The objection to the submission would probably have been well taken in a suit to prevent the issue of the bonds, but it comes too late now.

Another defence is that the bonds are void because the railroad company to which they were issued had no authority or power in law to build the road into or through the city of Fort Scott. But upon the agreed statement of facts this does not appear, and from the agreed statement taken in connection with the recitals in the act of March 2, 1871, relating to the Missouri, Kansas and Texas Railway Company, it would seem that the company had such power; and it appears from the ordinance of December 5, 1870, that the company did build the road and in all respects comply with the terms and conditions on which it was to become entitled to the $75,000 subscription. The decisions of the Supreme Court of the United States upon the subject of municipal railway-aid bonds cover the case, and under those decisions the defences of the city here relied on are not good.

JUDGMENT FOR THE PLAINTIFF.

Copyright at Common Law—Jurisdiction of the State Courts—Infringement.

ISAAC S. ISAACS v. AUGUSTIN DALY.

Superior Court New York City, Special Term, March, 4, 1874.

Before CURTIS, J.

1. **Copyright at Common Law.**—The right of an author or his assignee to the exclusive use of his literary productions exists at common law, independently of all statutes.

2. —— **Jurisdiction of State Courts.**—Such being the case, the state courts have jurisdiction to protect literary property. The act of congress of July 8, 1870, affords an additional remedy merely, and does not affect the pre-existing jurisdiction.

3. —— **Infringement—Title of Play.**—The mere fact that a dramatic composition bears the same title as a prior dramatic composition, does not, if this circumstance is wholly accidental, and if the compositions are in other respects dissimilar, constitute the latter composition an infringement of the copyright of the proprietor of the former.

CURTIS, J.—This action is brought to restrain the performance of a play called "Charity," also for accounting of profits and for $20,000 damages. The 19th of December, 1873, the plaintiff deposited in the copyright office, at Washington, the title of a play called "Charity," and copyrighted such dramatic composition. In January following the defendant procured the exclusive right, as he alleges, to possess and use manuscript copies of an entirely different play, by William S. Gilbert, also called "Charity," the latter being then played at the Haymarket, London. The defendant, in February following, prepared it for performance, and on the 27th of that month advertised it for a public representation on the 3d of March, the day subsequent to the hearing of this motion for an injunction. It is objected that the action should have been commenced in the federal courts. This court has long exercised a jurisdiction to protect literary property, and the act of congress, in 1870, conferring jurisdiction in this class of suits upon the federal courts, appears to afford an additional remedy—without affecting the pre-existing jurisdiction—in respect to the rights this plaintiff has in the play, and which exist at common law, independently of all statutes. (Palmer v. De Witt, 47 N. Y. R. 532.) The other question, as to whether the defendant should be enjoined from performing the play under the name of "Charity," is not free from difficulty. The affidavits fail to satisfy me that the plaintiff would be injured on the ground claimed by him, that Mr. Gilbert's play has been unfavorably received and criticised when played. It is not alleged that there has been any bad faith on either side. The complication appears to be purely accidental. Should the dramatic performance be enjoined because the word "Charity" is the title of each? No question exists as to any similitude or imitation in either. It is simply to be considered whether the use of the word "Charity" in plaintiff's play for a title, and his copyrighting the play, give him the exclusive use of that word as a title in the public performance of plays. Charity is a virtue that has been employed and portrayed in every

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stage and department of art for all ages. Would it be just that an engraver who has copyrighted a design that he entitled "Charity" should restrain another engraver from vending to the public a different design which the latter also designates as "Charity," both being works of art symbolizing the same virtue, but differing in plan and execution? If this principle is answered in the affirmative the same principle might be invoked by a publisher who has copyrighted a sermon called "Charity," by "——," to enjoin the sale by another publisher of a sermon, utterly different in composition, also called "Charity," written by some other person. The law favors literature and art, and while it seeks to protect all in the enjoyment of their property and their rights, it does not abridge the field of occupation and enterprise. The use of the word "charity" as a designation for any work of art or literature, cannot ordinarily be monopolized by any one person. There may be occasions were a title is made use of in bad faith, or to promote some imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use, or to compensate a party who has in consequence sustained an injury. But the present case does not appear to be one where the court is called upon to interfere for any of these reasons. Both parties having acted in good faith, it would be inequitable to subject the defendant to loss, who has prepared for representation and advertised Mr. Gilbert's play under the name of "Charity." Nothing is shown by which it appears that the plaintiff would sustain loss by changing the name of his play if he desired to do so, and I do not find any case where a court has granted a plaintiff, under the circumstances appearing in the papers, the relief he seeks by the present application. The motion for an injunction must be denied with costs.

INJUNCTION REFUSED.

NOTE.—The case of Palmer v. DeWitt, above referred to, contains a very clear exposition by ALLEN, J., of the rights of the owner of literary property as they exist at common law. The distinction is very clearly drawn between what is sometimes termed "copyright before publication," and the exclusive right to *multiply copies* after publication. It is this "copyright before publication" which the common law regards as property independently of any statute so declaring it, and which courts of common law jurisdiction will, without any statutory warrant for so doing, exercise their power to protect. Concerning the nature of this right, it may be said that it consists simply in the right of the author or his assignee to the first publication of his manuscript. "The author of a literary work or composition," said ALLEN, J., in the case above cited, "has by law a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. When once published, it is dedicated to the public, and the author has not at common law any exclusive right to multiply copies of it or to control the subsequent issue of copies by others. The right of an author or proprietor of a literary work to multiply copies of it to the exclusion of others, is the creation of the statute. This is the right secured by the 'copyright' laws of the different governments." "It is certain," said YATES, J., in Miller v. Taylor, 4 Burr. 2303, 2379, "that every man has a right to keep his own sentiments if he pleases; he has certainly a right to judge whether he will make them public or commit them only to the sight of his friends. In that state the manuscript is, in every sense, his peculiar property, and no man can take it from him, or make any use of it which he has not authorized, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication, and whoever deprives him of that priority is guilty of a manifest wrong, and the courts have a right to stop it." Mr. Phillips, in his valuable work on copyright, page 2, speaking of this right of first publication, says: "It is the exclusive privilege of first publishing any original material product of intellectual labor. Its basis is property. A violation of it is an invasion of property; and it depends entirely upon the common law." After quoting these and other authorities, the learned judge in Palmer v. DeWitt, *supra*, defines this right as follows: "An author of an unpublished literary work has, then, a property in such work, recognized and protected both here and in England, and the use and enjoyment of it is secured to him as of right. This property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property, so far as applicable. It is personal, as other movable property, personal in legal contemplation, following the person of the owner, and is governed by the law of his domicile." The court further held that an alien friend was entitled to the same measure of protection in this species of property as a citizen. Accordingly in that case, where a copy of an unpublished drama had been surreptitiously obtained in England and published in this country without the license or consent of the proprietor, it was held that he might maintain an action in the courts of New York to restrain its publication.

Notes of Cases Decided at the February Term, 1874, of Supreme Court of Missouri, at St. Joseph.

[Courtesy of Litt. R. Lancaster, Esq., of St. Joseph.]

1. **Criminal Procedure—Assistant Prosecuting Counsel.**—State v. Joseph P. Hamilton. There is no law in this state to prevent the employment of counsel to assist the prosecuting attorney in carrying on a prosecution, and the peculiar position or attitude that such counsel shall assume in reference to the trial of such cause, is a matter to be arranged among themselves, under control of the trial court.

2. ——. ——. **Closing Argument.**—It is discretionary with the trial court to permit assistant counsel to close the argument in the case, if the prosecuting attorney waives his right to do so, and such discretion will not be reviewed here.

3. **Re-examination of Witness.**—When a party has examined his witness, and the other party has cross-examined him, it is discretionary with the trial court whether a re-examination will be allowed, and this court will not interfere unless manifest abuse and injustice is shown.

1. **Sheriff's Deed—Effect of by Relation.**—William S. Leach v. George Kœnig. A sheriff's deed relates back to the day of sale, as to the defendant in the execution and his privies, and to strangers subsequently purchasing with notice, and vests title in the execution purchaser from the day of sale, but no title passes to a bidder at a sheriff's sale until the amount of the bid is paid and the deed delivered.

2. **Landlord and Tenant—Attornment to New Landlord.**—A tenant in possession of property under a lease cannot recognize another landlord under a subsequent lease, without the consent of the first landlord, and such attornment, if made, is void.

Bills and Notes—Endorser Presumed Innocent Purchaser.—Amanda Corby, executrix, &c, v. Squire T. Butler. The endorser, by delivery of a negotiable note, before maturity, is presumed to be an innocent holder for value, and must be so treated in absence of evidence to the contrary, and without such proof no evidence is admissible of fraud in procuring the note.

1. **Defaulting Guardian — Bankruptcy—Remedy of Sureties.**—Wesley Halliburton v. Calvin T. Carter. A defalcation by a guardian is not relieved by a discharge in bankruptcy, nor is his contingent liability to his security on his bond as such guardian discharged, where such security pays the debt, and the securety can recover for money paid to his use when he pays the defalcation after the discharge in bankruptcy of the principal.

2. ——. ——. ——. The relations of principal and surety of a fiduciary trust are not in any manner affected by bankruptcy proceedings. They remain in the same position toward each other, and to the *cestui que trust*, as if no bankruptcy proceedings had ever been commenced.

Suit to Quiet Title—Disclaimer.—Evan Jourdan v. Allen Stephens. In a proceeding under our statute to quiet title, if the defendant disclaims all title adverse to the plaintiff, tha ends the case.

Fencing Railway Track.—Michael Slattery v. The St. Louis, K. C. & N. R. R. Co. A railroad must be fenced as required by sec. 43, 1 Wag. 310, in all enclosures, whether timbered or not. [See F. & P. Railway Co. v. Lull in 11 Cent. Law Jour. 131.

Money Paid for Extension of Time—Usury.—Arthur Kirkpatrick v. F. W. Smith and T. B. Weakley. Money paid for an extension of time on a note cannot be recovered back as usury, nor be applied as payment on the note.

Possession of Mortgagee of Realty—Rents and Profits.—Augustus Honaker v. David Shough. A defendant in an action for possession of land, who becomes equitably entitled to a mortgage, may protect his possession against the mortgagor or his heirs, but must account for rents and profits toward the mortgage debtor till redeemed.

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Landlord and Tenant—Notice to Quit.—George W. Stephens v. A. J. Brown. When a lease has a definite period to run, no notice to quit is necessary, nor is any notice to quit necessary where the tenant denies or disclaims his landlord's title.

1. **Deed of Bargain and Sale—Construction.**—Benjamin Cornelius *et al.* v. Margaret Smith *et al.* Deeds of bargain and sale originated under the statute of uses, and are used to make family settlements in which express trusts may be created in favor of beneficiaries, the same as executory devises, and must demand th same liberal construction, &c.

2. **Partition—Equitable Title.**—A suit for partition of equitable real estate may be maintained by an action in equity.

Description of Town-Site—Mistake.—John G. Wood city attorney, *ex rel.* J. S. Rogers *et al.* v. Trustees of the Town of Cameron. A town built up and located on section 23, but described in the act of incorporation as on section 24: *Held*, the section is a false particular which may be stricken out and leave enough to demonstrate the locality. The town itself by name, as laid out on the ground, sufficiently demonstrates its locality, and is better known than the numbers of the United States survey.

Corporate Existence—Failure to Record Articles—Individual Liability of Directors.—Peyton J. Hunt v. Lucius Salisbury. Suit on a note given as directors of a corporation. The corporation organized under articles of association duly signed, acknowledged and recorded, but did not file the same with the secretary of state until after suit brought. *Held*, that the corporation had no legal existence to transact business until the articles of incorporation were filed with the secretary of state, and that defendants are liable *individually* on the note.

Note executed by one Partner and endorsed by the other to raise Money—Remedy of Endorser after Paying.—Benson Bond v. Luke W. Burris. Where one partner as maker, and another as endorser, makes a note to raise money to pay the debt of the firm, the endorser cannot take up the note and sue on it at law, and recover against his co-partner. It constitutes a debt in his hands against the firm, and must come in as such in a final settlement.

Tender on Terms.—Geo. W. Adams & J. M. Scott v. Mary A. Helm, Executrix, etc. A debtor has the right to prescribe the terms of a tender, and the creditor may accept or refuse. If he accept it, he must take the tender on the terms prescribed by the creditor.

Estoppel in Pais.—Wm. A. Donaldson v. Henry Hibner. Estoppels in pais act on *existing*, and not on subsequently acquired rights. If a party has no title at the time, he may afterwards acquire the title, and such subsequently acquired title will not pass by an alleged former estoppel.

Railway Negligence—Killing Cattle.—John Crafton v. H. & St. Jo. R. R. Co. Salt spilled on a railroad track in unloading cars, naturally attracts cattle, and when plaintiff's cow was so attracted and killed, this is evidence conducing to prove negligence on part of railroad company. It was not the plaintiff's, but the defendant's business to remove such salt, and no contributory negligence in plaintiff to let his cow run out, as he might presume the servants of defendant would do their duty.

1. **Sheriff's Deed—Amendment of.**—John H. Ware v. Wm. Johnson. A sheriff acts by authority of the statute in sales of land, and no court except the court under whose process he acts can supervise and make him correct his deed.

2. **Execution of Power—Equity Jurisdiction.**—A court of equity cannot aid the imperfect execution of a statutory power.

3. **Color of Title—Possession—Enclosures.**—A party holding color of title to a tract of land may take possession in good faith without making actual enclosures, but not so with a mere trespasser without color of title.

1. **Corporations—Suits Against—Denial of Corporate Existence—Appearance.**—Thomas Seaton v. The C. R. I. & P. R. R. Co. The appearance of a corporation as defendant, dispenses with proof of its corporate existence, and is conclusive evidence of its corporate existence for the purposes of such case.

2. **Suits for Penalties—Double Damages—Who must Sue.**—Double damages, though punitive in their nature, are not strictly penalties which belong to the state, referred to in sec. 42, 1 Wag. Stat. 310; but the parties injured are the real parties in interest under sec. 43; and they, and not the state, must sue.

1. **Corporation—Liability for Malicious Prosecution by Agent or Servant.**—Thomas S. Gillette v. The Mo. V. R. R. Co. A railroad company is liable to an action for malicious prosecution by an agent or servant when such alleged malicious prosecution is done by such agent or servant in the course of his employment, and within the scope and power of his duties, and exemplary damages may be recovered for such acts.

2. ———. ———. **What necessary to fix Liability.**—But in order to hold the company liable, the act complained of must not only come within the scope of the authority conferred upon such agent or servant, but it must appear that the act done was done in the performance of business, coming within the purview of the objects and purposes for which the corporation was organized, and the powers conferred by its charter.

3. ———. ———. ———. **Prosecution of Crimes.**—The prosecution of crimes against the state does not come within the scope of the powers conferred upon a railroad company by its charter; and therefore its officers and agents cannot bind the stockholders of any such company in their corporate capacity by such proceedings.

Charles Sumner.

This distinguished statesman died on the 11th instant, at his residence in Washington, having on the previous day occupied his seat in the senate. We do not propose entering upon an extended notice of his life. He has been so long an active combatant in the arena of national politics that his character as a lawyer had well nigh passed out of the professional mind. He was one of that numerous class of Americans whose lives have afforded illustrations of how eminently a sedulous study of the law is calculated to qualify a person for success in public life. In his earlier years Mr. SUMNER cultivated the law as a science—pursued it, not as a means of gaining a livelihood, but rather as an intellectual pursuit. He was called to the bar in 1834, at the age of twenty-three, and commenced the practice of the law in Boston. Although business rapidly sought him, he refused several advantageous offers of partnership. He was the pupil and friend of Mr. Justice STORY, who appointed him reporter of his circuit, in which capacity he published three volumes, known as Sumner's Reports. During the absence of Justice STORY, Mr. SUMNER filled his place as professor of law in Harvard University. So high an opinion did the former entertain of Mr. SUMNER'S ability and attainments as a lawyer, that he expressed a desire to see him occupy a seat on the Supreme Bench of the United States. Upon the death of Justice STORY, Chancellor KENT expressed a strong preference for Mr. SUMNER as the most suitable person to fill the chair of Dane Professor of Law in Harvard University, left vacant by that great jurist; but Mr. SUMNER instructed his friends not to press his appointment, and it was not made. He spent three years in Europe, during which time he was the recipient of distinguished honors, such as have seldom been bestowed upon young men, much less Americans, at the hands of the judges of Westminster Hall, and the most eminent jurists of England and the continent, including Mittermaier and Savigny. During this time his name appears as one of the editors of the American Jurist. This was one of the ablest law periodicals ever published in this country. Returning to America, he edited, with elaborate notes, in connection with J. C. Perkins, Esq., the Reports of the younger Vesey, in twenty volumes. This was his last contribution to the literature of the law.

In 1845 he engaged actively in politics, and in 1850 entered the senate as the successor of Daniel Webster. Since that time his public life has been part of the history of the country. One of the last acts of his life recalled his early and steadfast love of jurisprudence, which the contests of a quarter of a century of political life had in no degree diminished. We allude to the occasion when the subject of the confirmation of Chief Justice WAITE came before the senate in executive session. On that occasion Mr. SUMNER made a speech in which he reviewed in his most masterly style of eloquence the judicial career of STORY, MARSHALL, and others of the illustrious names which have adorned that great court, and whose labors have contributed in a lasting degree to the peace and honor of their country. At the end of his speech, the nomination of Mr. WAITE as chief justice was unanimously confirmed.

While many American statesmen have been found wanting towards the close of their career—while some have outlived their usefulness and even their fame—it was the extreme felicity of Mr. SUMNER to live to see the animosities which had been engendered by the fierce contests in which he had been engaged in a great measure pass away, and to see the charity and rectitude of his motives universally recognized by his countrymen.

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Removal of Causes from State to Federal Court—Amount in Dispute.

We learn through the press that an important decision on this subject was recently rendered by United States Circuit Judge DRUMMOND, in Wisconsin, in the case of Zinkeisen & Co. v. Hufschmidt. The action was brought in the state court to recover the value of a quantity of wheat. Upon the defendant's application, an order of removal to the circuit court of the United States was granted by Judge SMALL, of the state court. At the time he made the order, no pleading or writ was on file showing the amount in dispute except the petition of the defendant, asking for the removal. After the order was granted, Zinkeisen & Co. filed a complaint in the state court, alleging the cause of action and claiming damages in a stated sum. In that complaint they obtained an order from Judge SMALL to show cause why the order made by him, removing the cause into the federal court, should not be vacated and set aside. On hearing the order to show cause, Judge SMALL refused to vacate the order of removal. On the first day of the session of the United States circuit court after the order of removal, Hufschmidt brought into the court a certified copy of the papers filed in the state court, including the complaint filed after the order of removal was granted, and asked that said papers might be filed and the cause docketed in that court. The motion was argued before one of the judges of the United States district court, who denied it, holding that the complaint filed after the order of removal was conclusive as to the amount in dispute. A motion was then made before Judge DRUMMOND to vacate and set aside the order made by the district judge, and that the cause be docketed, and after argument the order was set aside and the plaintiffs required to file a declaration. This settles a question of practice which has perplexed the profession in the state, and also settles that when the plaintiff chooses to commence suit by summons, and not file either his summons or complaint, the defendant, in a proper case for removal, may enter an appearance and show by petition that a suit has been commenced, and the amount claimed exceeds $500, and tender a proper bond, and thus secure a removal of his cause into a federal court; and when he has done this, it is not in the power of the plaintiff to destroy that right by filing a complaint in the state court reducing his damages below $500, and that, when a cause is once properly in the federal court, the plaintiff cannot then file a declaration laying his damages at less than $500, and cut off the jurisdiction. In other words, when the jurisdiction of the federal court has once attached, it cannot be taken away by any act of the plaintiff.

Book Notices.

A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION. By Thomas M. Cooley, LL.D., one of the Justices of the Supreme Court of Michigan, and Jay Professor of Law in the University of Michigan. Third edition, with considerable additions, giving the results of recent cases. Boston: Little, Brown & Co. 1874.

We are glad to welcome a new edition of Judge COOLEY'S great work, not so much for the additional matter it contains, as for the renewed proof it affords of its almost unprecedented popularity. Its extraordinary success does not more than equal its intrinsic merits. We have had occasion thoroughly to examine it in every part, and have never failed to find convincing proofs of the careful research and great learning it embodies. Our judgment is that a work of equal value on this subject could have been produced by but few lawyers in the country. Judge COOLEY'S previous labors, studies, long judicial experience, ripe learning and sound judgment peculiarly fitted him to write upon American Constitutional Law; and his treatise from the first took rank among the productions of KENT, STORY, REDFIELD and PARSONS. This is no light praise, we know; for the works of these authors upon jurisprudence are certainly unsurpassed, and we may be pardoned if we add, in our judgment, unequalled by like productions in any country in the world. Foreigners, it is well known, have often disparaged the *general* literature of America, but have been compelled to concede the merits of its works upon the law. Even the liberal and enlightened Mr. Buckle says that "in no other country are there so few men of great learning, and so few men of great ignorance; * * and *with the single exception of jurisprudence* scarcely anything has been done for those vast subjects on which the Germans are incessantly laboring." (Hist. of Civilization, vol. 1, ch. 5.) The causes of this exception he endeavors to explain, but notices in passing, that Burke was early struck by the partiality of the Americans for works on law, and with the fact that even then nearly as many copies of Blackstone's Commentaries were sold in America as in England. Mr. Buckle adds: "Of this state of society, the great works of Kent and Story were, at a later period, the natural result."

The lawyers of America have done their full share in making the American name known and honored abroad, and it has so happened that this has been more effectually done by their general treatises than by the reported decisions of the courts. Of late years we frequently find the English judges citing, and with expressions of respect, the works of Kent, Story, Parsons, Greenleaf, etc., but we more rarely see any special reference to the judgments of our courts. Story is better known abroad than Marshall, and Parsons than Chief Justice Shaw. On the other hand, American lawyers and courts have from the first drawn freely from the fountains of English law. The productions of English lawyers and the judgments of English judges have always been familiar to the American bar, but the reverse is not so generally the case. This gives to an American lawyer, in the production of treatises on the law, great advantages over his English brother, and accounts, in part, for the number and excellent character of our works on jurisprudence.

In a familiar passage Macaulay portrays in eloquent words the extent of the influence of Greece upon the world, and declares that "Her empire is imperishable, * * and that her influence and glory will survive, fresh in eternal youth, exempt from mutability and decay, immortal as the intellectual principle from which they derived their origin and over which they exercise their control." Scarcely less vast, and probably not less enduring, are the triumphs of English law. It has followed the English flag into every country where English energy and enterprise have established themselves. More than all, it followed our ancestors here and has spread over the civilized portions of the American continent. If the traveller from the Thames visits the Supreme Court at Washington, or a court sitting on the banks of the Mississippi, or thousands of miles beyond on the shores of the Pacific, he will find lawyers citing and judges relying upon the decisions of the learned judges who have presided or are now presiding in Westminster Hall.

In the preparation of his work Judge Cooley has availed himself of whatever of English law or English history could contribute to it, and in addition has had the benefit of the decisions of the federal and state courts of his own country. The result is that he has produced a work distinguished for thoroughness of research, for learning, for original discussions, and for sound, temperate and conservative views—a work which has justly made him famous, and which is an honor to American legal literature.

Such is our estimate of its great value, and it gives us sincere pleasure publicly to express it. The general plan and character of the work are so well known that we do not feel called upon to notice in detail the subjects of which it treats. The second edition was published in 1871, and the third differs from it only in referring with adequate fullness to the decisions since rendered, which are quite numerous, bearing upon the topics discussed.

DIGEST OF FIRE INSURANCE DECISIONS IN THE COURTS OF GREAT BRITAIN AND NORTH AMERICA. By H. A. Littleton and J. S. Blatchley. 3d edition, revised and enlarged by Clement Bates, of the Cincinnati Bar. New York: Baker, Voorhis & Co. 1873. pp. 795.

This is the third edition of this excellent work. The favor with which it has been received by the profession, affords another example that it never fails to appreciate a work on which has been expended sufficient skillful labor to make it worthy of its approving judgment. We have been familiar with this Digest since its first appearance, and have had constant occasion to resort to it as an aid in investigating questions connected with the law of fire insurance. The credit of its production belongs to the state of Iowa. Mr. Littleton was practically acquainted with insurance, and Mr. Blatchley was one of the most industrious and accomplished lawyers in the State. These two performed the greater part of the labor of preparing the work, but they were assisted by John L. Hawey, Esq., whose death, under distressing circumstances, soon after the appearance of the first edition, was deeply deplored by his friends and by the bar of the state, who felt a just pride in his abilities and promise.

The work was distinctly limited to fire insurance, and wisely so, and

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embraced a digest of *all the decisions* in Great Britain and America (including Canada), from the earliest times down to the date of publication. It was, throughout, an original work—prepared from an actual examination of over 2,500 volumes, and gave the substance of the points decided of 930 cases, in 1,525 sections. A useful feature was that it gave the date of each decision. This is especially important in the study of a branch of the law which is constantly developing, and whose progress has been attended with so many judicial conflicts as the law of insurance. The second edition appeared in 1868, under the editorial charge of Stephen G. Clarke, Esq., who, by bringing it down to that date, added to the original work an abstract of 316 cases and 691 additional sections. This edition by Mr. Bates includes not only all the original work, but also the sections added by Mr. Clarke, and an addition of 362 cases, coming down to June, 1873. The work of the present editor has been carefully performed.

Whoever has this Digest and the recent elementary work of Mr. May, heretofore noticed (1 CENT. LAW JOUR. p. 48), has the means of ascertaining, with the least possible trouble, the existing state of the law on the subject of fire policies, or, at least, the sources where it may be found.

THE AMERICAN LAW TIMES AND REPORTS. NEW SERIES. Monthly. New York: Hurd & Houghton. Cambridge: The Riverside Press. Edited by Rowland Cox, Esq., of Washington, D. C.

The new series of this publication, beginning with 1874, embraces two features: a digest of decisions published *in extenso* in the various American legal periodicals, and reports of leading cases on important topics of the law. The cases digested and reported are in separate series, so that the reports can be bound in a separate volume at the end of the year. The editor makes his selections with much discrimination; and for typographical beauty this publication is unsurpassed by anything of the kind, whether issued in this country or in England.

THE NASHVILLE (Tenn.) COMMERCIAL REPORTER, weekly, $2 00 per annum, has adopted the feature of a "law department," in which is published the decisions of the supreme court of Tennessee long in advance of the regular reports. The "law department" is under the editorial charge of Maj. Josiah R. Hubbard, an accomplished lawyer, by whom the cases are reported, with carefully prepared head-notes and appropriate editorial comments. This feature renders the Commercial Reporter well deserving of the patronage of the legal profession in Tennessee.

Notes and Queries.

A correspondent asks whether "the chairman of the board of trustees" of towns incorporated under the general law of Missouri (2 Wag. Mo. Stat. 1318, § 16), is a *judicial officer*, and as such authorized to hear and determine causes arising under the town ordinances.

ANSWER.—The statute clothes the chairman of the board of trustees with power to hear and determine all civil actions for fines and penalties accruing to the town corporation, subject to the right of appeal to the circuit court; gives him power to issue execution, and upon a return of no property, to imprison the defendant.

In view of the terms of the statute, we cannot understand what notion our correspondent had in his head that prompted the question he asks. If a person who is vested with power to sit as a justice in the trial of causes, to render judgment, to issue execution and to imprison the defendant, is not a judicial officer, we are at a loss to know what kind of an officer he is. If, as our correspondent suggests, the question was raised in the case of O'Connor v. The Town of Memphis, supreme court of Missouri, October term, 1873, we presume the counsel for the plaintiff in error had the discretion not to press it before the court. It is not noticed in the opinion.

United States Supreme Court — Decisions Last Week.

[Compiled from the New York Herald.]

Private Corporations—Directors have no Power to Increase Capital Stock.—No 577. The Chicago City Railroad Company v. Ailtoner. Appeal from the circuit court of the northern district of Illinois. The directors of the company, without consultation or calling a meeting of the stockholders, resolved to increase the capital stock of the company from $1,250,000 to $1,500,000. The appellee, a stockholder, objected to the proceeding and filed his bill to prevent the increase, insisting that it could not be lawfully done without the concurrence of the stockholders. The court below sustained the position and restrained the act. That decree is here affirmed on the ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter canno be made by the directors alone, unless expressly authorized thereto. Mr. Justice STRONG delivered the opinion.

Taking Private Property for Public Use—Writ of Error.—No. 555. Baltimore and Potomac Railroad Company v. Trustees of Sixth Presbyterian Church. Error to the supreme court of the District of Columbia. The church recovered a judgment against the company for $11,500 damages for running the road through Sixth street in front of the church edifice. The company obtained a writ of error, and a motion was made to dismiss it on the ground that the law under which the assessment of damages was made by the jury in the case was a Maryland statute, which, by the construction of the Maryland courts, does not allow an appeal or writ of error. Mr. Justice MILLER delivered the opinion of the court denying the motion, holding that the writ lies in such a case, notwithstanding the objection urged. The early decisions of this court, it is said, held that the right to the writ exists by virtue of the appellate power of this court as defined in the act of 1801, creating the circuit court of the district, and the court is governed by that act.

Insolvency—Marshalling of Assets — Charleston Fire Loan Bonds.—No. 153. Baring Bros. v. Dabney Morgan & Co. Error to the supreme court of South Carolina. This case involved the distribution of the assets of the bank of the state of South Carolina, on its own account and as the financial agent of the state, now in the hands of a receiver, and particularly the question of the title of the fire loan bondholders and the fire loan stockholders—bonds and stock negotiated by the bank, under the authority of the state, for the rebuilding of Charleston after the fire of 1838. The bonds were taken up in Europe and the stock in the United States. The former had the guarantee of the bank, and the latter did not. The decision is that the fire loan bondholders are on an equal footing with the other creditors of the bank, and that the fire loan stockholders are not creditors of the bank at all, and not entitled to any participation in the fund. The assets are directed to be distributed among the creditors of the bank in proportion to the amount of claims, reducing those arising during the war to their values in national currency. This is an affirmation of the judgment of the supreme court of the state. Mr. Justice BRADLEY delivered the opinion. Mr. Justice STRONG dissented.

Construction of Will.—No. 200. Croply v. Cooper. Appeal from the supreme court of the District of Columbia. Wm. Cooper left a will containing the following clause: "To my daughter, Elizabeth Croply, at her mother's death, I give and bequeath the rent of my house on Pennsylvania avenue in the city of Washington, for and during her life, and at her death it is my will that the said house be sold and the avails therefrom become the property of her children, or child, when he, she or they have arrived at the age of twenty-one years, the interest in the meantime to be applied toward their maintenance." The daughter had one child at the death of the testator, who lived to be twenty-one years of age, who died intestate and unmarried, in the lifetime of his mother. The mother, Elizabeth Croply, now claims the property, under the clause of the will quoted. The court below sustained a demurrer, holding that the devise over to the children or child of Elizabeth Croply was contingent upon its, or their, surviving the mother, and, also, attaining the age of twenty-one years. That decree is here reversed, where it is held, in substance, that the testator vested the residuum in the child or children of Elizabeth Croply, and there left it without further disposition to now go to the mother Mr. Justice SWAYNE delivered the opinion.

Foreclosure of Mortgage—Defence of Fraud—Rights of Bona Fide Holder.—No. 184. Sawyer v. Pickett *et al.* Appeal from the circuit court or the northern district of Illinois. This was the foreclosure of a mortgage given by the appellees to the Fox River Valley Railroad Company to secure a subscription note, and by the company assigned to the appellant. The defence was that the note and mortgage were obtained by fraud of the company practiced to induce property owners in the locality of the appellee to subscribe to its stock. The court below sustained the defence and dismissed the bill. That decree is here reversed, the court holding that the defence is not satisfactorily proven, and that, as against the appellant, a *bona fide* holder, without notice, it should not be sustained. Mr. Justice HUNT delivered the opinion.

Admiralty—Collision—Negligence and Fault of Libellant.—No. 210. Schooner Mary H. Banks v. Steamer Falcon. Appeal from the circuit court for the district of Maryland. This was the reversal of a decree dismissing the libel of the schooner in a case of collision on the Chesapeake Bay in July, 1867, the principle affirmed being that it was the duty of the steamer to see the schooner as soon as she was to be discovered, watch her progress and direction, observe the general situation, and thus keep out of her way, having

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at command all the means to do so--ample sea room, calm weather and water, abundant light, and no other vessel in proximity on either side. It is also said the steamer was grossly at fault in approaching too near the schooner and at too high a rate of speed, which, as asserted, was the real cause of the disaster. Mr. Justice SWAYNE delivered the opinion.

Claims against Government—Transportation of Stores—Right to Employ other Contractors.—No. 63. Caldwell v. United States. Appeal from the court of claims. This was an action on a contract for the transportation of military stores and supplies in the west. The government maintained that there was no covenant to employ Caldwell on the route, to the exclusion of other persons or means, but the court of claims gave judgment for the claimant for a portion of the amount alleged to be due. The judgment is here reversed and the defence of the government sustained. Mr. Justice HUNT delivered the opinion.

Construction of Will—Limitation over.—No. 164. Clarke *et al.* v. Johnson *et al.*, executors. Appeal from the circuit court for the southern district of New York. The appellants sought to recover of the defendants as executors of one Boorman, who was last surviving executor of their great-grandfather, J. R. Smith, the present value of certain lands of which he died seized. The complainants were children of the son of a daughter of the testator, their grandfather dying before their grandmother. A codicil to the will provided for the children of a daughter whose husband should survive her, but not for the children of a daughter who should survive her husband. Hence it was held below and is affirmed here that the limitation over to the grandchildren provided by the codicil does not inure to the benefit of the complainants. Mr. Justice MILLER delivered the opinion.

Land Law—Conveyance of Ancestor's Title.—No. 199. Zautzinger v. Gunton. Appeal from the supreme court of the District of Columbia. This was the ffirmance of a decree of the supreme court of the District determining that certain lands conveyed by the parents of the wife of Zautzinger to Gunton terminated their interest in the property and vested it in Gunton and the Bank of Washington, of which he is president, and concludes the complainants as heirs. Mr. Justice MILLER delivered the opinion.

Pleading in Federal Court—Allegation of Citizenship.—No. 211. Morgan ex S. N. Gay. Error to the circuit court of Louisiana. The testator was charged as the drawee and accepter of an inland bill of exchange of which one Goodrich was the drawer, and with being the drawer of another of which Pilcher and Goodrich were the drawees. The plaintiff did not allege that the payee and first endorser was a citizen of a state other than Louisiana, only averring that he was a citizen of Louisville, Ky. This allegation is deemed insufficient to give the court jurisdiction, and the judgment is reversed and the cause remanded, that amendments may be made to the pleadings showing the citizenship of the endorsers of the bills, and whether such as to give jurisdiction. Mr. Justice STRONG delivered the opinion.

Action on Foreign Judgment—Defendant may show that he was not served with Process in Original Suit.—No. 477. Knowles v. Gaslight Company. Error to the circuit court for the district of Minnesota. This was an action on a judgment by the Logansport (Ind.) Gaslight Company on a judgment recovered in Indiana against Knowles. The plea was that the Indiana court did not acquire jurisdiction by personal service on Knowles. The company relied on the sufficiency of the judgment record to show that the court did acquire jurisdiction, and the court below held the record to be conclusive of the question. The judgment was for the company. This court reversed the decision, applying the doctrine laid down in Thompson v. Whitney, the opinion in which was read just in advance of the one in this case, that Knowles was entitled to show that he was not served with process in the case in which the judgment was entered, and that the court did not, therefore, acquire jurisdiction therein. Mr. Justice BRADLEY delivered the opinion.

Infringement of Patent—Decision upon the Facts.—No. 181. Klein v. Russell. Error to the circuit court for the northern district of New York. This was an action to recover for an alleged infringement of a patent for improvement in the process of preparing bark-tanned sheep and lamb skins for gloves, by the agency of "fat liquor," an article produced by the scouring of deerskins after tanning in oil. The judgment below was for the patentee, the verdict having found the fact of infringement, and it is sustained here. Mr. Justice SWAYNE delivered the opinion.

Infringement of Patent.—No. 87. Mitchell v. Tilghman. Appeal from the circuit court for the southern district of New York. In this case the appellee recovered in the court below for the infringement of his patent for a new process in the use of fat acids in the manufactures to which they are adapted. The decree is here reversed, the court sustaining the theory of the defence that there was no infringement of the patent in the process used by the defendant. The court say that differences between the two processes so great as that exhibited in the record relieve the case, in their judgment, from all doubt, and warrant the conclusion that the process under which the respondent works is substantially different from that of the complainant. Mr. Justice CLIFFORD delivered the opinion. Dissenting, Justices SWAYNE, STRONG and BRADLEY; not sitting, Mr. Justice DAVIS.

Bankruptcy—Fraudulent Preference.—No. 196. Cook *et al.* v. Tullis. Appeal from the circuit court for the southern district of Ohio. In this case Cook and others are the assignees in bankruptcy of one Homans, an insolvent, and as such claimed to hold a demand note for $7,000, which before his failure he had deposited in the place of certain bonds and securities which Tullis had left with him for safe-keeping, using the securities for his own purposes. This was done without the knowledge of Tullis, and about a month before the failure. The note maturing, Homans took measures for its collection On the day of the suspension, and nearly a month before the petition was filed, he notified his attorney that the note belonged to Tullis. Under these circumstances the court below found that the note was the property of Tullis, and that the transfer was not a proceeding intended to give him the preference over other creditors contrary to the statute. That decision is affirmed here. Mr. Justice FIELD delivered the opinion. Mr. Justice MILLER dissenting.

Affirmance by Divided Court.—No. 194. Clinkenbeard *et al.* v. The United States. Error to the circuit court for the southern district of Ohio. The questions involved are not stated. Mr. Justice CLIFFORD announced the affirmance of the judgment in this case by a divided court.

Appeal--Final Decree.—In the case of Governor Kellogg, of Louisiana, v. H. C. Warmoth, in the Louisiana circuit, the court was petitioned to allow an appeal to the Supreme Court of the United States, but the motion has been refused on the ground that the record does not show a final decree.

Parties in Equity—Joinder of Complainants.—In the case of The City of Davenport *et al.* v. Darks, the latter sued in the circuit court for Iowa on behalf of himself and others as stockholders in the Chicago, Rock Island and Pacific Railroad Company, to restrain the city from enforcing a tax for general revenue against the company. A demurrer insisted that the company should have been joined in the action; that the complainant had a complete remedy at law, and that the tax was a valid one upon the property of the company. The court overruled the demurrer and enjoined the tax. Without passing upon the other questions, it is here held that the company should have been joined, and as it was not, the demurrer should have been sustained. The decree was reversed. Mr. Justice DAVIS delivered the opinion.

Public Lands—Entry before Proclamation of Sale.—No. 205. Eldred v. Sexton. Error to the supreme court of Wisconsin. This was a contest concerning the title to certain lands in Wisconsin. It is here held that the plaintiff's entries were invalid, and rightfully cancelled because they were made before the lands had been proclaimed for sale at the price fixed by law, and that as the entries of the defendant were made after the lands were properly put into the market they were valid. Judgment affirmed. Mr. Justice DAVIS delivered the opinion.

Demurrer Overruled.—No. 8. Original. State of Florida v. Anderson. Demurrer overruled.

Legal News and Notes.

—CASSIUS G. FOSTER has been confirmed United States district judge for the district of Kansas.

—MESSRS. TAVEL, EASTMAN & HOWELL, of Nashville, have just issued a "Criminal Code and Digest of Criminal Cases decided by the Supreme Court of Tennessee," compiled by Hon. James M. Quarles, of Clarksville. Gen. Quarles is one of the most accomplished lawyers of Tennessee.

—WM. L. GROSS, Esq., proposes to the Illinois legislature to furnish the new revision of the statutes of that state at $2 per copy. If this proposition is accepted, Illinois will have reached the golden age of cheap statutes. So much for competition.

—THERE appears to be no definite prospect of the passage of the bankrupt bill as it recently came from the senate. It is stated that a majority of the house judiciary committee adhere to their first decision in favor of a total repeal, and will not yield their concurrence to the bill which has passed the senate. They are, however, going through the entire law, scanning every sentence, and will make such thorough work of it that a bill may finally be produced which will be satisfactory to both houses. The involuntary bankruptcy clause will doubtless be repealed, but if the house judiciary committee utterly refuse to change their views, no bankrupt law is likely to pass this session.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, MARCH 26, 1874.

SUBSCRIPTION: $3 PER ANNUM, in Advance

Liability of Assignee in Bankruptcy to be Sued in the State Courts.

The bankrupt act has given rise to a multitude of vexed questions growing out of conflicts of jurisdiction between the state and federal courts with reference to the possession of the property of insolvent persons, or property seized as belonging to insolvents; and these are continually presenting themselves in new shapes. We are indebted to our correspondent in Boston, Henry N. Sheldon, Ksq., for the following memorandum of the case of Stephen W. Leighton v. J. A. Harwood *et al.*, recently determined in the supreme judicial court of Massachusetts, in which it is determined that an assignee in bankruptcy, appointed by the federal bankrupt court, is liable to suit in a state court for the tortious taking of property alleged to belong to the bankrupt's estate:

This was an action of replevin. The defendants were assignees in bankruptcy of C. G. Foss, and they seized the replevined property as belonging to the bankrupt's estate. It was proved or admitted at the trial that the defendants took possession of the property by virtue of their assignment in good faith, with reasonable cause to believe it was part of the bankrupt's estate. The defendants contended, first, that they were officers of the federal court and their custody was the custody of the court; that a state court had no jurisdiction and could not take the property from their custody; and, secondly, that under section 14 of the bankrupt act, they were entitled to twenty days' notice before the action could be brought. At the trial before a jury these positions were both overruled by the presiding judge, and a verdict was taken for the plaintiff. The defendant took exceptions which the supreme court has now overruled. The court decide that the assignment is not a precept, and it gave the assignees no color of authority to take property of strangers; that the plaintiff's right of action was not affected by section 14 of the bankrupt act; that the state court has jurisdiction of the action; that the cases relied on by the defendants were mostly cases where property in the hands of a marshal of the United States had been interfered with by a process from the state courts; that his office was different from that of an assignee in bankruptcy and his custody of attached property was of a different character; that the doctrine of these cases should not be extended by analogy; that it is not material that the defendant acted in good faith, and that the bankrupt act did not purport to exempt any person from an action in the state court for a tortious taking of the property of a stranger.

Should Defendants in Criminal Cases be Permitted to Testify?

The recent case of Edward Lange, tried in the United States circuit court at Brooklyn, before Judge BENEDICT, on a charge of stealing government mail bags, calls to mind in a forcible manner the propriety of changing the common law rule of evidence, which prevents the defendant in a criminal prosecution from testifying in his own behalf; and as there is now a bill before congress changing this rule so as to admit such testimony in prosecutions in the federal courts, including courts martial and courts of inquiry, a few observations on the subject may not be inappropriate.

We shall not advert particularly to the facts of the Lange case, further than to say that Mr. Lange was proprietor of an extensive printing establishment, and a gentleman of upright Christian character. The prosecution was commenced at the instance of his discharged coachman, who evidently smarted for revenge against him. This fellow was of course permitted to testify against him; but when Mr. Lange offered to testify and explain the possession of the mail bags and reconcile it with his innocence, the district attorney objected, and he was refused permission to do so. This ruling the Judge was obliged, under the law, to make, although the defendant's testimony would have been admitted in the state courts in New York. (United States v. Hawthorne, 1 Dillon C. C. 422.)

Is this rule of law right? Does it embody the common justice which every citizen has a right to expect in the courts of his country? We cannot avoid expressing a strong conviction that these questions must be answered in the negative. The argument urged in support of the common law rule is that the *interest* of the prisoner in the result of the prosecution is so strong, and his temptation to commit perjury therefore so great, that his testimony, if admitted, will be of no value in elucidating the truth. It is believed that this reason, on examination, will be found to be of no substantial force. We constantly receive and act upon the testimony of interested witnesses in all the most momentous affairs of life; and what reason can be adduced for holding that a mode of enquiry which is approved of as advantageous for the ascertainment of truth everywhere else, should be dangerous when applied to investigations in a court of justice?

Again, the existing rule of the common law produces the most absurd inequalities, not to say the grossest and most palpable injustice. Thus, the defendant is prohibited from testifying on account of his *interest* in the result of the prosecution, while at the same time the public prosecutor, who is likewise interested, and sometimes in an equal degree with the defendant, is heard without objection.

The law indemnifies the latter against the payment of costs unless the prosecution is adjudged frivolous or malicious; and in the latter event, he is liable to pay damages in a civil action. In some cases he is an *informer* who gets a moiety of the fine recovered. It is true that so far as the federal courts are concerned, it has been held by Mr. Justice MILLER that the claimant of property seized for a violation of the internal revenue laws is made by the act of July 2, 1864, a competent witness in his own behalf. Case of 10,000 cigars, 1 Woolw. 123. But cases are no doubt of frequent occurrence, both in the federal and in most of the state courts, where the public prosecutor is permitted to testify although under the impulse of a hope of a large pecuniary reward which will accrue to him in the event of conviction; while the defendant, however irreproachable his previous character may have been, is not allowed to be heard;—an argument that the public is

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more interested in the conviction of crime than in the acquittal of accused innocence.

Again, it is now a rule of evidence in the federal courts and in most of the state courts, that parties in *civil suits* shall not be prohibited from testifying in their own behalf. Shall a privilege which is allowed a man for the protection of his property be denied for the protection of his life and liberty?

A volume might be composed of cases illustrating the impolicy and hardship of this exclusionary rule of evidence. Let us take two cases, somewhat similar in their circumstances, one occurring in England, the other in this country. In Rex v. Morrison, 8 Car. & P. 21, a man had been shot, and an officer searching for the person supposed to have done the shooting, came to the defendant and said he was searching for a person named Morrison who was reported to have shot a man. The defendant replied, "*unfortunately*, I am the man." The committing magistrate, who held a preliminary examination of the case, in which the prisoner made a statement of the facts of the transaction, released him on his own recognizance; and afterwards the grand jury ignored a bill of indictment for manslaughter. But he was neverthless tried upon the verdict of the coroner's inquisition, charging him with manslaughter. On the trial he, of course, was not permitted to testify, and his statement made before the committing magistrate, and by him reduced to writing, was not read, because there happened to be no witness present to prove it. The only evidence of guilt adduced against him, then, consisted simply of proof of his admission to the officer that, *unfortunately*, he was the man that shot the deceased; and it was urged in his behalf, that this admission was entirely consistent with the idea that the killing was accidental, and that the jury ought so to find. But the court ruled otherwise. PARK, J., in summing up, said to the jury: "It is argued that no person was present, and therefore it cannot be said that it was not accidental. I do not agree with that view of the case. Because no person was present, is it to be inferred that the killing was accidental, *without any evidence on the part of the prisoner?* I say not. The law of England has said (and I wish to call your attention to this as the rule which has been attempted to be violated) the death of man, homicide, as it is called, if it be shown to have been occasioned by the prisoner, will be *murder* or *manslaughter*, as the circumstances may turn out, unless it be *shown by the prisoner* to have been occasioned by accident." The jury, under these instructions, were obliged to find the prisoner guilty of manslaughter; but, no doubt, conscious that he had been tried on *a part* only of the testimony applicable to his case, strongly recommended him to mercy, and he was sentenced to pay a fine of 40 shillings. Now, the declaration of PARK, J., is unquestionably sound law; but how cruel and absurd is that rule which says that, in such a case, no third person being present, the prisoner shall be adjudged guilty of a felonious homicide unless he show by evidence that it was accidental, when the law at the same time disables him from giving any such evidence.

In the other case, that of Silvus v. The State, 22 Ohio State, 90, the killing took place under similar circumstances. The deceased was stabbed in a vital part, no third person being present. From the imperfect report it would seem that the deceased had no weapon. The defendant was tried upon his own testimony in connection with evidence of the surrounding circumstances, and was found guilty of manslaughter. From the statement of the facts proved, it can scarcely be doubted that the verdict was correct. But what would have been the verdict if his testimony had been excluded? The circumstances showing that he did the killing with a deadly weapon, by a stab in a vital part, the law would have *presumed*—that is to say, the jury would have been obliged to find—that he was guilty of murder in the second degree. (State v. Turner, Wright, Ohio, 20, 28.) In other words, under the Ohio Statute, he was tried upon *all* the evidence of which the case admitted, and the verdict was probably correct; whereas, under the common law rule of evidence he would have been tried on *a part* of the evidence taken in connection with a blind and arbitrary presumption, and the verdict would probably have been wrong.

If other examples are needed to illustrate the injustice and impolicy of the rule which prohibits a person charged with crime from testifying in his own defence, take the common case of a prosecution for receiving stolen goods. The rule in England and in most of the American states is that *recent* possession of the fruits of the larceny is, unexplained, conclusive evidence of guilt *per se*. 2 East P. C. 656; 2 Russ. Cr. 123; 2 Bish. Crim. Proc. §§ 742, 743. The prosecution, then, having shown that the goods were stolen, and that they were soon after found in the defendant's possession, a case against him is made out, and the burden shifts upon him to reconcile that possession with his innocence. Now the defendant is, of all others, the person most likely to be in possession of facts which will enable him to do this, and in many cases he is the only person in possession of such facts. The law says, Show your innocence; but you must not do this yourself; you must find some one else to do it for you, and if you can find no such one, you must suffer the penalty.

Similar cases might be multiplied indefinitely, did space permit. We shall, however, content ourselves with referring to Judge APPLETON'S work on evidence, chapter 7, in which the learned author, with the most searching analysis, picks to pieces, thread by thread, the tissue of fallacies by which the rule of the common law we are here considering is supported, and holds the fragments up to ridicule and scorn.

In several of the states, Massachusetts, New York, Ohio, Kansas and California, defendants in criminal cases are permitted to testify. So they are in Pennsylvania, when the prosecution is for a misdemeanor. It may be added that the tendency of judicial sentiment appears to be in favor of extending this privilege to accused persons. Thus, in Michigan there is a statute permitting the defendant to make a statement not under oath to the jury. It has been ruled by the supreme court of that state that this statement is *evidence* which may go to counterbalance sworn testimony. Durant v. People, 13 Mich. 351, 355; De Foe v. People, 22 Mich. 224, 226; People v. Jones, 24 Mich. 217, 226. See also Gale v. People, 26 Mich. 157. And the same ruling has been made under a similar statute in Florida. Barber v. State, 13 Fla. 675. For the construction of recent statutes permitting defendants to testify in criminal cases, see 1 Whart. Crim. Law, § 782 *a*, 7th edition.

Since writing the foregoing, we learn from the Chicago Legal News, that under the new criminal code which has just

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been adopted by the legislature of Illinois, defendants in criminal cases are allowed to testify. The editor of the Legal News thinks the new measure will tend to convict the guilty and acquit the innocent. T.

Mortgages in Georgia—Mortgages with Power of Sale—Powers Collateral and Powers Coupled with an Interest—Effect of Bankruptcy of Mortgagor, and Jurisdiction of Bankrupt Court.

IN RE DANIEL P. HILL, BENJAMIN G. LOCKETT v. DANIEL P. HILL THE BANKRUPT AND HIS ASSIGNEE, EDWARD F. HOGE.

United States District Court, Northern District of Georgia, January 29, 1874.

Before Hon. JOHN ERSKINE, District Judge.

1. **Powers, Collateral or Coupled with an Interest—Expiration of.**—A collateral power, although irrevocable, expires with the life or bankruptcy of the appointor; otherwise in case of a power coupled with an interest.

2. ——. **Nature of Mortgages in Georgia—Mortgages with Power of Sale.**—In Georgia a mortgage is merely a security for debt, and passes no title, estate or interest to the mortgagee. Therefore a power of sale in a mortgage is not, in Georgia, a power coupled with an interest, but is merely a collateral power.

3. ——. ——. **Execution of Power of Sale—Bankruptcy of Mortgagor.**—It follows that, in Georgia, a power of sale contained in a mortgage cannot be executed after the mortgagor has been adjudged a bankrupt.

4. **Mortgages with Power of Sale—Possession of Mortgagee—Fractions of a Day.**—Courts will regard fractions of a day when it is necessary to ascertain which of two events first happened. Thus, where a power to sell mortgaged premises was made to the mortgagee, and a lease of the mortgaged premises to a third person was made at the same time, which lease was referred to in the power, the court noticed the fact that the lease was executed previously to the power, for the purpose of ascertaining whether the mortgagee had been actually put in possession of the mortgaged premises or not.

5. ——. ——. If a mortgagee acquire possession of real property after the expiration of a lease made by the mortgagor to a third person, and there is no evidence that the property was rented to him by the mortgagor, he will, in Georgia, be a mere tenant at will or at sufferance.

6. ——. **Possession of Mortgagee as Tenant at Sufferance.**—The possession by a mortgagee of the mortgaged premises as tenant at will or at sufferance, is not a possession of such dignity as will, in connection with a power of sale granted to the mortgagee, create a power coupled with an interest.

7. ——. **Execution of Power of Sale where there is a Limit as to Time.**—Where the power granted to a mortgagee to sell the mortgaged premises is limited to a specified time, if the mortgagee fail to execute it within that time, the power is forever gone.

8. ——. **Execution by Mortgagee of Power to Sell—Mortgagee cannot become Purchaser.**—A mortgagee with a power to sell cannot himself become the purchaser, either in severalty, joint tenancy or otherwise. The relations of vendor and vendee cannot thus be united in the same person. Thus, where a mortgage with power of sale was made to an individual, he could not execute the same by selling the mortgaged property to a firm of which he was a member.

9. ——. **Mortgagee with Power to Sell, a Trustee.**—A mortgagee with power to sell is, in Georgia, a trustee for the mortgagor, his heirs, etc., and as such is accountable in equity; and this, although the power may not be regarded as collateral, but as coupled with an interest.

10. ——. ——. **Bankruptcy of Mortgagor—Jurisdiction of Bankrupt Court.**—This relation of trustee is not discharged by the bankruptcy of the mortgagor, but, upon the happening of such event, the trustee can no longer be held to account in a state court. The courts of bankruptcy possess a broad and comprehensive authority, sufficiently extensive to enable them, in such cases, to entertain jurisdiction over the rights of the parties, to take possession of the mortgaged property and administer in accordance with the bankrupt law.

Mr. Ely, for Lockett, the mortgagee and complainant; *Mr. Hoge*, the assignee, *in propria persona*, and *Mr. Culberson* and *Mr. Conley*, for both defendants.

ERSKINE, J.—This suit arises out of a mortgage given by Hill, in January, 1871, to Lockett. The bill states that Hill being indebted to Rust, Johnson & Co. (of which firm Lockett was a member), and in settlement and liquidation thereof, drew his draft on Burt, Johnson & Co., payable to his own order, for $7,451.75, and it was accepted by them and transferred to Lockett; and to secure its payment and in consideration of supplies and money, and to discharge a certain draft in favor of Ketchum & Hartridge, Hill executed the mortgage to Lockett on 1,625 acres of land and certain personal property, and which mortgage contained, among other stipulations, a power to sell the land on non-payment.

Lockett also alleges that he was placed in possession of the property, real and personal, on the 20th of December, 1871, and continued in possession until he conveyed the land under his power, on the 13th of December, 1873, for $4,875, to the firm (of which he was then a member) of Rust, Johnson & Co., and that he is still in possession of the personal property.

He prays an injunction against Hoge, the assignee, to restrain him from selling any of the personal property, or interfering with any of the mortgaged property, real or personal; and asks for a subpœna against both Hill, the *bankrupt*, and Hoge; and the bill prays for "other and further relief."

There is an addendum to the bill—an offer to take the property at a fair valuation to be determined by the court, or to sell the personal property by virtue of his power, and account to the assignee for any surplus; or to surrender the property upon payment of his debt.

The conveyance in mortgage from Hill, the bankrupt, to Lockett, the mortgagee and complainant, was executed on the 16th of January, 1871, by which he conveyed to Lockett a plantation in Dougherty county, in this state, containing sixteen hundred and twenty-five acres, also certain personal property on the land consisting of fourteen mules, all the stock of hogs, cattle, etc., wagons, carts and farming implements, and likewise the crops of corn, cotton and fodder to be raised on the place during the said year 1871; provided, nevertheless, if Hill shall pay on or before the 1st day of October, 1871, a certain draft accepted by one Rust & Son, and all advances so made during the year for provisions, and shall save Lockett harmless on the Ketchum & Hartridge draft, and all costs, expenses and fees, then the deed to be void, else of full force. The mortgage further stipulates that if Hill shall fail to pay the draft accepted by Rust & Son, at the time and in the manner specified, and also the advances for the present year, then Rust & Son or Lockett shall have the right to foreclose said lien or mortgage on the growing crops and other personal property, in accordance with the statutes of this state. As to the real estate, it is further agreed that Lockett shall have the right to foreclose this mortgage upon the same, or to sell said plantation upon the most favorable terms practicable, either at public sale to the highest bidder, or at private sale, and to account to Hill, after paying off said debts, for the balance; and Hill constitutes and appoints Lockett his attorney in fact, ratifying his acts and doings in the premises, provided, nevertheless, that this power of attorney to convey and make titles shall not operate until after the first day of October next, 1871.

On the 20th of December, 1871, Hill and Lockett entered into a written agreement, under seal, reciting that Hill being indebted to Lockett in a large amount, and to secure the debt, as well as for other purposes, he, on the 16th of January, 1871, executed to Lockett a mortgage to certain property, real and personal, and being still indebted to Lockett in the sum of six thousand seven hundred and thirty-three dollars twenty-three cents with interest from the 1st of December, 1871, at the agreed rate of ten per cent. from said 1st of December until paid; and that, by said mortgage, Lockett had the right to sell the land therein conveyed, but the present not being considered a judicious time to make the sale, it is agreed that Lockett shall take possession of said property, real and personal, and shall have the right to rent the plantation and the personal property in terms this day agreed upon between Lockett and one John La Roque, and that the rent shall be applied to the extinguishment of the debt due by Hill to Lockett; and that during the ensuing year (1872) Lockett shall have the right to sell all of the property, both real and personal, mentioned in said mortgage, consisting of the lands mentioned in the mortgage and personal property this day turned over to La Roque, and

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apply the proceeds, firstly, to the balance due on the debt above mentioned in this agreement, and secondly, to the payment of the Ketchum & Hartridge draft (provided this draft has to be paid), and Lockett is appointed attorney in fact for Hill, with full power and authority to act as his attorney in fact and to make all needful conveyances.

On the 24th October, 1873, Hill wrote Lockett that as he was unable to pay him, he might take all the stock, etc., on the land ("all of which is mortgaged to you") at a fair valuation, and credit the same on the debts. There is no evidence that this offer was accepted or rejected. Much was said during the argument as to whether Lockett ever took actual possession of the land and personal property. The evidence read is conflicting. It was, however, agreed by the instrument of December 20, 1871, that Lockett "shall take possession of the said property, real and personal, and shall have the right to rent and hire," etc. By a writing dated December 20, 1871, Lockett rented the "plantation of D. P. Hill," and the personal property thereon, for the year 1872, to La Roque for forty bales of cotton, to be raised on the place and delivered to him. One Blake filed an affidavit stating that he rented the plantation from Lockett for 1873, and paid him the rent, and regarded Lockett as the lawful owner and posssesor of said plantation, and held the same as his tenant, and upon delivering the possession to Lockett, he put one White in possession. But he does not positively state that Lockett was at any time in actual possession of the land, and he makes no mention whatever of the personal property. Mr. Ely, solicitor and counsel for Lockett in this cause, swears that he was present on the plantation of D. P. Hill on the 20th December, 1871, and that in his presence Hill delivered the possession of the plantation to Lockett, and all the personal property thereon. The bankrupt, in his answer, read as an affidavit, denies that he ever, at any time, turned over the possession of the plantation and personal property to Lockett, but simply authorized him to exercise a supervisory control over the same, in order to protect and further defendant's interests in the way of making crops. He also denies that Lockett rented out the property for 1872 or 1873, but, on the contrary, he says that he rented out the plantation, stock, etc., etc., to La Roque for forty bales of cotton for the rent; but intending that Lockett should have the rents and profits, he caused La Roque to execute the contract with Lockett instead of with himself. He further says that Lockett never gave him (Hill) leave to rent the place for 1873 to Blake, as his (Lockett's) agent; but that he himself rented it to L. Blake, without obtaining the consent of any one, except that of Blake; but let Lockett collect and retain the rents due by Blake for 1873.

On the 3d of December, 1873, Hill filed his petition in bankruptcy, and was adjudged a bankrupt by Register Black. On the 9th Lockett was, on petition of the bankrupt, restrained from selling the mules, wagons, etc., enumerated in the mortgage; and Edward F. Hoge was appointed assignee of Hill on the 20th; but on the 13th, intermediate the filing the petition in bankruptcy and the appointment of the assignee, Lockett sold the land, in fee, to Rust, Johnson & Co. (the mortgagee himself being the company), for $4,875, by a warranty deed, executed in the name of Hill, the mortgagor and bankrupt; the deed of conveyance is signed and sealed as follows: "D. P. Hill, [L. s.] by B. G. Lockett, attorney in fact." Hill, in his answer, swears that this land cost him $16,225 before the war. On the 2d of January, 1874, Lockett instituted the present suit, and by consent, the court granted an order restraining the assignee from selling the personal property until argument could be had on the prayer for injunction, etc. Lockett, by counsel, insisted that by virtue of the power of sale inserted in the mortgage of January 16, 1871, and in the power of sale in the agreement of December 20, 1871, and by the power of attorney contained in each of these instruments, appointing him attorney in fact to sell, convey and make all needful conveyances, and by the authority given him in the latter instrument to take possession of all the mortgaged property, real and personal, he had a power coupled with an interest, and therefore a perfect right to convey the fee as he had done, and authority to make an absolute sale of the personal property notwithstanding Hill was then a declared bankrupt; and that no part of this property, real or personal, is assets of the bankrupt's estate.

On the part of the assignee it was contended that all said real and personal property is assets of Hill's estate, and that it passed to him by deed of assignment for distribution among the creditors of the bankrupt, under the bankrupt act of 1867 and its amendments.

And for the bankrupt it was urged that he, being the head of a family, is under the first section of the seventh article of the state constitution of 1868, and the state law of the same year (Code, section 2002), entitled to a homestead in said mortgaged land to the value of $2,000 in specie, and exemption in the personal property to the value of $1,000 in specie.

It is a rule too well settled to need the citation of authorities, that a collateral power, although in many instances irrevocable by the principal, expires with his life or bankruptcy, but it is otherwise when the authority or power is coupled with an interest; for in the latter case it is not extinguished by the death or bankruptcy of the appointor; it survives and may, as a general rule, be executed in the name of the person in whom it was placed. Venerable authority on questions of this nature says that if a person clothed with a power hath at the same time an estate in the land, the power is not collateral because it savors of the land. Hardres, 415. And the Supreme Court of the United States, by Chief Justice MARSHALL, in Hunt v. Rousmanier, 8 Wheat. 175, said: "What is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing."

Does the power now in question answer the definition given in Hardres, or the equally accurate description given by the Supreme Court? Had Lockett, at the time when the power was executed, a vested interest or estate in the mortgaged property? Was the power conferred conjoined with an estate, held by Lockett, in the thing itself? "A mortgage in this state is only a security for a debt, and passes no title" Code, 1954. Avoiding unessential matters as far as may be, and matters collateral to the questions for decision, I will quote from or refer to the construction given to this statute by the state supreme court, as found in the Reports. In Davis v. Anderson, 1 Kelly, 176, WARNER, J., in delivering the opinion of the court, said that "a mortgage in this state is nothing more than a security for the payment of the debt; and the title to the mortgaged property remains in the mortgagor until foreclosure and sale, in a manner pointed out by the statute." * * * * "Under our law the legal title to the mortgaged property remains in the mortgagor until after foreclosure and sale." And the interpretation given by that learned judge has been followed from that day to this. See the Reports, *passim*. In Scott v. v. Warren, 21 Ga. 408, MCDONALD, J., said: "In England and in some of the states of the Union, when the condition is broken, the estate is so absolutely vested in the mortgagee that he may maintain ejectment and recover the premises. This is not the case here. In this state a mortgage in its inception is nothing more than a security for the payment of money, and it so continues to be, and nothing more, after the breach of the condition; therefore, creates a lien only, and not an estate." And this court, in The United States v. The Athens Armory, 35 Georgia, 344, said: "A mortgage in Georgia is only a security for the debt; the title to the property remains in the mortgagor." This is fully settled as a rule

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of property by a series of state adjudications, and when such is the case the federal courts adopt the decisions of the state courts.

It has been nearly a century and a half, if my researches are correct, since powers of sale, in conveyances in mortgage, were first known to the courts in England. And notwithstanding their validity has been supported in courts of equity, and they have at least impliedly become a part of the jurisprudence of that country, yet as late as 1825, Lord Chancellor ELDON, in Roberts v. Bozan, mentioned in 1 Pow. on Mortg. 9, 13, characterized them as extraordinary and of a dangerous nature.

The first reported case in our own country, which I have been able to find on this subject, is Bergen v. Bennett, 1 Caines' Cases in Error, 19. This is a bill to redeem on the ground that the power to sell, contained in the conveyance in mortgage, became extinct on the death of the mortgagor. The court for the correction of errors held that the authority to sell was a power coupled with an interest, and dismissed the bill. I will quote portions of the language used by KENT, J., who gave the opinion of the court, and which embody the principal reasons for holding that the power in the mortgage was a power coupled with an interest: "But when power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land. * * The power now in question answers exactly to this definition" (Hardres, 415) "of a power with an interest, because the mortgagee has, at the same time, a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, and never had, any estate whatever."

Wilson v. Troup, 2 Cowen, 195. This was also a bill to redeem. It was held by the court, as had previously been done in Bergen v. Bennett, and Wilson v. Troup, 7 Johns. C. R. 25, that a power of sale contained in a mortgage is a power with an interest. And the court of errors intimated the opinion that a power of sale inserted in a mortgage was in the nature of a power appendant to the land. A power appendant is where a person has an estate in the land, and the estate to be created by the power is to, or may, take effect in possession during the continuance of the estate to which the power is annexed; as a power to tenant for life, in possession to make leases. Co. Litt. 342 b. n. 298 H. & B. And SUTHERLAND, J., in Wilson v. Troup, 2 Cowen 195, said: "Now, the power of the mortgagee to sell is a power to create or acquire to himself the equitable estate in the land during the continuance of the legal estate conveyed to him by the mortgage."

The validity of the clause of a power of sale inserted in a mortgage has been, as already remarked, established in the courts of chancery at Westminster (Coote on Mortgage, 128 *et seq.*) and also in New York, and indeed in nearly all the states. In New York and in other states the mode of enforcing these power-of-sale-mortgages is in a greater or less degree guarded by statutes, against irregularity and abuse. Such enactments are highly commendable, for it may be borne in mind that the mortgagee holds the antagonistic and anomalous position of creditor and trustee united in himself, and it must often transpire that the time, the place and the manner of selling will present questions of difficulty and importance to the parties. In New York, for example, there must be six months' notice in the public Gazette before the mortgagee can sell under the power of sale. See Jackson v. Lawson, 17 Johns. 300.

With these remarks, I will proceed to ascertain whether, under the statute law of this state, and the construction which it has uniformly received by the state supreme court, a power of sale contained in a conveyance in mortgage, executed in this state, is a power coupled with an interest. Directing attention to the cases which have been cited on the subject of a power of sale in a conveyance in mortgage, it will readily be perceived that the decisions of the courts of England and New York, founded on the legal fact that to create a power combined with an interest, the donee must have at the time of the creation of the power a vested estate in the land or thing. Such power may be classed as an appendancy, and the power must have an estate to conjoin with and nourish it. When this is not the case, the power is simply collateral and ends, at farthest, with the life or bankruptcy of the donor.

In England and in several of the states, including New York (and in the latter state at least when the decisions above noted were made), ejectment may be maintained by the mortgagee against the mortgagor on his failure to pay the money at the time stipulated. Whereas, in Georgia, no ejectment or other possessory action on breach of the condition by the mortgagor has been recognized as a part of its jurisprudence. The rule of evidence is that the plaintiff in ejectment must succeed, if at all, on the strength of his own title, and not on the infirmity of the claim of the defendant. So, too, the claimant, to support his action of ejectment, must be clothed with the legal title to the lands. In Reed v. Shepley, 6 Vermont, 502, it was resolved that in an ejectment a mortgagor cannot dispute the title of the mortgagee. Thus, in England and in New York and other states of the Union, upon the delivery of the ordinary conveyance in mortgage, an estate or interest passes to and vests in the mortgagee, and such estate being then vested in him, it is sufficient, in law, upon which to raise a power coupled with an interest; and the estate or interest in the land or thing being in the mortgagee at the time he is clothed with the authority, the estate supports the power and they stand united.

So far as my information extends, the common law doctrine, even in its modern and modified form, in relation to conveyances in mortgage, has never met the sanction of the supreme court of this state. Here the rights of parties to these securities for debts, from beginning to end, are regulated and enforced solely by the principles of equity; the very language of the statute is the rule in equity. "A mortgage," says the Code, sec. 1954, "in this state is only a security for a debt and passes no title." As already observed, the state supreme court, in Davis v. Anderson, said that the title remains in the mortgagor until foreclosure and sale in the manner pointed out by the statute. And MCDONALD, J., in Scott v. Warren, said: "Here a mortgage in its inception is nothing more than a security for the payment of the money, and it so continues to be, and nothing more, after the breach of the condition. The mortgage therefore creates a lien only and not an estate; and the mortgagee in relation to the mortgaged property stands on the same footing as any other creditor." And this view of the law of mortgages in Georgia was approved by LUMPKIN, J., in delivering the opinion of the court in Elfe v. Cole, 26 Georgia, 197.

Numerous other cases, containing like views, might be cited; but it is deemed unnecessary to do so. Counsel for complainant read the case of Robenson v. Vason *et al.*, 37 Ga. 66, as affirming and adopting as a rule of decision the doctrine of the courts in Westminster and New York. In Robenson v. Vason *et al.*, the main question before the court was whether an injunction which had been granted at the instance of the mortgagor to restrain an innocent assignee of the notes and mortgage from selling the property under a power of sale, given to the mortgagee, his heirs and assigns, was properly dissolved. WARNER, C. J., for the court, held that it was. The chief justice, in the latter part of his opinion, said: "As a general proposition the power to mortgage would seem to include in it a power to authorize the mortgagee to sell in default of payment. William v. Troup, 7 Johns. 32. In this case there is an express power given by the mortgagor to the mortgagee or his assigns to sell the mortgaged property on default of payment upon giving thirty days' notice." I have perused the extended statement of the case made by the reporter, and have not discovered one word in it, nor in the opinion of

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Chief Justice WARNER, which says or indicates, in the remotest manner, that the authority to sell was a power connected with an interest, and I respectfully hazzard the remark that under the facts of that case, as they appear in the report, it could not be a point for decision. The mortgagor was before the court *propria persona*, and not a declared bankrupt. But notwithstanding the power from the mortgagor to the mortgagee and his assigns was not coupled with an interest, yet it may have been, and probably was, given for a valuable consideration, and consequently, in contemplation of law, irrevocable, but would cease with the life or bankruptcy of the mortgagor. Walsh v. Whitcomb, 2 Esp. 565; Hunt v. Rousmanier, *supra*. "These powers are not ordinary powers operating by means of limitation or use, but *trusts* declared on the legal estate in the mortgagee." Hilliard on Mortgages, 138, 3d edition.

I am of opinion that the power of sale contained in the mortgage, or that inserted in the agreement of December 20, 1871, was not in either instance, under the statute laws of this state, or the decisions of the state supreme court, that power which is known in legal language as a "power coupled with an interest."

Adverting to the synopsis of the bill, etc., in a former part of this opinion, in which is embodied the substance of the mortgage of January 16, 1871, and agreement of December 20, 1871, it will be seen that the authority to foreclose, as to the personal property, on default of payment was given to Rust & Son or to Lockett; and the power to foreclose, as to the land, or to sell it if the condition was broken, was given to Lockett.

It will be remembered that the mortgage conferred no power to sell the personal property; that authority was given by the agreement. If the authority inserted in the mortgage was a power combined with an interest, it must have been based upon a vested estate in Lockett. He did not foreclose the mortgage upon either the personal or real property, or sell the land after the first of October, 1871 (and which act a proviso in the mortgage authorized him to do if Hill did not pay the money at the time appointed), or before the 20th of December, 1871, on which day the "agreement" was executed. This instrument says Lockett shall take possession of the land and personal property mentioned in the mortgage and rent the same to La Roque "on terms this day agreed upon between Lockett and La Roque," and it is also stipulated that Lockett "shall have the right during the ensuing year (1872) to sell all of the real and personal property this day turned over to La Roque."

If the power in the mortgage to sell the land after the first of October, should the debts not then be paid, was a power linked with an interest, re-granting it by the agreement of December 20, 1871, was notional and superfluous, unless it had previously become extinct by efflux of time or otherwise, and the language of the agreement does seem to indicate that it had at that period been extinguished. As just mentioned, it is provided in the agreement that Lockett shall take possession of the mortgaged property, real and personal, and rent and hire the same to La Roque, and Lockett is given the right, during the ensuing year, to sell all of said land and personal property.

Courts disregard fractions or divisions of a day unless it be necessary to ascertain which of two events first happened. And I think it is proper to apply the exception here. It is plain, from the language used in the agreement, that Lockett, before the execution of the agreement, had agreed to rent and hire the mortgaged property to La Roque, and that it had been turned over to him—transferred; these were accomplished facts, effected anterior in time to the delivery of the agreement, though done on the same day. The words are not that Lockett is in possession, but that he shall take possession, etc. In the contract of lease for the mortgaged property made between Lockett and La Roque, it is rented for the ensuing year, 1872, as the "plantation of D. P. Hill." La Roque acknowledges himself as the tenant of Lockett, and signs the lease; Lockett does not sign it. Ely, in his affidavit, says that Hill, on the 20th of December, 1871, delivered the possession of the plantation and all the personal property thereon to Lockett. Hill swears that he never did turn over the possession to Lockett. If the possession was turned over to Lockett on that day—and I express no opinion on the weight of the evidence—the conclusion is that it must have been subsequent, in time, to the execution of the agreement, and consequently after the property had been turned over to La Roque, the lessee. The agreement provides that "Lockett shall have the right during the ensuing year" (1872) "to sell all the real and personal property this day turned over to La Roque." And Hill bestows on Lockett full power to act as his attorney, and to make all needful conveyances. No time was specified in the agreement for the termination of the possession; therefore the law of this state construes it to be for a calendar year. Code, sec. 2290. The agreement, as mentioned already, gave him the right during the ensuing year to sell all the real and personal property turned over to La Roque. This power he did not execute during 1872. And, as he must have known the certainty of his own term, he ought to have availed himself of his power to sell the property indicated in the agreement during its continuance; and whether the right to sell within the time named was a naked authority, revocable at the pleasure of the principal, or was a power irrevocable by the grantor, and consequently current until his bankruptcy, or a power coupled with an interest, is here an enquiry of no legal consequence. The right to sell the entire property during the ensuing year was suspended by Lockett beyond the limitation clause in the agreement, and being once suspended by his own voluntary act, it is, in my judgment, gone forever. But as the power of sale was merely cumulative, it would not bar a foreclosure. Turbish v. Sears, 2 Cliff. 454. "If a man grant all his trees to be taken within five years, the grantee cannot take any after the expiration of five years; for this is in the nature of a condition annexed to the grant." Moore, 882.

Lockett alleges that Hill, as his agent, rented the property to Blake for the year 1873. Hill says he rented it to Blake himself, but allowed Lockett to receive the rent, to be applied in discharge of the debt due him. Blake avers that he rented the plantation from Lockett for 1873, paid him the rent and surrendered the place to him, and he put White in possession. Lockett says he has been in possession of all the mortgaged property from the 20th December, 1871, until he sold the land, shortly after the bankruptcy of the mortgagor, and is still (2d January, 1874) in possession of the personal property. Let it be conceded that Lockett was in possession, though there is no evidence in the record that Hill rented him the property for 1873, so then he must have been in as a tenant at will or at sufferance. The possession as a tenant at will, or at sufferance, would not be of that dignity and nature which could be engrafted on a power in a mortgage in fee so as to make it a power coupled with an interest; it would not bring the power within the definition given in Hardres, or by Chief Justice MARSHALL, of a power coupled with an interest.

If the power of sale given to Lockett was what I have ruled it to be, a collateral power, then it became extinct, at farthest, on the bankruptcy of Hill, nine or ten days prior to the sale of the land by Lockett. But if it was really a power united with an interest, then it survived his bankruptcy, and Lockett could (were it not for reasons which will be explained presently) have conveyed the property in his own name, but not, as he adventured to do, in the name of Hill, who was at the time *civiliter mortuus*—at least he was incapable in law to execute a deed of conveyance. And assuming the power conferred to be of the latter kind, still Lockett could not purchase this land himself, either in severalty, joint tenancy, or otherwise; he could not be vendor and vendee; the characters are inconsistent. Michoud *et al.* v. Girod *et al.*, 4 Howard, 502; Griffin v. Marine Company, 52 Ill. 130.

The remaining question which I shall now consider—and it is a

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question of importance in this case—springs from the record. Let the fact be yielded that the power granted by Hill, the mortgagor, to Lockett, the mortgagee, was a power connected with an interest, and consequently not revoked by the bankruptcy of Hill, nor shall I presume it to have been lost previously by the laches of Lockett, the donee, in not selling the property within the time limited, could he, by virtue of such power of sale, convey the land to himself or any one else after Hill had been adjudged a bankrupt under the provisions of the bankrupt act of 1867, unless the sale was made by the order and authority of this court? Now, although Lockett may have, by a clause in the mortgage or agreement, received a power coupled with an interest, yet, after all, he would be but a trustee for Hill, the mortgagor, his heirs or assigns; for neither the mortgage, the agreement, nor the power (even if coupled with interest) invested him with an absolute and indefeasible estate in the property which is the subject of this controversy; and as agent or trustee for the mortgagor, his heirs, etc., a court of chancery could compel him to account for the rents and other fruits of the mortgaged property. Did the bankruptcy of Hill discharge or in any manner lessen the responsibility of Lockett as trustee? Surely not. True, when Hill became a bankrupt, Lockett was no longer liable to account directly to him; for the moment he filed his petition in this court under the bankrupt act, all his estate, of every kind and description, in possession or in action, came by the mere operation of the bankrupt law into the possession of this court, and under its immediate control; and no state court, nor person, can interfere with the possession except by permission of this court. *In re* Steadman, 8 N. B. R. 319. It is declared by the first section of the bankrupt act, that the jurisdiction of the United States district courts, acting as courts of bankruptcy, shall extend "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors." Thus it will be seen that the congress of the United States has conferred on the bankruptcy courts a broad and comprehensive authority, sufficiently extensive for this court to entertain jurisdiction over the respective rights of the parties in and to the property, real and personal, which was mortgaged by Hill to Lockett, and to cause it to be administered in accordance with the bankrupt law.

Hill, the bankrupt, appears on the face of the bill as a party defendant; but whether he is a proper party need not now be enquired into; he appeared and responded to the allegations and charges in the bill.

The prayer for the writ of injunction is refused; and the order previously granted restraining the assignee from selling the personal property is hereby set aside.

ORDERED ACCORDINGLY.

Railway-Aid Bonds—Effect of Railway Consolidation.

GEORGE NUGENT v. THE BOARD OF SUPERVISORS OF PUTNAM COUNTY.

Supreme Court of the United States, No. 620, October Term, 1873.

1. **Railway Consolidation—Bonds—Case in Judgment.**—A county under legislative authority voted to subscribe for stock in a railroad company, to be paid for in its bonds; the county officers agreed to make the subscription, and the company accepted it; negotiable bonds of the company, payable to the company or bearer, were made, but before they were delivered the company *consolidated* with another company in pursuance of a law in force when the subscription was voted, and subsequent to the consolidation the county received certificates of stock in the *new* company, and delivered to the new company bonds payable to the company to which the bonds were voted or to the bearer: *Held*, that the plaintiff, a *bona fide* holder, could recover.

2. **Effect of the Consolidation on the liability of the subscription for stock considered.**

3. **Cases Criticised.**—Marsh v. Fulton County, 10 Wall. 676, and Clearweather v. Meredith, 1 Wall. 25, distinguished.

Mr. Justice STRONG delivered the opinion of the court.

We think the circuit court erred in sustaining the demurrer to the plaintiff's replication. The bonds to which the coupons in suit were attached purport to have been made and issued by the order of the board of supervisors of Putnam county, in payment of the county's subscription to the capital stock of the Kankakee and Illinois River Railroad Company. They are made payable to that company or bearer, and the plaintiff is a *bona fide* holder of the coupons, having paid value for them without notice of any defence. If, then, the bonds are valid obligations, if they were rightfully issued, the right of the plaintiff to a judgment against the county is plain. The material facts relating to their issue, as gathered from the pleadings, may be concisely stated as follows: The Kankakee and Illinois River Railroad Company was a corporation existing in Illinois under a special charter, and it was authorized to construct and maintain a railroad from the eastern line of the state to Bureau Junction. It had liberty to increase its stock to such an amount as might be necessary to complete its road. At the same time the county of Putnam was empowered, by a general law of the state, to subscribe for the stock of the company, and to issue its bonds in payment of its subscription. In attempted exercise of the power thus conferred, the board of supervisors of the county, on the 4th day of June, 1869, ordered an election to be held to determine whether the county should subscribe for stock of the railroad company to the amount of seventy-five thousand dollars, to be paid for with the bonds of the county, provided the railroad should be so located and constructed through, or within one half mile of, the town of Hennepin. The election was held, and it resulted in favor of the subscription. On the 4th day of January, 1870, another election was ordered to determine whether the county would subscribe for twenty-five thousand dollars more of the stock, to be paid in the same manner, and with a similar provision respecting the location of the road. This subscription was also sanctioned by the popular vote. On the 24th day of September, 1869, the railroad company accepted the $75,000 subscription, and on the 27th of October next following, gave notice of the acceptance to the board of supervisors of the county. This notice was put upon record, and on the same day the board of supervisors adopted a resolution that the subscription was thereby made for the building of the railroad, and directed the clerk of the county court to execute and deliver the bonds on behalf of the county. The resolution also declared that the bonds should be issued on the written order of a committee appointed to protect the interests of the county; that they should not be issued until the railroad company had made a *bona fide* contract with responsible parties for all necessary iron for their road, nor until the company should have made a *bona fide* contract with responsible parties for laying the iron and operating the road through the county, as specified in a previous order of the board. On the 15th day of March, 1870, the second subscription for $25,000 was made in a similar manner and with like directions.

That thus the county became, in effect, a subscriber to the capital stock of the railroad company, and liable for the sums designated, admits of no serious question. The fact that no subscription was formally made upon the books of the company is quite immaterial. In The Justices of Clarke County v. The Paris, Kentucky River and Winchester Turnpike Company, 11 B. Monroe, Kentucky Reports, 143, it was ruled that an order of the county court, by which it was said that it subscribed for a specified number of shares of road stock, was binding, the court having authority to make a subscription. In this case there was more. There was not only the resolution declaring the subscription made, but

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there was an acceptance by the railroad company and notice of the acceptance. The minds of the parties came together. Both understood that a contract was made, and had nothing subsequently occurred to change their relations, the county could have enforced the delivery of the stock, and the company could have compelled the delivery to itself of the bonds, on performance of the conditions stipulated. So the parties regarded their relations to each other. The bonds were delivered. The committee appointed by the board of supervisors to protect the interests of the county, under whose direction the bonds were ordered to be issued, were satisfied that all the prescribed conditions precedent to their delivery had been complied with, and so they decided. The county accepted the position of a stockholder, received certificates for the stock subscribed, voted as a stockholder, and proceeded to levy a tax to pay the interest falling due on the bonds. Were this all of the case, the validity of the bonds, and of their accompanying coupons, in the hands of a *bona fide* holder for value, would be beyond doubt.

The circuit court, however, was of opinion, and so decided, that the bonds are invalid, because before their delivery the Kankakee and Illinois River Railroad Company had become consolidated with the Plymouth, Kankakee and Pacific Railroad Company, another corporation. The facts of this part of the case, as set forth in the pleadings, are as follows: On the 12th of January, 1870, a company was organized under the laws of Indiana, for the purpose of building a railroad from Plymouth, Indiana, to the east line of the state of Illinois, at some point to be selected in the direction of Momence and Kankakee, with a view to connection with some railroad leading westward. Its corporate name was the Plymouth, Kankakee and Pacific Railroad Company. With this corporation, on the 21st day of October, 1870, the Kankakee and Illinois River Railroad Company became consolidated, taking the name of the former. The consolidation was authorized by the general laws of the two states, and by a section in the special charter of the latter company. No claim is made that it was not legally effected. The result necessarily was that the consolidated company succeeded to all the rights, property and privileges which belonged to each of the two companies out of which it was formed, before their consolidation. It was not until after this had taken place that the county bonds were handed over and sold, and it was certificates of the stock of the consolidated company which the county received.

What, then, was the legal effect of the consolidation? Did it release the county from its prior assumption to take stock in the Kankakee and Illinois River Railroad Company and give its bonds in payment? or did it render unauthorized the subsequent delivery of the bonds, and make them invalid even in the hands of a *bona fide* purchaser? These are the only questions presented by the record that need discussion.

It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule, it has no applicability to a case like the present. The consolidation of the Kankakee and Illinois River Railroad Company with another company was no departure from its original design. The general statute of the state, approved February 28, 1854, authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each other, and with companies out of the state, whenever their lines connect with the lines of such companies out of the state. The act further declared that the consolidated company should have all the powers, franchises and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee and Illinois River Railroad Company contained in its 11th section an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed or that might thereafter be constructed within the state, or any other state, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was, therefore, contemplated by the legislature, as it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the state. and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their vote, and when the board of supervisors, in pursuance of that sanction, resolved to make the subscription, they were informed by the law of the state that a consolidation with another company might be made, that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge and in view of such contingencies they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed, other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and, consequently, the rule is inapplicable.

In a multitude of cases decided in England and in this country it has been determined that a subscriber for the stock of a company is not released from his engagement to take it and pay for it by any alteration of the organization or purposes of the company which, at the time the subscription was made, were authorized either by the general law or by the special charter, and a clear distinction is recognized between the effect of such alterations and the effect of those made under legislation subsequent to the contract of subscription. In The Cork & Youghal Railway Company v. Patterson, 37 Eng. Law & Eq. 398, which was an action to recover a call of one pound per share on one hundred shares subscribed, it appeared that the defendant was one of the subscribers to the agreement for the Cork, Middleton and Youghal Railway Company. That agreement authorized the provisional directors to extend the purposes of the organization, to change the termini of the road, and to amalgamate with other companies. The subscribers' agreement for the Cork and Waterford Railroad Company contained similar provisions. After the defendant's subscription was made the two companies executed a deed of amalgamation, without any other assent of the defendant than his signature to the subscriber's agreement for the first-named company. Upon this state of facts all the judges held that he remained liable on his subscription. Its effect was said by Chief Justice JERVIS to be an authority to the company to tack his subscription to anything else they might see fit, and thus make him a subscriber to that; and therefore, added the judge, by signing the Cork and Youghal he afforded an authority to the directors to apply his signature to the Cork and Waterford, and so make him a subscriber to that. To the same effect are the cases of Nixon v. Brownlow and Nixon v. Green, 3 Hurl. & Norman, 686. The American authorities are equally explicit. They uniformly assert that the subscriber for stock is released from his subscription

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by a subsequent alteration of the organization or purposes of the company only when such alteration is both fundamental *and not provided for or contemplated by either the charter itself or the general laws of the state.* In Sparrow v. The Evansville and Crawford Railroad Company, 7 Porter, Ind. 369, where it appeared that after a public act had taken effect authorizing the consolidation of the charters of two railroad companies, the defendant had subscribed for shares in one of them, and a consolidation was afterwards made, he was held liable to the consolidated company for his subscription, and this though the consolidation took place without his knowledge or consent. The same doctrine was asserted in Bish. v. Johnson, 21 Ind. 299. (See also Hanna v. Cincinnati, 20 Ind. 30.) The supreme court of Connecticut recognized the rule in Bishop v. Brainard, 28 Conn. 289, and a subscriber to one company was held to be a debtor to the consolidated company in a case where there was no general authority to consolidate, but the charter of the company was subject to amendment by the legislature, and where the legislature, after the subscription, confirmed the consolidation. (Vide also Schenectady and Saratoga Plank Road Co. v. Thatcher, 1 Kernan, 102; Buffalo and New York City R R. Co. v. Dudley, 4 Kernan, 336; Meadow Dam v. Gray, 30 Maine, 347; Agricultural Branch R. R. Co. v. Winchester, 13 Allen, 32; Moyes v. Spalding, 27 Vt. 420; Pacific R. R. Co. v. Renshaw, 18 Mo. 210; Fry v. Lexington, 2 Metc., Ky. 314; Illinois River R. R. Co. v. Beers, 27 Ill. 189; Terre Haute and Alton R. R Co. v. Ear, 21 Ill. 292.)

Many other citations are at hand, but these are sufficient. No well-considered cases are in conflict with them. Marsh v. Fulton County, 10 Wall. 676, is altogether a different case. In that it appeared that the people of the county voted in November, 1853, in favor of a subscription for stock in the Mississippi and Wabash Railroad Company, and in April, 1854, the board of supervisors of the county ordered their clerk to make the subscription. It was not, however, then made. Subsequently, in 1857, the legislature made fundamental changes in the organization of the company, dividing it substantially into three companies, with a distinct governing body for each, and with three classes of stockholders. It was after this that the county subscription was made, and made not for the stock of the Mississippi and Wabash Railroad Company, but for the stock of one of the divisions. Necessarily, therefore, we held that there was no authority to make the subscription which was made, that it had not been approved by a popular vote, and hence that the bonds issued in payment for it were invalid. The county had entered into no contract until after the radical changes had been made in the organization of the company. It never assented to such a change, and when the proposed subscription was approved by the popular vote, there was no reason to expect the change afterwards made. There was at that time nothing in the general law of the state, and nothing in the charter, which authorized the company to change its organization, or which looked to its division into several distinct corporations. It needs nothing more to show how unlike that case was to the present.

In the case in hand the county had, under lawful authority, undertaken to subscribe for stock before the consolidation was made, and the undertaking had been accepted. A liability had been incurred, and the business agents of the county, to whom exclusively the law entrusted the management of its affairs, consented to and promoted the consolidation. And the subscription was made in full view of the law that allowed an amalgamation with another company. The contract was made with reference to that law. Nothing has taken place which the county was not bound to anticipate as likely to happen, and to which the people in voting for the subscription, and the board of supervisors in directing it, must not be considered as having consented. What was ruled in Marsh v. Fulton County, therefore, does not touch this case. Nor was there anything decided in Clearwater v. Meredith, 1 Wall. 25, which sustains in any degree the defence set up on behalf of the defendants.

We have, then, in brief, this case: The people of Putnam county, in pursuance of law, voted a county subscription for stock in a railroad company, to be paid for with county bonds. The financial agents of the county agreed to make the subscription, and the company accepted it. The bonds were made payable to the company, or bearer, but before they were delivered, the company became consolidated with another, in pursuance of authority conferred by the law in force when the subscription was voted, and at the instance of the board of supervisors of the county. All the conditions precedent to the delivery of the bonds were complied with to the satisfaction of the county agents, certificates for the stock were received, and the bonds were delivered and sold. The plaintiff is a *bona fide* holder of some of the coupons for value paid. It would, we think, be a reproach to the administration of justice if he cannot enforce the payment of those coupons, and we see no principle of law or equity that stands in the way of his action. He found the bonds and the coupons upon the market, payable to the Kankakee and Illinois River Railroad Company, or bearer. Proposing to buy, he had only to enquire whether the county was, by law, authorized to issue them, and whether their issue had been approved by a popular vote. He was not bound to enquire farther, and had he enquired he would have found full authority for the issue, and if he had also known of the consolidation it would not have affected him.

The judgment of the circuit court is reversed, and the cause is remitted, with instructions to overrule the defendant's demurrer.

Dissenting, Mr. Justice DAVIS and Mr. Justice MILLER.

Railway-Aid Bonds — Funding Bonds — Defences when Sued on by Innocent Holders.

ISAAC W. POLLARD v. THE CITY OF PLEASANT HILL.

United States Circuit Court, Western District of Missouri, November Term, 1873.

Before DILLON and KREKEL, JJ.

1. **Railway-aid Bonds—Defences when Sued on by Innocent Holder.**—An innocent holder of bonds issued by municipal corporations in aid of railroads, is not required to look beyond the authority and recital in the bond to see whether formalities of any kind, embracing the question as to the subscription, have been complied with.

2. ——. ——. **Application of this Principle.**—Thus, where the vote and ordinance under which bonds were issued by a town corporation in aid of a railroad, required that they be issued to a particular road, and the bonds on their face recited that they were issued to such road, it was no defence to a suit by an innocent holder, upon coupons detached from such bonds, that they were in fact issued to another and a different road.

3. ——. ——. **Interest Payable in Gold.**—Nor is it any defence to such a suit that the interest on such bonds is payable in gold coin. A contract specifically made for the payment of interest in gold coin is valid and will be enforced.

4. ——. ——. **Bonds issued to raise Funds to influence Legislation.**—In a suit upon coupons detached from municipal bonds which recite on their face that they are issued to fund the floating debt of the city, if legal authority to fund such debt existed, it is no defence that such bonds were in fact issued to raise funds to improperly influence legislation. The municipal authorities will not be thus permitted to set up their own wrongful acts against innocent holders of commercial securities which they have issued.

Judson and *Barnard*, for plaintiff; *Hall* and *Adams*, for defendant.

DILLON, Circuit Judge.—This action is brought on detached coupons of two classes of bonds, the first on subscription of $15,000 to the Pacific Railroad of Missouri; the second on bonds funding the debt of the city.

Plaintiff claims to be holder for value before maturity.

As to the Pacific Railroad bonds and coupons, the answer sets up that the vote and ordinance authorizing the subscription were to the Pacific Railroad of Missouri in aid of constructing the Pleasant Hill and Lawrence branch thereof, that the subscription was actually made to the Pleasant Hill and Lawrence Branch of

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the Pacific Railroad, and the bonds issued in payment thereof delivered to the St. Louis, Lawrence and Denver Railroad; that for not pursuing the authority as cited in subscribing, the bonds and coupons are void. It is admitted by the pleading that the necessary two-thirds vote to authorize the taking of stock was had. The bonds on their face recite that they were issued to the Pacific Railroad. An innocent holder is not required to look beyond the authority and recital in the bond to see whether formalities of any kind, embracing the question as to the subscription, have been complied with. This has been the uniform decision of the supreme court of Missouri, from the case of Flagg v. The City of Palmyra, 33 Mo. 440, to its last unreported utterances in the Clark county case. Nor has the federal judiciary been wanting in its steadfast adherence to this doctrine. As late as 15 Wallace, Grand Chute v. Winegar, 355, it has been re-asserted, and former cases affirmed.

As to the defence that the bonds are payable in legal tender notes, and that no authority exists to contract for gold coin in payment of interest, it is only necessary to refer to the case of Triblecock v. Wilson and Wife, 12 Wallace, 687, to find the law as settled by the supreme court of the United States. It is there held that a contract may be made for gold coin or specie, and that such contract cannot be satisfied by payment in legal tender notes. That a contract to pay bonds in legal tender notes and the interest thereon in gold coin can be made, it is apprehended will not be seriously questioned. It is a matter of contract purely, and when its conditions sufficiently appear, the court will enforce it. In this case the bonds call for six per cent. interest, payable in gold coin, and the coupons conform to the bonds. No objections are perceived why the contract thus specifically made for gold coin should not be valid and enforced.

The demurrer to the second, third and fourth counts of the answer will be sustained.

The second class of coupons sued on are on funding bonds, and the petition as to them alleges that they were issued in pursuance to an act of the general assembly of Missouri authorizing the funding of the floating debt of the city; that the bonds issued; that plaintiff became a holder for value before maturity, and that the coupons were not paid on presentation.

The answers sets up that the bonds were not issued in payment of outstanding warrants, or in satisfaction of liabilities of the city; that they were issued to raise funds to improperly influence legislation, quoting an ordinance of the city, from which it would appear that such was the case. However much we may deprecate that any people should thus expose themselves on their own record, and swift as this court would be to visit upon the heads of those who would contaminate the fountain of legislation (if a proper case and parties were before the court), it would be but aiding and abetting their wrongful acts to allow them to come and set them up in their own defence against innocent holders of the commercial securities they issued. It is admitted that legal authority to fund the floating debt of the city existed, and that the bonds on their face purported to be issued under and by virtue of it. This binds the city. The use made of the proceeds of the bonds cannot affect holders for value.

The demurrer as to second and third count of answer, as to the second class, the funding bonds will be sustained.

JUDGMENT ACCORDINGLY.

The Bar Association of St. Louis.

The members of the legal profession in St. Louis have organized an association with the above title, similar in its character and in most of the provisions of its constitution to the bar association of New York City, which has succeeded in purifying the professional and judicial atmosphere of that city in a marked degree. It is established "to maintain the honor and dignity of the profession of the law; to cultivate social intercourse among its members, and for the promotion of legal science and the administration of justice." At the meeting which took place on Monday evening, a constitution and by-laws were adopted, the important features of which are that members of the bar in good standing, residing or practicing in the city of St. Louis, may be active members; members of the profession residing elsewhere in Missouri may be members with all privileges except that of voting. Judges are likewise honorary members, and upon the accession of any member to the bench he ceases to be an active, and becomes an honorary member. The initiation and annual fees are fixed for the present at the low sum of ten dollars each, subject to be increased or diminished as the needs of the association may require. An adjourned meeting of the association will be held on Monday, the 6th prox., at which time the officers of the association will be elected.

Properly conducted, this movement may result in great good. That the the legal profession in the United States is greatly in need of the beneficial influence of such agencies cannot be denied. Under the influence of the law societies of London the legal profession in England has maintained a high standing, and has constantly deserved and received the confidence of the government and the people. The same cannot be said of the profession in this country. With us there are no effective means in existence of preventing the entrance of incompetent and improper persons into the ranks of the profession, or of securing their expulsion when they have shown themselves unfit to remain in it. It results that in the United States the legal profession is overrun with its multitude of pettifoggers and shysters, the same as the medical profession is overrun with its quacks. In England to be a barrister is to possess a title of honor and a passport to good society everywhere. To be an attorney and counsellor at law in this country is to be something or nothing, precisely according to the use which the possessor of these titles makes of the privileges of the bar. Indeed, in some instances our profession seems to have reached such a low standard and to have degenerated so thoroughly into a trade, that the name of lawyer has become almost a reproach. To remedy these evils should be, it occurs to us, the principal office of a bar association. If this association keeps the limited objects for which it is created steadily in view, it cannot fail to accomplish great good. If it steps outside of that limited circle and attempts to interfere with the general policy of legislation, or with other things which do not directly concern the legal profession as a profession, it will soon discover that it has outlived its usefulness.

Notes of Recent Decisions of the Supreme Court of Missouri.

[Through the courtesy of W. J. Gilbert, Esq., publisher of the Missouri Reports, we are permitted to make the following abstracts from proof sheets of Volume 54. The cases were decided at the October term, 1873, at Saint Louis.]

Evidence—Admissions—Hearsay.—In a suit brought on the parol promise of the defendant to pay for stock sold to A., although one of the plaintiffs testified that he knew nothing about the contract with the defendant, yet in cross-examination it would be proper to show by him that on a former occasion he had testified that it was his understanding that A. had purchased the stock, and that B. had become his surety. Such testimony was competent as an admission on the part of the plaintiff. Glenn v. Lehner, vol. 54, p. 45.

Statute of Frauds—Original and Collateral Liability.—The question whether a verbal contract comes within the statute of frauds or not, depends wholly on the agreement. If a party agrees to be originally bound, the contract need not be in writing; but if his agreement is collateral to that of the principal contractor, or is that of a guarantee or surety for another, the agreement must be in writing. It is immaterial in such case whether the promise was prior to the passing or delivery of the consideration, or afterwards; in either case the contract must be in writing, and in the latter, must have a new consideration to uphold it. Ib.

Social Evil Ordinance of St. Louis—General Law Repealed by Municipal Charter.—The case of The State v. Kate Clarke, vol. 54, p. 1, has been published in several of the legal journals, and is familiar to the profession in Missouri. In 1870 a charter was granted to the city of Saint Louis, giving the city council power "by ordinance not inconsistent with any law of the state * * to regulate bawdy houses." In pursuance of the power thus granted an ordinance was passed providing for the compulsory registration of prostitutes and houses of prostitution, and for the physical examination of the inmates of such houses by medical officers at stated periods

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also compelling the payment of fees for such examinations, which fees went to the establishing of a hospital for the curing of diseased inmates of such houses, who on being discovered to be diseased were sent compulsorily to such hospital and compelled there to remain until cured, when they were set at liberty. The city ordinance thus "regulated" houses of prostitution and gave them a permissive existence, whereas the law of the state punishes prostitution as a crime. The defendant kept a house of prostitution in Saint Louis, and was indicted therefor in the state court and convicted under the state law. The defendant appealed, and urged that the grant of power in the charter and the exercise thereof by the city council repealed, *pro tanto*, the state law, so that she could not be prosecuted and convicted thereunder; and so the supreme court in effect held. The judgment of conviction was, therefore, reversed. NAPTON, ADAMS and WAGNER, JJ., concurring; VORIES and SHERWOOD, JJ., dissenting.

Railway Aid Bonds—Defences in Hands of bona fide Holders.—Smith *et al.* v. Clarke County, vol. 54, p. 58. [This case has been published in this paper, *ante*, p. 5.]

Practice before Justices of the Peace—Judgment—Execution—Motion to Quash, etc.—Caldwell v. Fea, vol. 54, p. 55. The entry on a justice's docket showed suit brought against Fea, Brother & Turnbull, and judgment against defendants "as a firm, or against Joseph Fea and William Turnbull, as the summons was served on them personally. The execution issued under it recited a judgment and ordered levy against the three defendants. *Held*, that although the judgment bound only the two defendants named, yet under the statute (2 W. S. 839, § 15) the execution should not be quashed, but should be amended so as to conform its recitals to the law, and should be directed against the defendants who had been personally served.

Contracts by Infants—Disaffirmance—Ratification.—In Baker v. Kennett, vol. 54, p. 82, an infant who had taken a deed of land and given his note for the purchase money, made an attempt to disaffirm the contract before his majority, and again within a few days thereafter, and upon the refusal of the vendor to agree thereto, offered to give him $2,000, together with the improvements erected on the land, by way of compromise; and abandoned the premises and left them to be occupied by the vendor when he saw fit. *Held*, that the disaffirmance was sufficiently speedy and unequivocal to avoid the contract. The court say in substance that to constitute a ratification of an infant's contract, a mere acknowledgment that the debt existed, or that the contract was made, is not sufficient. There need not be a precise and formal promise, but there must be a direct and express confirmation and a substantial promise to pay the debt or fulfill the contract. And the promise must be made with a knowledge of the facts, and with a deliberate purpose of assuming the liability from which the party knows that he is discharged.

———. ———. **Liability of Surety on Infant's Note.**—The same case decides that where an infant gives his note for land purchased, and on his majority disaffirms the contract, the sureties on the note are not liable.

Supreme Court of Missouri—Decisions this Week.

State v. Alexander. Appeal from St. Louis criminal court. Affirmed in part and reversed in part.

Baldwin v. Chouteau Insurance Company. Appeal from general term of St. Louis circuit court. Judgment of general term affirmed, and cause remanded.

Walser v. Theis. Appeal from St Louis circuit court Affirmed.

State v. Gibbs. Appeal from St. Louis court of criminal correction. Reversed and remanded.

Bartholow v. Campbell. Appeal from St. Louis circuit court. Affirmed.

State v. Crowner *et al.* Appeal from St. Louis court of criminal correction. Reversed and remanded.

Missouri Loan Bank v. Filley. Appeal from St. Louis circuit court. Affirmed.

State *ex rel.* Attorney Genl. v. Townley. Original proceeding by *quo warranto*. Judgment of ouster.

State v. Fred Miller. Appeal from St. Louis court of criminal correction. Affirmed on an inspection of the record.

Myers v. Van Wagoner. Appeal from St. Louis circuit court. Affirmed.

Barry v. Otto *et al.* Appeal from St. Louis circuit court. Affirmed.

Eggeman v. Henschen. Appeal from St. Louis circuit court. Affirmed.

Kronenberger v. Buiz. Appeal from St. Louis circuit court. Affirmed.

We give below abstracts of the opinions so far as the space at our disposal this week will permit, and shall continue the same next week and thereafter, so as to give complete abstracts of all cases decided at this term.

Burglary in First and Second Degree.—State v. George Alexander. In this case the defendant was tried upon an indictment for burglary, which charged that he "with force and arms, about the hour of one of the clock in the night, * * * the dwelling-house of one Clemens Harig, * * * in which there was at the time a human being, feloniously and burglariously did forcibly break and enter, with the intent the goods and chattels in the said dwelling-house * * * to steal, take and carry away," etc. The proof corresponded with the allegations. Under the instructions of the court below the defendant was convicted of burglary *in the second degree*, and of larceny. It was here urged that the judgment was erroneous, since the indictment was for burglary in the *first degree*, and the evidence all tended to establish that offence and none other. The court held that the indictment is applicable alone to the tenth section of the statute (1 Wagn. Stat. p. 454), which defines burglary in the first degree, and not to the eleventh section, which defines burglary in the second degree. The judgment convicting the defendant of burglary in the second degree is therefore reversed, but the judgment convicting him of larceny is affirmed. WAGNER, J., delivered the opinion. The other judges concurred, except SHERWOOD, J., who was absent.

Malicious Prosecution in Suing Out Attachment—Allegations and Proof—Measure of Damages.—Peter F. Walser v. Frederick Theis. This was an action for damages for maliciously suing out an attachment against the plaintiff, causing the same to be levied on his goods, and thereby breaking up his business.

The court hold—1. That it is not necessary in this kind of action that it should appear, from the pleadings or proof, that the defendant participated in the execution of the attachment process; overruling on this point Drake on Attachments, § 730, and Marshall v. Betner, 17 Ala. 832. The court say: "We are not willing to concede that it is necessary to the maintenance of the action that the defendant should in person deliver the writ to the officer, or be present and point out the property and tell him what to do. It is the duty of the court to deliver the process to its executive officer, and it is the duty of that officer to levy the attachment writs on whatever property may be necessary to satisfy the same. The plaintiff in the suit sets the whole proceeding in motion by making out the affidavit, and if he does the same maliciously, vexatiously and without probable cause, and injury results from his unlawful and wrongful act, he is liable and must respond in damages."

2. The jury fixed the plaintiff's damages at $800, and of this the plaintiff remitted $350 This was not such an assessment of damages as the supreme court will disturb. The business of the defendant (who kept a boarding-house) was injured by the attachment, and he was forced to sell out his establishment at great loss.

The court say: "The rules as to damages applicable to other cases of malicious prosecution apply to actions for malicious attachment." The court then state the rule in the language of Dr. Greenleaf (2 Greenl. Ev. § 456) and quote approvingly Drake on Attachments, § 745.

The judgment below is affirmed. WAGNER, J., delivered the opinion. The other judges concurring, except SHERWOOD, J., who was absent.

Assault and Battery.—The State v. Fred Miller. No bill of exceptions and no assignment of errors, the judgment of conviction in this case is affirmed upon an examination of the record. ADAMS, J., delivering the opinion. The other judges concurring, except SHERWOOD, J., absent.

Trade-Marks—The Missouri Statute Expounded.—The State v. John S. Gibbs. This was a criminal information in the Saint Louis court of criminal correction for counterfeiting the trade-mark of Lea & Perrin, of London, England, manufacturers of Lea & Perrin's Worcestershire Sauce, and for vending a spurious article thereunder. The opinion involves an exposition of the Missouri Statute of 1870 on the subject of trade-marks (2 Wagn. Stat., 2d ed., p. 1330). The questions ruled arise on the defendant's motion to dismiss the information for the following reasons: 1. Because the complaint did not charge upon the defendant the violation of any statute known to the laws of the state of Missouri. 2. Because the law under which the defendant was prosecuted was not intended to, nor did it protect merchants or manufacturers doing business in any other place than the state of Missouri. 3. Because the law on which the complaint was based was for the protection of merchants and manufacturers doing business in this state. These objections (the substantial one being embraced in the two last propositions, namely, that the statute was intended to protect domestic manufacturers, and does not extend to the protection of foreign manufacturers) the court overrule.

The court say: "A reading of the act will show that it is comprehensive and general in its character. There is not a word or an intimation given that it was intended to apply only to citizens of this state. Indeed, to give it such a construction would, I apprehend, defeat its principal object and expose our people to all the impositions and deceptions against which the law was intended to guard them. There is a well-known right of property in a trade-

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mark which the law will protect, and which it was not the intention of the statute to abridge. The citizens of foreign states will be protected in their rights of property in trade-marks in our courts the same as our own citizens. (Taylor v. Carpenter, 11 Paige, 292; S. C., 2 W. & M. 1.)

"But aside from this, the statute had another important object in view, which was intended directly to benefit our own citizens and shield them against counterfeiters and impostors. Many articles manufactured by certain persons, firms and corporations, have attained a high reputation and are of great excellence, and those articles are sold with peculiar marks, brands or wrappers, or other devices which have been adopted to show by whom they were made. These trade-marks are valuable to the persons who have a proprietary interest in them, and to the people who buy and use the articles, because they are a guarantee of their genuineness. But if by fraudulent means other persons are permitted to counterfeit and forge and simulate these trade-marks and attach them to inferior or indifferent articles, the community is imposed on and cheated. It was to prevent this that the law was enacted. And in its provisions it makes no distinction as to where the original manufacturer resides. It applies to all alike, and was designed to protect our people against gross deception and imposition, regardless of the place where the genuine articles were made."

Judgment reversed. WAGNER, J., delivered the opinion. All the judges concurring, except SHERWOOD, J., who was absent.

Promissory Note—Suit against Endorser—Composition with Maker a Defence.—Hermann Eggeman v. C. H. Henschen. This was an action against the payee and endorser of an ordinary promissory note drawn by Henschen, Krite & Co., in favor of C. H. Henschen, the defendant in this suit, and by him endorsed to the plaintiff. The defence is that the note before maturity had been satisfied by Henschen, Krite & Co., and the satisfaction accepted by the plaintiff, and that this released the defendant, the endorser. This composition deed was passed upon in Diermeyer v. Hackman, 52 Mo. 282, where it was held to be a release by the creditors of their debts. The defence here set up is sustained, the court holding in accordance with Story Prom. Notes, § 423, that the release of the makers by the holder released also the endorser. ADAMS, J., delivered the opinion. The other judges concurring.

Book Notices.

THE AMERICAN REPORTS: Containing all decisions of general interest decided in the courts of last resort of the several states, with notes and references. By ISAAC GRANT THOMPSON. Vol. 9. Containing all cases of any general importance in the following Reports: 1 Colorado; 37 and 38 Conn.; 43 and 44 Georgia; 35 Ind.; 107 Mass.; 23 Mich.; 27, 28 and 29 Wis. Albany: John D. Parsons, Jr., Publisher. 1873.

We gladly avail ourselves of this occasion briefly to speak concerning the series of Reports of which the volume above entitled is the last one which has yet made its appearance. The number of reports is so great and is being added to so rapidly that a complete set of even the American Reports is beyond the reach of the body of the profession. The time, however, has not yet arrived, and probably is not very near at hand, when the lawyer can dispense with reports. If he attempts it, his adversary who has recourse to them is likely to obtain thereby an advantage. But the problem remains, how is it practicable for the lawyer to overcome the difficulties which grow out of the publication each year of so many volumes of reports? Fifty or more are issued annually in this country alone. On the bench of the highest courts of many of the states are judges of great and varied learning, large experience and wise judgment, and this has been so from the beginning. Parsons the elder, Parker, Shaw, Redfield, Kent, Denio, Tilghman, Gibson, Hitchcock, Blackford, Breese, Dixon, Cooley and many other names familiar to American lawyers, will at once occur to the reader.

From causes which it has been found impossible to remove, the practice is to include in the official reports substantially *all* the cases determined by the several courts of last resort. These reports are published primarily for the use of the bar and courts of the particular state, and hence include many cases relating to local practice and which have no extra-territorial value. Besides, it is largely true that the value of an opinion depends very much upon the judge who prepares it; and whoever has had occasion to examine critically the opinions which are found in the fifty volumes of reports issued here each year has not failed to discover that many of them have been hastily written and not well considered.

Now, the object of the series known as the American Reports is to give, in about three volumes each year, all the cases of general value decided in the courts of last resort of the several states, omitting cases relating to practice, to constructions of statutes peculiar to the particular state, and those of merely local interest. In this way twelve or more volumes of state reports can be put in one of the present series.

The value of reports upon this plan depends almost wholly upon the selection of the cases to be published, and the manner in which the work of the editor is performed. None but an accomplished and experienced lawyer can do this work as it ought to be done; and we congratulate the profession that it has been undertaken by one so eminently fitted as Mr. Isaac Grant Thompson. His learning and ability as a law writer are known wherever one of the very best Law Journals in the world is read, and his tastes, talents and studies peculiarly qualify him to edit these reports. His notes to the cases, which are often full and exhaustive, are, in many instances, worth more to the practitioner than the principal case.

We warmly recommend this series of reports as deserving the favor of the profession. Its general usefulness will be much increased by a Digest when the number of volumes shall have somewhat increased.

Legal News and Notes.

—JUDGE PRATT, of the supreme court of New York at Brooklyn, has granted a peremptory mandamus compelling the coroners to deliver the bodies of paupers to the medical faculty of the Long Island College Hospital Association.

—TWEED has just been defeated in a legal endeavor to change his abode in the penitentiary on Blackwell's Island for the more convenient Ludlow street jail. Judge BRADY has overruled this application of his counsel, and holds that the terms of his sentence warrant his confinement in the penitentiary.

—THE new supreme court of Texas, after an examination of the question, have unanimously decided that Mr. De Normandie, appointed clerk of that court by military authority in 1869, and re-appointed by the late bench, December 8, 1873, is entitled to retain his office under the present bench.

—LOUIS JACOB, a laundryman, has obtained a verdict of $500 damages in the superior court of New York city, against Drs. Lalanne and Miller, for false imprisonment in sending him to the insane asylum at Blackwell's Island. Mr. Jacob was at the asylum five days, when the physician in charge examined him, pronounced him sane and ordered his discharge. He thus gets $100 a day for the unlawful detention.

—THE Supreme Court of the United States has just pronounced a decision in the case of Bartemeyer v. The State of Iowa—a case in which a liquor dealer, indicted under the recent Iowa law for the suppression of intemperance, sought the protection of the 14th amendment. The court rule against him, but chiefly on the ground that it was but a moot case, made up to obtain the opinion of the court, when the facts would not warrant a review in this tribunal. Mr. Justice MILLER delivered the opinion.

—THE following important rule, substituted for rule 39 of the United States district court for the eastern district of Missouri, has just been promulgated—Judge TREAT holding that the change becomes necessary under the provisions of the act of Congress of May 9, 1872.

"In all suits had in law pending in this court, depositions shall be taken in conformity with the provisions of section 30 of the act of September 24, 1789 (1 United States statutes, 88), section 3 of the act of February 20, 1812 (2 United States statutes, 682), and sections 1 and 2 of the act of July 24, 1827 (4 United States statutes, 197), as modified by the act of May 9, 1872 (17 United States statutes, 89). Commissions to take testimony in such causes may be issued in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party seeking the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issue of the commission, and if no cross interrogatories are filed at the expiration of the time, the commissioner may issue *ex parte*. In all cases the commissioner or commissioners may be named by the parties jointly or by the court, or by the judge thereof, or by the clerk. If the parties shall agree, the testimony may be taken on the terms agreed, upon oral interrogatories by the parties, or their attorneys or agents, without filing any written interrogatories, and all depositions, on being filed, shall be opened by the clerk at the instance of either party, and be subject to the inspection of the respective parties or attorneys."

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, APRIL 2, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

The Legal Uses of Photography.

Examples are constantly occurring of the uses in legal investigations of the art of photographing. We noted in a previous number (*ante*, p. 121), that Judge BLATCHFORD has decided that photographs of papers will not be admitted in evidence where the genuineness of the handwriting is in dispute, and where the originals can be procured. The London Times, in its graphic account of the close of the Tichborne trial, thus alludes to this subject:

"It is impossible to avoid noticing, at the conclusion of the case, the important service rendered to the cause of justice by the art of photography. The principal documents in the case, the pocket-book of the defendant, his letters and those of Roger Tichborne, were photographed by the Stereoscopic Company, under the auspices of Mr. Nottage, their manager, and the *fac similes* thus produced were of immense use in facilitating the comparison of handwriting, to which the Lord Chief Justice attached much importance as one of the great tests of identity. There probably never was a case in which the application of the invention was of greater service."

We may add our conviction that the use of photography in legal investigations is destined, at no distant day, to form an important chapter in the law of evidence.

The London Times on Lord Westbury's Will—Some Advice to People who insist upon being their own Lawyers.

The London Times, after alluding to a conjectural interpretation which Sir GEORGE JESSEL, Master of the Rolls, has been obliged to put upon the will of the late Lord Chancellor WESTBURY, in pursuance of one of Lord WESTBURY'S own decisions, makes the following observations:

"The more prosaic question remains, what lesson we may best learn from Lord WESTBURY'S ill-success in carrying into effect his testamentary wishes. The first and most obvious feeling is, that English law presents a series of pitfalls which the most careful and most experienced travellers are not always able to avoid. If Lord WESTBURY stumbled, who, we ask, can expect to walk safely? But this reflection would really be unjust to English law so far as this particular case is concerned. Nor would it, again, be fair to draw from this suit a moral on the danger of neglecting the use and repetition of the proper cabalistic phrases, as though the courts incline to punish curtness and plainness as offences against the genius of an essentially mysterious profession, whose aim it is to deter the steps of all unqualified intruders. The true lesson of the case, in fact, is that it is not very prudent for any one to be entirely his own legal adviser, any more than it is prudent for him to be his own stockbroker or physician. Lord WESTBURY is far from being the first lawyer of eminence who has made himself, involuntarily, an occasion for the enforcement of this remark. It is not only the general public who cannot dispense with lawyers; lawyers themselves are scarcely less in need of one another's services. There are few men who can judge with any exactness of the nature of their own performances. The criticism even of an inferior mind will often be of the utmost value, and will often pronounce a truer, if only because a more unprejudiced, opinion. The case, as we have said, does not much differ, whether the sphere be that of law, or of medicine, or of finance. There is a great deal in all of them which a qualified man may do well and easily for himself, and there is a great deal, too, which it would be prudent for him to commit to others. Some will, perhaps, err by too great caution and self-distrust, just as others have erred in the contrary way from too great self-confidence; but there is no comparison whatever between the consequences of the two mistakes."

Enforcing Payment of Municipal Securities After Judgment.

We surrender considerable space in this number to the case of Rees v. The City of Watertown, recently decided by the Supreme Court of the United States, concerning the mode of enforcing judgments against municipal corporations. Viewed in the light of the practical consequences, which it requires no uncommon sagacity to see will flow from it, no case since Knox County v. Aspinwall, upon the subject of municipal securities, is of more moment than this one. Undoubtedly this is so, if what the learned Justice who delivered the opinion says upon the subject of the inherent inability of the court to appoint, if necessary, its own officers to discharge the duty which the municipal officers evade or refuse to perform, is to be regarded as the opinion of the court.

The bill was in equity, and for the reasons stated sought equitable relief, substantially upon the double ground that the property of the inhabitants was liable to judicial seizure for the corporate debts, and that the municipal authorities held their powers, in respect to the taxation of property, as *trustees* for the creditors of the corporation, and that the refusal of the trustees to do their duty in this regard constituted a ground of equity jurisdiction in favor of the judgment creditor, whose legal process had been three times thwarted and rendered unavailing. The court denies the proposition that for corporate debts the inhabitants are liable to be proceeded against personally, or their property seized by the court, and also holds that the proper *legal* remedy to enforce payment of a judgment against a municipality is the writ of mandamus, and that it is no sufficient ground for *equity* jurisdiction that by the devices and contrivances of the corporation debtor or its officers or inhabitants the writ has been rendered fruitless. Clearly, the case is decisive against the right of the creditor to enforce payment through the instrumentality of a court of chancery.

How far what is said as to the want of inherent power in the court in mandamus proceedings in any event to appoint its own officers to perform a duty specifically enjoined by statute as to levying and collecting taxes, which duty the corporate officers refuse to perform, is to be considered as a point decided or only *obiter*, will, in view of the vital importance of the question and the nature of the case before the court, be likely to give rise to controversy. At all events, the views here expressed are ominous, and the case marks a new epoch in the judicial history of the municipal bond question. Hereto-

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fore the bondholders have had an almost uninterrupted succession of victories in the federal tribunals. In this judgment they have met with the first reverse; and if the views therein expressed are the views of the court in other than a case in equity, the reverse is a serious one in cases where the corporations and their people are so bent upon not paying that they will not keep up a regular corporate organization.

Liability of Banks and Bank Officers for Misrepresentations Concerning Solvency of Customer.

An interesting question concerning the liability of a bank or its manager for damages sustained by an individual through the false representations of the manager with regard to the solvency of a customer, has recently (February 2) been determined in the Exchequer Chamber, Westminster Hall, in the case of Swift v. Jewsbury, appealed from the Court of Queen's Bench. The plaintiff, Swift, having been applied to by Sir William Russell to supply him with a quantity of rails, applied to his own bank to ascertain, if possible, the condition of Sir William. The manager of this bank wrote to the manager of the bank at which Sir William had banked, desiring to know whether Sir William was responsible to the extent of £50,000. To this the manager of Sir Willlam's bank sent the following reply:

"GLOUCESTERSHIRE BANKING COMPANY,
CHELTENHAM, 9th November, 1869.

"GENTLEMEN: I am in receipt of your favor of the 8th inst., and beg to say in reply that Sir William Russell, Bart., M. P. for Norwich, is the lord of the manor of Charlton Kings, near this town, with a rent roll, I am told, of over £7,000 per annum, the receipt of which is in his own hands, and has large expectancies; and I do not believe he would incur the liabilities you name unless he was certain to meet the engagement. I am, gentlemen, yours faithfully,

T. B. GODDARD, Manager."

This letter was directed to the plaintiff's bank, namely: "The Sheffield and Hallamshire Bank, Sheffield." This information having been conveyed to the plaintiff by his bank, he took in payment of his rails Sir William's acceptance, which was afterwards dishonored. He now brought this action against the Gloucestershire Banking Company, and against Mr. Goddard individually. The court hold—Chief Justice COLERIDGE delivering the opinion—that the bank is not liable for the misrepresentation, reversing on this point the Queen's Bench. But with regard to the individual liability of Mr. Goddard, they rule otherwise. The Chief Justice on this point says: "With regard to Mr. Goddard, he has signed this, is found by the jury to have signed it with a knowl edge that it is untrue, and with the distinct intention to mislead those, whoever they were, to whose knowledge that misrepresentation should come. Mr. Swift is a person to whose knowledge it has come, and upon him it has acted unfavorably to the extent of the loss of his money. Therefore, it appears to me clearly, as far as Mr. Goddard is concerned, the action can be maintained for the whole sum that Mr. Swift has lost, against Mr. Goddard."

This case involves a construction of the English statute of frauds, 9 Geo. 4, chap. 14, under which it is held that the writing "signed by the party to be charged therewith" was not signed by the bank so as to charge it. It is further ruled that the 19th and 20th Vict., ch. 97, § 13, does not operate to charge the bank. This statute provides that "an acknowledgment or promise made or contained by, or in writing signed by an *agent* of the party chargeable thereby, and duly authorized to make such acknowledgment or promise, shall have the same effect as if the writing had been signed by such party himself." The force of the case would then seem to be that representations of this character are not made by bank officers in their fiduciary character, but simply as individuals, and for the truth of which they are alone individually responsible.

The full opinion of Chief Justice COLERIDGE will be found in the Bankers' Magazine for March.

Louisiana Funding Bill—Suit to Enjoin its Enforcement—Decision by Judge Woods.

The act passed by the last legislature of Louisiana, providing for the funding of the debt of that state, is meeting with a determined opposition by the holders of Louisiana bonds in England and in this country. Among financial men this measure is regarded as an attempt at a partial repudiation of the obligations of the state. On the other hand, the results of the war and subsequent misgovernment have fastened upon that unhappy people a debt of such magnitude, much of it tainted with fraud and corruption, that the payment even of the interest of the debt in its present status seems a hopeless and foregone question.

We may perhaps find space to mention the character of this Louisiana funding scheme more fully hereafter. We allude to it now merely for the purpose of stating that at New Orleans the suits brought in the United States Circuit Court, before Hon. W. B. WOODS, by J. L. Macauley, of New York, and Stern Bros., of England, holders of Louisiana bonds, against auditor Clinton and other state officers, to enjoin the enforcement of the funding bill, were decided on the 21st instant. Judge WOODS, in an elaborate written opinion, held that this is in effect a suit against the state, and that the court has no jurisdiction, because such suits are prohibited by the 11th amendment to the federal constitution. This was the chief and decisive question of the case; but the learned judge also proceeded to point out that if any remedy existed at all, it would not be by injunction, but by mandamus. We have not seen the full opinion; but we publish in another place the substance of it, as given in one of the New Orleans papers.

In an article in a previous number on the North Carolina special tax bonds, we pointed out what seemed to us the difficulty in the way of success in the suits brought by the bondholders in that state, namely, that they involved a seeming attempt on the part of the creditors to coerce a sovereign state into the payment of its supposed obligations. It is a familiar principle that a sovereign state cannot be sued unless by its own consent, and then only in the particular forum and in the particular manner pointed out by that consent. Were this not so, states might be so embarrassed by the suits of private individuals and by the seizing of the public property under executions, that civil government would become impossible. Within the meaning of this principle the states of the American Union are sovereign. (Briscoe v. Bank, 11 Peters, 257, 321; Houston Tap and B. Railway Co. v. Randolph, 24 Tex. 317, 339; Auditorial Board v. Arles, 15 Tex. 75

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Beers v. Arkansas, 20 How. 527; Auditor v. Davies, 2 Ark. 494, 504.)

It is true that it was held under the original constitution, by the Supreme Court of the United States, that the jurisdiction of the federal courts extended to the entertaining of a suit by a citizen of one of the states against another state of the Union. Chisholm v. Georgia, 2 Dall. 419. But the 11th amendment of the federal constitution afterwards intervened, and put an end to this jurisdiction, if it ever in fact existed; so that no suit can now be entertained in the federal courts against one of the states of the Union in which a private person is plaintiff.

Now, what is a *suit against a state?* It is manifest that any proceeding, whether brought against the state itself or its executive officers, which seeks to compel the performance of a supposed duty on the part of such state—to coerce it into the payment of its supposed obligations—to restrain it from violating its contracts—is as much a suit against the state as one in which the state is sued by name, and which seeks to reach and diminish a fund in the state's treasury, or to subject the state's property to execution. This conclusion would seem to be fully supported by the opinion of Judge WOODS. The bondholders have appealed from his decision to the Supreme Court of the United States. We shall watch the case with interest, but without much doubt as to what the result will be.

Bankrupt Act—Illegal Payment—Right of Holder of an Endorsed Note to Receive Payment from an Insolvent Debtor.

The case of Bartholow *et al.* v. Bean, published in this number, recently decided by the Supreme Court of the United States, lays down a principle of law, under the bankrupt act, of great practical importance to bankers, business men, and the holders of endorsed paper. Bean, as assignee in bankruptcy of Kintzing & Co., sued Bartholow, Lewis & Co., bankers in St. Louis, to recover back money which it was alleged they had received by way of an illegal preference from the bankrupts. The material facts were that the defendants held the note of Kintzing & Co., endorsed by one Wilcox, who was solvent and whose liability had become fixed by his waiver of protest and notice. Kintzing & Co. were insolvent and known to be so by Bartholow & Co. Under these circumstances, Kintzing & Co., without the procurement of the endorser, and without being required to do so by the defendants, paid to them the amount of the note; and the question was whether they were liable to refund the money to the assignee, the makers having, within four months, been thrown into bankruptcy. The supreme court, affirming the judgment of the circuit court, held that the assignee was entitled to recover, placing its judgment upon the ground that the bankrupt act (sec. 15), in the language of Mr. Justice MILLER, "intended, in the pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or endorser from the right to receive payment from the insolvent bankrupt. * * It was equally the duty of the holder of the note and the endorser to refuse to receive such a payment." The court say that if the holder had refused to receive payment, the endorser could not have set this up as a defence in an action against him by the holder.

The severe effect of the holder receiving payment from the insolvent maker is declared, *arguendo*, to be that "he makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses the right to recover *either of the endorser, or of the bankrupt's estate.*"

How far this had reference to the facts of the particular case, or is meant as a general proposition, does not appear from the opinion itself. But as stated, it relieves the solvent endorser, who was the party really benefited by the payment, since if it had not been made he would be liable; and the defendants had no motive to defeat or evade the bankrupt law, because the endorser's liability to them was fixed, and their right to insist upon and receive payment from him was undisputed.

Other aspects of the subject have arisen in the lower courts. Thus in Bean v. Laflin, East. Dist. of Mo., 5 Bankr. Reg. 333, TREAT, J., decided that an endorser who receives none of the proceeds of the note and whose liability has not become absolute, and who is guiltless of any fraud, cannot be compelled to pay to the bankrupt's assignee the amount of the note paid to the holder by the bankrupt while he was still carrying on business. But where the holder, who was innocent, was paid out of the means of the insolvent maker by the agency of the endorser, who knew the maker's insolvent condition, it was held that the *endorser* was liable to pay the amount to the assignee in bankruptcy, he and not the maker being, under these circumstances, the "party benefited" by the payment. LEAVITT, J., in Ahl v. Thorner, 3 Bankr. Reg. 29. Some general expressions in the opinions in both of the cases last cited require modification, perhaps, in view of the decision of the supreme court in the above-mentioned case of Bartholow, Lewis & Co.

Enforcement of Judgments upon Municipal Bonds —No Relief in Equity.

JAMES H. REES v. THE CITY OF WATERTOWN.

Supreme Court of the United States, No. 219, October Term, 1873.

1. **Municipal Bonds—Bill in Equity to Enforce Payment after Judgment.**—The plaintiff had obtained judgments upon municipal railway-aid bonds in the proper federal court in Wisconsin against a municipal corporation therein, and three successive writs of mandamus had been rendered ineffectual by reason of the want of a quorum of the council, caused by resignations and by the refusal of the municipal officers to obey the writs: thereupon the judgment creditor brought a *bill in equity*, asking a decree subjecting the taxable property of the citizens to the payment of his judgments, and that the marshal of the district be authorized to seize and sell so much of it as might be necessary for that purpose. *Held*, that the court had no power to grant the relief prayed.

2. ——. ——. **Appointment of Marshal to Levy Tax.**—In the absence of a statute authorizing it, the court has no power on a bill in equity to appoint its marshal a commissioner with authority to levy a tax upon the taxable property of the municipality, and on this point the case was distinguished from The Supervisors v. Rogers, 7 Wall. 175, which arose in Iowa, where there was such a statute.

3. **Municipal Debts—Personal Liability of Inhabitants.**—There is no personal liability on the part of the citizens or inhabitants of an ordinary municipal corporation outside of the New England states for corporate debts.

4. ——. **Enforcing Payment after Judgment—The Remedy.**—Mandamus is the appropriate *legal* remedy for the enforcement of judgments against a municipal corporation, and the fact that this remedy has proved fruitless by reason of the devices of the corporation debtor or its citizens does not constitute ground of *equity jurisdiction* to enforce payment of the judgment.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiff was the owner of certain bonds issued by the city of Watertown to the Watertown and Madison Railroad Company, and by them sold for their benefit. The plaintiff recovered three several judgments in the United States Court on these bonds, amounting to nearly ten thousand dollars. Afterwards he

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brought another suit in the United States Court for the Western District of Wisconsin, upon these several judgments, and on the 3d of February, 1871, recovered a judgment for $11,066.89.

In the summer of 1868 he issued executions upon the two judgments first obtained, which were returned wholly unsatisfied.

In November of the same year he procured from the United States Circuit Court a peremptory writ of mandamus, directing the city of Watertown to levy and collect a tax upon the taxable property of the city, to pay the said judgments; but, as the plaintiff alleges, before the writ could be served, a majority of the members of the city council resigned their offices. This fact was returned by the marshal, and proceedings upon the mandamus thereupon ceased.

In May, 1869, another board of aldermen having been elected, the plaintiff procured another writ of mandamus to be issued, which writ was served on all of the aldermen except one Holger, who was sick at the time of the service upon the others. No steps were taken to comply with the requisition of the writ. An order to show cause why the aldermen should not be punished for contempt, in not complying with its requirements, was obtained, and before its return day six of the aldermen resigned their offices, leaving in office but one more than a quorum, of whom the said Holger, upon whom the writ had not been served, was one. Various proceedings were had and various excuses made, the whole resulting in an order that the aldermen should at once levy and collect the tax; but before the order could be served on Holger, he resigned his office, and again the board was left without a quorum. Nothing was accomplished by their efforts in aid of the plaintiff, but fines were imposed upon the recusant aldermen, which were ordered to be applied in discharge of the costs of the proceedings.

In October, 1870, the plaintiff obtained a third writ of mandamus, which resulted as the former ones had done, and by the same means on the part of the officers of the city. A special election was ordered to be held to fill the vacancies of the aldermen so resigning, but no votes were cast, except three in one ward, and the person for whom they were cast refused to qualify. There is a very limited denial in the answer of some of these allegations, but their general truth is not denied. It is certain that no part of the debt of the plaintiff has ever been paid, and that with an accumulation of fourteen years' interest, the same remains wholly due, and that the plaintiff's efforts to obtain satisfaction of his judgments have failed.

The bill sets forth certain acts of the legislature of Wisconsin, which, it is alleged, were intended to aid the defendant in evading the payment of its debts, and which, it can scarcely be denied, have had that effect, whatever might have been the intent of the legislature passing them.

The plaintiff asks the aid of the court to subject the taxable property of the city to the payment of his judgments, alleging that the corporate authorities are trustees for the benefit of the creditors of the city, and the property of the citizens a trust fund for that purpose, and that it is the duty of the court to lay hold of the property and cause it to be justly applied. He asks specifically that a decree may be made subjecting the taxable property of the citizens to the payment of his judgments, and that the marshal of the district may be empowered to seize and sell so much of it as may be necessary, and to pay over to him the proceeds of such sale.

This case is free from the objections usually made to a recovery upon municipal bonds. It is beyond doubt that the bonds were issued by the authority of an act of the legislature of the state of Wisconsin, and in the manner prescribed by the statute. It is not denied that the railroad, in aid of the construction of which they were issued, has been built, and was put in operation.

Upon a class of the defences interposed in the answer and in the argument it is not necessary to spend much time. Thus it is alleged that the city of Watertown contains a population of but 7,553 inhabitants; that the value of its property is assessed at but little over a million of dollars; that the debt of the city is $750,000; that it is impossible for the city to pay this debt; that it was expected and provided that the railroad company would pay the bonds in question, but the roads have been foreclosed and sold; that the city has compromised and settled a portion of its indebtedness; that it has levied the taxes necessary to effect such compromise; and that it is ready to compromise all outstanding bonds and judgments at as high a rate as can be collected of the people of Watertown; that there is no law to compel the retention of the office by aldermen to levy taxes; that the plaintiff took his chance of its being voluntarily done, and that, not being voluntarily done, there is no violation of law.

These theories are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community, and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it.

There is, however, a grave question of the power of the court to grant the relief asked for.

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority, at once so delicate and so important. The question is not entirely new in this court.

In the case of Supervisors v. Rogers (7 Wall. 175), an order was made by this court appointing the marshal a commissioner, with power to levy a tax upon the taxable property of the county, to pay the principal and interest of certain bonds issued by the county, the payment of which had been refused. That case was like the present, except that it occurred in the state of Iowa, and the proceeding was taken by the express authority of a statute of that state. The court say: "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment. This depends upon a provision of the code of the state of Iowa. This proceeding is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner, in pursuance of the above section, is to provide for the performance of this duty where the board has disobeyed or evaded the law of the state and the peremptory mandate of the court.

The state of Wisconsin, of which the city of Watertown is a municipal corporation, has passed no such act. The case of Supervisors v. Rogers, is, therefore, of no authority in the case before us. The appropriate remedy of the plaintiff was and is a writ of mandamus. (See Riggs v. Johnson County, 6 Wall. 193.) This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present.

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In Welch v. St. Genevieve (10 Am. Law. 512), at a circuit court for the district of Missouri, a tax was ordered to be levied by the marshal under similar circumstances. We are not able to recognize the authority of the case. No counsel appeared for the city (Mr. Reynales as *amicus curiæ* only); no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph, and the execution of the order suspended for three months to give the corporation an opportunity to select officers and itself to levy and collect the tax, with the reservation of a longer suspension if it should appear advisable. The judge, in delivering the opinion of the court, states that the case is without precedent, and cites in support of its decision no other cases than that of Riggs v. Johnson County, 6 Wall. 166, and Lansing v. Treasurer, 9 Am. Law Reg. N. S. 415. The case cited from 6 Wallace does not touch the present point. The question in that case was whether a mandamus having been issued by an United States court in the regular course of proceedings, its operation could be stayed by an injunction from the state court, and it was held that it could not be. It is probable that the case of Supervisors v. Rogers (7 Wall. 175), was the one intended to be cited. This case has already been considered.

The case of Lansing v. Treasurer (also cited), arose within the state of Iowa. It fell within the cass of Supervisors v. Rogers, and was rightly decided because authorized by the express statute of the state of Iowa. It offered no precedent for the decision of a case arising in a state where such a statute does not exist.

These are the only authorities upon the power of this court to direct the levy of a tax under the circumstances existing in this case to which our attention has been called.

The plaintiff insists that the court may accomplish the same result under a different name; that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of state taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls, or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights, we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of the law even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by assessment, and when the proportion is ascertained or paid it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void. (Van Hoffman v. City of Quincy, 4 Wall. 535.) But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted, he has no cause of complaint. (Cooley Const. Lim. 285 287.)

By section 9 of the defendant's charter (Priv. Laws, ch. 237, p. 667) it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it, and form a part of the measure of the obligation of the one party and of the right acquired by the other. (Cooley Const. Lim. 285.)

But independently of this statute upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge STORY says "there are cases of fraud, of accident and of trusts which neither courts of law or of equity presume to relieve or to mitigate," of which he cites many instances. (1 Story Eq. Jur., § 61.) Lord Talbot says "there are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it and extend it further than the law allows." (Heard v. Stanford, Cas. Temp. Talbot, 174, cited Story, *sup.*)

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust or accident when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law and there be well disposed of. (1 Story Eq. Jur. § 60.)

A court of equity cannot, by avowing that there is a right, but no remedy known to the law, create a remedy in violation of law

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or even without the authority of law. It acts upon established principles not only, but through established channels. Thus assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglected its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or, if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter 29 of *Magna Charta*, and embodied in the constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding and have a day in court to make his defence. (Westervelt v. Greig, 12 N. Y. 209.)

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." (Ib.) In the New England states it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those states is brought in form against the inhabitants of the town, naming it; the individual inhabitants, it is said, may and do appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them. (See the cases collected in Cooley Const. Lim. 240 to 245.) This is local law peculiar to New England. It is not the law of this country generally, or of England. (Russell v. Men of Devon, 2 T. R. 667.) It has never been held to be the law in New York, New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western states. (See Emeric v. Gilman, 10 Cal. R. 408, where all the cases are collected.) So far as it rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those states where provision is made for compulsory taxation to satisfy judgments against a town or city. (Cooley Const. Lim. 246.)

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and therefore that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of Emeric v. Gilman, before cited, it is said: "The inhabitans of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who opposed the creation of the liability may be subjected to its payment, while those by whose fault the burden has been imposed may be entirely relieved of responsibility. * * * To enforce this right against an inhabitant of a county would lead to such a multiplicity of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from the property owned by the creditor himself, if he should happen to own property within the limits of the corporation of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment, we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law. (1 Story Eq. Jur., § 470 and onwards.)

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that by means of the aid afforded by the legislature, and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in central New York combinations of settlers and tenants, disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence or crime, its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.

DECREE AFFIRMED.

Mr. Justice CLIFFORD.—I dissent from the opinion of the court in this case upon the ground that equity will never suffer a trust to be defeated by the refusal of the trustee to administer the fund, or on account of the misconduct of the trustee, and also because the effect of the decree in the court below, if affirmed by this court, will be to give judicial sanction to a fraudulent repudiation of an honest debt. For which reasons, as it seems to me, the decree of the subordinate court should be reversed.

Mr. Justice SWAYNE concurring.

The Louisiana Funding Bill—The Federal Courts have no Power to Coerce a State into the Payment of its Supposed Obligations.

MACAULEY *ET AL.* v. CLINTON, AUDITOR OF LOUISIANA.

STERN BROS. *ET AL.* v. THE SAME DEFENDANT.

Circuit Court of the United States, District of Louisiana, March 21, 1874.

Before Hon. W. B. WOODS, Circuit Judge.

1. Injunction Against State Officers.—An injunction will not lie against the officers of a state government to restrain them from hindering or delaying the estimate, levy and collection of taxes. Such an injunction is in its nature *mandatory*, and a man-

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datory injunction for such a purpose will not lie. If there were any remedy at all, it would be by mandamus.

2. ——. For the same reason an injunction will not lie to restrain an officer of a state government from receiving delinquent taxes in auditor's warrants.

3 **Remedy against State to Compel Payment of its Debt—Jurisdiction of Federal Courts.**—No power exists in the federal courts to compel the officers of a state government to proceed with the execution of the laws of the state which prescribe means of raising revenue for the payment of the state's obligations. Any proceeding of this kind is, in effect, a suit against the state, and is prohibited by the 11th amendment to the federal constitution.

The following is the substance of the opinion:

WOODS, J.—[After stating the case.]

It is obvious to remark that there are insuperable objections to so much of the prayer for relief as asks that the defendants may be decreed to comply with and specifically perform the contracts of the state by estimating and collecting the interest and sinking fund taxes and applying it to the payment of the principal and interest on the bonds. The objection is, that if there is a remedy at all, it is a remedy at law, namely, by the issuance of the writ of mandamus. If this suit were brought against a municipal corporation and its officers to compel the collection of a tax to pay the interest on its bonds, the plain, adequate and complete remedy would be the legal writ of mandamus. It is true that before the writ could issue the bondholders must have received a judgment at law on their bonds. Bath County v. Amy, 13 Wallace, 247. It may be replied to this that the bondholders cannot lay the necessary foundation for the writ of mandamus in the United States courts, because they are prohibited from suing the state by the eleventh amendment to the constitution of the United States. But this fact may prove that there is no remedy for the complainants in the United States courts. It certainly does not follow that because there are obstacles to the adoption of the plain legal remedy that therefore the remedy is in equity. It might as well be claimed that because the bondholder could not go into a court of law and secure a judgment against the state upon his bonds, he might therefore go into equity and seek a decree against the officers of the state for the amount due on his bonds. Where the eleventh amendment to the constitution declares that "the judicial power of the United States shall not be construed to extend to any suit at law or in equity commenced or prosecuted against one of the United States by citizens of another state, or subjects of any foreign state," the purpose is clear to exempt states from suits upon their contracts, either at law or in equity, and the fact that this amendment interposes an obstacle to a suit at law against a state does not give a court of equity jurisdiction to enforce the same contract on the pretext that there is no remedy at law. Suits in both forms against a state are prohibited. It is evident, therefore, that should this bill come on for final hearing the decree prayed for could not be granted.

We may, however, consider the bill as one for injunction only, and the question now presented is, can or ought the court to allow the injunction to go as prayed for? It is claimed by the bill, and conceded by the counsel for defendants, that the bonds of the state of Louisiana held by the complainants are contracts; that the laws under which the bonds were issued, and which provide for the levy and collection of taxes to pay the interest and reduce the principal, and declaring that the same should be annually continued until the principal and interest of said bonds were fully paid—that these provisions of law entered into and formed a part of the contract between the state and the bondholder, just as completely as if the laws themselves were entered in the body of the bonds. The state has, therefore, contracted that at a certain date named in the bonds she would pay the principal; that in the meantime she will pay the interest semi-annually to the holders of the bonds; and as an assurance that this part of her contract will be performed, she promises further that she will levy and collect an annual tax to make these payments, and that the revenue raised by this tax shall be set apart for the purpose of paying said interest and principal. It is conceded that the state has made this contract with the complainant in this case.

Now to what ends is the injunction sought for in this case? They are two-fold. First, to compel the officers of the state to execute the contracts of the state by estimating, levying, collecting and applying to the payment of the bonds the tax originally provided by law for the payment of the interest and the redemption of the principal. It is true the prayer for injunction is that the officers of the state may be restrained from hindering or delaying the estimate, levy and collection of the tax, etc. But as the defendants are the officers whose duty it is to estimate, levy and collect, it is clear that such an injunction from this court would be mandatory, and compel the performance of affirmative acts. Second, to restrain the state officers from receiving delinquent taxes in auditor's warrants instead of lawful money of the United States. The first question presented by the prayer for injunction is: Can the officers of the state be compelled by injunction to do an affirmative act? The complainant claims that the funding bill and the act of March 14th, 1874, which in effect prohibits the collection of taxes for the payment of the principal and interest of the outstanding bonds of the state, are unconstitutional and therefore void. If this be conceded, then the case is in the same plight as if these acts just named had never been passed, and as if the officers of the state, without pretence of warrant of law, were refusing to levy and collect the taxes which the state had agreed should be levied and collected and applied to the payment of these bonds. Has this court the power, by injunction, to do an affirmative act? The authorities are adverse. The case of Walkley v. City of Muscatine, 6th Wallace, 483, was a bill in equity to compel the authorities of the city of Muscatine to levy a tax upon the property of the inhabitants for the purpose of paying the interest on certain bonds issued by the city. It appeared that a judgment had been rendered in the same court against the city for $7,666, interest due on bonds held by plaintiff; that execution had been issued and returned unsatisfied, no property being found liable to execution; that the mayor and aldermen had been requested to levy a tax to pay the judgment, but had refused; that the city authorities possessed the power, under their charter, to levy a tax of one per cent. on the valuation of the city property, and had made a levy annually, but had appropriated the proceeds to other purposes, and had wholly neglected to pay the interest upon the bonds. The bill prayed that the mayor and aldermen might be decreed to levy the tax and appropriate so much of the proceeds as might be sufficient to pay the judgment, interest and costs. Upon this case the supreme court say: "We are of the opinion that complainant has mistaken the appropriate remedy in the case, which was by writ of mandamus from the circuit court. We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus. An injunction is generally a preventive writ, not an affirmative remedy. It is sometimes used in the latter character, but this is in cases where it is used by the courts to carry into effect its own decrees, as in putting the purchaser under a decree of foreclosure of the mortgage into posession of the premises. Even the exercise of this power was doubted till the case of Kershaw v. Thompson, 4th Johnson, 609, in which the learned chancellor, after an examination of the cases in England on the subject, came to the conclusion he possessed it—not, however, by the writ of injunction, but by the writ of assistance."

A consideration of the second branch of the injunction asked, namely, to restrain the state officers from receiving delinquent taxes in auditor's warrants, will show that this is an indirect way of praying for an injunction to compel the state officers to receive the delinquent taxes in lawful money of the United States, according to the contract of the state as claimed by complainants. The complainant would not be satisfied should the state officers suspend the receipt of state warrants. The evident purpose of this

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part of the injunction is to compel them to receive lawful money; for, unless the officers, after declining to receive auditor's warrants, proceed to collect the taxes in lawful money, the complainant would take no advantage from his motion. But the fatal objection to the motion of complainant is found in the character of his bill: it is either a suit in effect against the state of Louisiana, or if not, the parties defendant are merely nominal parties having no interest in the controversy. In either case no decree can be made.

In the case of Kentucky v. Denison, Governor, 24th Howard, 109, it was held that neither the congress nor the courts of the United States could coerce a state officer, as such, to perform any duty imposed upon him by act of congress. Does it not follow *a fortiori* that a court of the United States cannot compel the governor of a state to execute a law passed by the state?

In the view I have herein taken of the case, I have conceded what the complainants claim, that the funding bill and the act of March 14, 1874, are both unconstitutional and void, and have regarded the case just as if those acts had never been passed, to-wit: a bill to compel the defendants, officers of the state, to execute its laws. This may be done in the case of officers of municipal corporations, but the sovereign power of a state cannot be so coerced. To do so would be to substitute this court for the executive officers of the state, to supplant their views of duty and the obligations imposed upon them by their official oaths, by the discretion of this court and its official oath. In other words, it would be an undertaking upon the part of this court to administer the state government. This the court has no power and no inclination to do. In my judgment this is, to all intents and purposes, a suit against the state. The officers of the state, including the chief executive, are sued in their official capacity to compel them to execute the laws of the state. It is a suit to enforce the contract of the state to pay money; the officers are not sued as individuals who happen to be in public offices, to prevent them from doing some act to the prejudice of complainant not warranted by law, as was the case of Osborne v. The Bank and Davis v. Grey. If a suit like this can be maintained, then the 11th amendment to the constitution of the United States is waste paper..

Bankrupt Act—Fraudulent Preference by Insolvent.

THOMAS J. BARTHOLOW, JAMES W. LEWIS, BENJAMIN W. LEWIS, JR., AND JOHN D. PERRY, PLAINTIFFS IN ERROR, v. WILLIAM C. BEAN, ASSIGNEE OF CHARLES S. KINTZING, BANKRUPT.

Supreme Court of the United States, No. 171, *October Term*, 1873.

1. **Bankrupt Act—Fraudulent Preference.**—A payment by an insolvent, which would otherwise be void as a preference under sections thirty-five and thirty-nine of the bankrupt law, is not excepted out of that provision because it was made to a holder of his note over-due, on which there was a solvent endorser whose liability was already fixed by protest and notice.

In error to the Circuit Court of the United States for the Districts of Missouri.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiffs in error were bankers in the city of St. Louis, with whom Kintzing & Co. kept a bank account, and they had discounted the note of Kintzing & Co. for $2,500, dated January 15th, 1869, payable in sixty days, endorsed by J. B. Wilcox. Before its maturity Wilcox, who was solvent, waived protest and notice, and the note remained unpaid until August 9th, when Kintzing paid the amount to plaintiffs in error.

In the meantime Kintzing & Co. failed in business, and in February attempted a composition with their creditors at seventy cents on the dollar, in notes payable in six, twelve, and eighteen months. Plaintiffs in error did not sign this agreement, though they knew of it, and that effort seems to have failed. It must be conceded that Kintzing was utterly insolvent when he paid the note, and this must have been known to plaintiffs in error.

A petition in bankruptcy was filed against Kintzing within less than four months after the payment of the note, and Bean, the defendant in error, having been appointed assignee, brought the present suit to recover the money so paid, as being a preference of a creditor forbidden by the bankrupt law.

If it were a transaction solely between Kintzing and the bankers there seems to be no reason to doubt that the payment was such a preference as would enable the assignee to recover it back. But the case is not a little embarrassed by the fact that the endorser, Wilcox, was solvent, and was liable on the note to the bankers; and the question arises whether, under such circumstances, they were at liberty to refuse to receive payment of the principal without losing their claim upon the endorser, who was probably a mere accommodation surety. It is a question not without difficulty.

It is very true that an ingenious argument is made to show that by an arrangement between Kintzing and his partner the former assumed all the debts under the attempted compromise, and took all the property of the former, and that, by reason of the partial success of the compromise, Kintzing was no longer insolvent. But the facts in the finding of the court leave no room to doubt that Kintzing was, after the failure, always insolvent, in the sense of being unable to pay his current over-due debts, and of this plaintiffs could not be unaware, since they held the note, on which they received the money now sued for, about five months after its maturity, without payment, and without their signing the compromise paper. They must, therefore, have known that, in the sense of the bankrupt law, Kintzing had been insolvent for months before they received payment.

Does the fact that Wilcox, the endorser, was solvent, and was liable, change the rule as to payment as a preference?

The statute in express terms forbids such preference, not only to any ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is therefore very evident that the statute did not intend to place an endorser or other surety in any better position in this regard than the principal creditor, and that if the payment in the case before us had been made to the endorser, it would have been recoverable by the assignee. If the endorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it would certainly have been recovered of him. Or if the money had been paid to him directly instead of the holder of the note, it could have been recovered; or if this money or other property had been placed in his hand to meet the note or to secure him instead of paying it to the bankers, he would have been liable. He would not, therefore, have been placed in any worse position than he already occupied if the holders of the note had refused to receive the money of the bankrupt. It is very obvious that the statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or endorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place and an evasion of it in another. It was made by the statute equally the duty of the holder of the note and of the endorser to refuse to receive such a payment.

Under these circumstances, whatever might have been the right of the endorser, in the absence of the bankrupt law, to set up a tender by the debtor and a refusal of the note-holder to receive payment, as a defence to a suit against him as endorser, no court of law or equity could sustain such a defence, while that law furnishes the paramount rule of conduct for all the parties to the transaction; and when in obeying the mandates of that law the endorser is

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placed in no worse position than he was before, while by receiving the money the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover either of the endorser or of the bankrupt's estate.

We are of opinion, therefore, notwithstanding the hardship of the case, which is more apparent than real, that the payment must be held to be a preference within the bankrupt law, and that the judgment of the court below, that the assignee should recover it, must be affirmed.

JUDGMENT AFFIRMED.

The Indiana Liquor Law.

What is called the "Baxter Law" of Indiana is said to provide that the commissioners of any county shall not allow a man to sell liquor unless he first obtains the signatures to his petition of a majority of the voters of the county. Suits for damages may be brought against a liquor seller who has sold liquor to an habitual drunkard, by a variety of persons, friends or relatives, of the drunkard, or even, in some cases, by the township trustee. None of the permissions granted to saloon keepers permit liquor selling on Sundays or holidays. In many of the large towns the law is a failure. In such places no dealer finds it difficult to procure the requisite number of signers to his petition; but the country press generally supports the law, and in the country towns the majority of the voters refuse to lend their names to those who are petitioning for permission to sell. It is said that the law has thus far stood the test of judicial examination except that the supreme court has declared unconstitutional the 9th section, which declares it to be unlawful to become intoxicated, and which provides that all intoxicated persons may be arrested and forced to disclose the name of the dealer who sold the liquor.

The Fourteenth Amendment and the State Liquor Laws.

The liquor sellers of Iowa have been reduced to such straits by the recent temperance legislation of that state, that they not long since got up a test case and took it to the Supreme Court of the United States, to see if they could not get some relief under the fourteenth amendment of the federal constitution. The case was argued at the same time with the Louisiana slaughter-house cases (16 Wall. 36), but a decision was not rendered until March 4th. The opinion of the court was delivered by Mr. Justice MILLER. It will be found in full in the Washington Chronicle of March 17th. The court express, in substance, the view that the right to sell such liquors is not one of the privileges and immunities of citizens of the United States which by the fourteenth amendment the states are forbidden to abridge; but they say that if a case were presented in which a person owned liquor, and while so owning it a law was passed by the state absolutely prohibiting any sale, it would be a very grave question whether such a law would not be inconsistent with the provisions of that amendment which forbids the state to deprive any person of life, liberty or property without due process of law.

But the court further say, in substance, that while the court below attempt to present this question, the record fails to raise it; first, because the plea which is taken as true does not state in due form, by positive allegation, the *time* when the defendant became the owner of the liquor sold; and secondly, because the court are satisfied, from an examination of the record, that the case is but a moot case, made up to obtain the opinion of the court on a grave constitutional question without the existence of facts necessary to raise that question. In such a case, where the supreme court of the state from whence the cause comes has not considered the question, the Supreme Court of the United States will not feel at liberty to go out of its usual course to decide it.

Mr. Justice FIELD and Mr. Justice BRADLEY delivered concurring opinions, in which they took occasion to restate the grounds of their dissent from the opinion of a majority of the court in the slaughter-house cases, in order to correct some apparent misapprehension of their views as to the fourteenth amendment. We have not seen these separate opinions; but from a note in the Albany Law Journal, we learn that Mr. Justice FIELD says that the judges who dissented in those cases never contended that the fourteenth amendment interferes, in any respect, with the police power of the state, but that, on the contrary, "they recognized the power of the state in its fullest extent, observing that it embraced all regulations affecting the health, good order, morals, peace and safety of society; that all sorts of restrictions and burdens were imposed under it, and that, when these were not in conflict with any constitutional prohibition or fundamental principles, they could not be successfully assailed in a judicial tribunal. But they said that, under the pretence of prescribing a police regulation, the state could not be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to guard against abridgment; and because, in their opinion, the act of Louisiana, then under consideration, went far beyond the province of a police regulation, and created an oppressive and odious monopoly, thus directly impairing the common rights of the citizens of the state, they dissented from the judgment of the court. * * * It was because the act of Louisiana transcended the limits of police regulation and asserted a power in the state to farm out the ordinary avocations of life, that dissent was made to the judgment of the court sustaining the validity of the act." The judge continues: "The amendment was not, as held in the opinion of the majority, primarily intended to confer citizenship upon the negro race. It had a much broader purpose; it was intended to justify legislation extending the protection of the national government over the common rights of *all* citizens of the United States, and thus obviate objections to the legislation adopted for the protection of the emancipated race. It was intended to make it possible for *all* persons, which necessarily included those of every race and color, to live in peace and security wherever the jurisdiction of the nation reached. It therefore recognized, if it did not create, a national citizenship, and made all persons citizens, except those who preferred to remain under the protection of a foreign government, and declared that their privileges and immunities. which embrace the fundamental rights belonging to citizens of all free governments, should not be abridged by any state. This national citizenship is primary and not secondary. It clothes its possessor, or would do so if not shorn of its efficiency by construction, with the right, when his privileges or immunities are invaded by partial or discriminating legislation, to appeal from his state to his nation, and gives him the assurance that, for his protection, he can invoke the whole power of the government." The views of Mr. Justice BRADLEY were to the same effect, and were concurred in by Mr Justice SWAYNE.

Supreme Court of Missouri—Abstract of Decisions at the March Term, 1874.

Interpretation—Charter of Missouri Loan Bank.—Missouri Loan Bank v. John Haw and Giles F. Filley. This case involves the interpretation of the charter of the Missouri Loan Bank, which provides that the bank shall have power "to loan money *upon personal security and the pledge of goods and chattels*," etc. The question comes up in this way: The defendant Haw borrowed $4,000 from the bank and executed his note for that amount to Filley, who, for the accommodation of Haw, endorsed it to the bank. The note having been dishonored, the bank brings this action jointly against the maker and endorser. The endorser, Filley, alleges that he is an endorser for the accommodation of Haw merely, and further alleges that the bank by the terms of its charter had no power to lend money upon *personal security* merely, and that the note is hence wholly void and he not liable. But the court hold otherwise. The provision of the bank's charter is interpreted as though it read "the association shall have power to lend money upon personal security, and shall also have power to lend money upon the pledge of goods and chattels." The case of North River Insurance Company v. Lawrence, 3 Wendell, 482, is examined and distinguished. The judgment below, that the plaintiff recover on the note, is here affirmed. VORIES, J., delivered the opinion. NAPTON, J., having been of counsel, did not sit. SHERWOOD, J., absent. The other judges concurred.

Action on Account Stated—Impeachment of Account.—Dominic Kronenberger v. Stephen Kinz. This was an action on an account stated. Upon the facts the court hold: 1. That there was no error in excluding the evidence offered to impeach the settlement, no foundation for the introduction of such evidence having been laid in the pleadings. 2. That the amount found in favor of the plaintiff by the settlement was due from the time of the settlement. But the defendant had a right to extend the time by the execution of his notes to the plaintiff in payment of the amount found due; and having agreed to do so, and then having failed to comply with his agreement, the right of action accrued immediately to the plaintiff. Judgment affirmed. ADAMS, J., delivered the opinion. The other judges concur.

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Wife's Separate Estate Charged by Executing Note.—John Meyers v. Adaline H. Van Wagoner *et al.* In this case Mrs. Van Wagoner, a married woman, executed to the plaintiff her promissory note in lieu of a note which the plaintiff held against her son by a former marriage, who was insolvent. She at the same time took up and destroyed her son's note. This note, thus given by Mrs. Van Wagoner, was renewed by her by giving a second note, she thus procuring an extension of time. In these transactions nothing was said about charging her separate estate. The second note having been dishonored, suit was brought upon the same. Mrs. Van Wagoner pleaded want of consideration, and on the trial testified that in these transactions she had no intention of charging her separate estate. But the court hold: 1. That the note is supported by a good consideration. 2. That by executing her promissory note, the law implies that she intended to charge her separate estate; otherwise the doing of it would be entirely nugatory. The court cite Metropolitan Bank v. Taylor, 53 Mo. Judgment for the plaintiff is affirmed. ADAMS, J., delivered the opinion. SHERWOOD, J., absent. The other judges concurring.

Open and Notorious Adultery—The Missouri Statute Expounded.—State v. John D. Crowner and Nettie Gordon. The defendants were indicted under the Missouri statute for open and notorious adultery. The Missouri statute is as follows: "Every person who shall live in a state of open and notorious adultery, and every man or woman, one or both of whom are married and not to each other, who shall lewdly and lasciviously abide and cohabit with each other, and every person married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor," etc. The indictment pursued the statute. The proof was that the defendant, Crowner, a married man, and the defendant, Nettie Gordon, a single woman, took a private room in St. Louis, paid a month's rent in advance, and lived there for three days, apparently as man and wife, the man being away part of the time. The trial was before the court, a jury being waived. The defendants asked, among others, the following declaration of law: "That if the court, sitting as a jury, shall find from the evidence that the defendants were not living together in a state of open and notorious adultery, but were simply, at the time charged in the information, stopping together in the same room occasionally, and were only guilty of occasional acts of illicit intercourse, then the court should find the defendants not guilty." This declaration the court below refused, and this refusal is here assigned as error.

J. G. Lodge. for the appellants, cited and argued from the cases quoted by the court, *infra*. *J. C. Normile*, prosecuting attorney, *contra*.

The court hold that the refusal of the declaration of law above set forth was error, and also that under the facts proved the conviction cannot be sustained. The court say: "The statute contemplates three different classes of offences. The first, and the one for which the defendants in this case are prosecuted, applies only to persons who live in a state of open and notorious adultery, and the offence under that clause of the statute can only be committed by a married person. The second class of offences can only be committed by a man or woman, one or both of whom are married and not to each other, and who shall lewdly and laciviously abide and cohabit with each other, etc. The third class of offences provided for may be committed by any person, either married or unmarried. The defendants in this case are charged with living in a state of open and notorious adultery. The offence consists of an open and notorious living or cohabitating together. Occasional illicit intercourse will not constitute the offence. The statute was intended to provide against persons who, in defiance of morality and the good or well being of society, should openly live together. They must reside together publicly in the face of society, as if the conjugal relation existed between them. Their illicit intercourse must be habitual. (Wright v. State, 5 Blackf. 358; Seares v. People, 13 Ill. 597; State v. Gartrell, 14 Ind. 380; Dameron v. State, 8 Mo. 494.) I would not be understood to say that the cohabiting and abiding together must be for any great length of time. Perhaps a short time would do. But the parties must live together in an open and notorious manner, to the evil example of society. Simply having occasional illicit intercourse, without a public or notorious living together, as the evidence in this case tends to prove, is certainly not sufficient."

Judgment reversed; VORIES, J., delivering the opinion. SHERWOOD, J., absent. The other judges concurring.

Recent Reports.

MISSOURI REPORTS, VOL. 53. Reports of Cases Argued and Adjudged in the Supreme Court of Missouri. By TRUMAN A. POST, Reporter. Vol. 53. Embracing part of the June term, 1873, at Jefferson City, and part of the October term, 1873, at St. Louis. St. Louis: W. J. Gilbert. 1874 Price $4.

Hons. DAVID WAGNER, WASH. ADAMS, H. M. VORIES, T. A. SHERWOOD, E. B. EWING, and W. B. NAPTON, Judges.

In size and appearance this volume does not differ from its predecessors. The editorial and mechanical work are very fairly done—certainly as well done as the meagre compensation allowed by the state will admit of. We note the following cases of interest:

Bills and Notes—Conditional Acceptance.—The acceptance of an order for money stated therein to be against sums due on a pending contract, is a conditional acceptance, and a subsequent breach of the contract by the drawer may be a good defence to a suit on such acceptance. Crowell v. Plant, 145.

———. **Liability of Surety who Signs with Particular Agreement as to Co-surety.**—Where one becomes surety on a non-negotiable promissory note on the express condition that another shall be procured as co-surety, and the latter fails to sign, the surety will not be liable, although the note is in the hands of a holder having no notice of the agreement. As to the surety, while the condition remains unperformed, the instrument is merely an escrow and there is no delivery. Ayres v. Milroy, 516.

———. **Agreement to Obtain Co-surety—Maker Agent of Surety.**—Although a surety upon a note is induced to sign upon the promise of the maker that a co-surety shall be joined, yet if nothing on the face of the paper imparts notice to the holder, or puts him on enquiry as to such agreement, no fault attaches to the latter, and the surety must run the risk of the fraud of his own agent. Per NAPTON, J.; SHERWOOD, J., concurring. *Id.*

———. **Notice to Endorser—Due Diligence, what is.**—A notary public not knowing the residence of an endorser, on the day of protest made enquiry at the bank in St. Louis, where the note was payable, and at the place of business of another endorser, and examined the city directory to ascertain the residence, but without success. He thereupon placed the notice in the city post-office. The evidence showed that other endorsers could have given the desired information, and that one of them lived in East St. Louis, immediately across the river. *Held*, that it was the duty of the notary to enquire at least of all the parties to the note, if accessible, and that he might have prosecuted his enquiries for that purpose for several days; that there was no search made such as the law requires, and that putting the notice in the post-office, under the circumstances, amounted to nothing. Gilchrist v. Donnell, 591.

———. ———. **Residence—Presumption as to Service of Notice Must be Made, How.**—There is no presumption that an endorser resides in the town or city where the bill or note is made payable. If such be the fact, notice cannot be served by depositing it in the post-office, but the service must be personal, or by leaving it at the usual place of business of the endorser, or with his family at his domicile. Id.

Criminal Law—Association with Thieves.—An individual may associate with thieves, &c., without being guilty of any offence, for it is not the business of the legislature to keep guard over individual morality; but if such person so associate with a design to aid, abet or promote, or in any way assist the parties charged with, or suspected of, being thieves, prohibitory legislation may be applied, not to correct the evil consequences which such association may bring on the individual, but to protect society from actual or anticipated breaches of law. City of St. Louis v. Fitz, 582.

———. ———. **St. Louis Ordinance.**—The ordinance of the city of St. Louis (City Ord. chap. 20, art. 4, § 1), prohibiting the "knowingly associating with persons having the reputation of being thieves and prostitutes," is void, as invading the right of personal liberty. Per SHERWOOD, J., concurring. Id.

Evidence—Surgical Examination at the Trial.—The proposal of counsel in a damage suit, to have surgeons called in during the progress of the trial to examine plaintiff as to the extent of his injuries, is unknown to the law, and the court has no power to enforce such an order. Loyd v. H. & St. Jo. R. R. Co., 509.

Female Suffrage—Fourteenth Amendment.—There is no conflict between the constitution of the state and the registration laws restricting the right of voting to male citizens, and the fourteenth amendment to the constitution of the United States. Minor v. Happersett, 58.

Husband and Wife—Married Women as Witnesses—Missouri Statute.—Section 5 of the statute concerning witnesses (W. S 1373), holding married women incompetent to testify as to admissions and conversations of their husbands, was intended to apply to all cases, whether the husband was a party or not. Moore v. Wingate, 398.

Municipal Corporations—Special Taxes—Streets—Re-paving—Assessment of Benefits.—The power to grade and improve streets is a legislative power, and is a continuing one unless there is some special restraint

imposed in the charter of the corporation. It may be exercised from time to time as the wants of the municipal corporation may require, and of the necessity or expediency of its exercise the governing body of the corporation, and not the courts, is the jndge; and it follows that the power to compel the property-owners to pave generally, extends to compelling them to re-pave when required by the municipal authorities. If the first paving of a street is a special benefit to the front proprietor, justifying the imposition on him of a portion of the expense, so the removal of an insufficient pavement and the making of a new and sufficient one in its stead, is a matter of special benefit to the front proprietor, although it may be also of general utility. McCormack v. Patchin, 33.

———. **Improvement of Streets—Personal Judgments.**—Personal judgments against the owner of property in a city, on account of assessments for improvements of streets, &c., are null and void, and statutes authorizing such judgments are unconstitutional and void. City of St. Louis v. Clemens, 36 Mo. 467, and Id. 49 Mo. 552, overruled. City of St. Louis to Use, etc., v. Allen, 44.

———. **Judgments—Interest—Assessments for Street Improvements in City of St. Louis.**—The 15 per cent. interest in suits on assessments for street improvements should be allowed to the time of the verdict, but the judgment rendered thereon should bear six per cent. interest. Id.

———. **Liability for Losses by Fires.**—A grant by the legislature to a city of power to establish a fire department, confers a legislative or discretionary power, and does not render the city liable, if the power is exercised, for losses occurring through fires. Heller v. The Mayor, &c., of Sedalia, 159.

———. **Liability for Damages in Changing Grade of Streets.**—A city is not liable for the damages which may accrue to a property-owner merely from a change in the grade of the streets. Schattner v. The City of Kansas, 162.

———. ———. **Charter of Kansas City.**—The charter of the city of Kansas required the city council, as soon as practicable, to establish the grades of all the streets in the city, to prepare and exhibit to public view a map thereof, and thereafter only to change such grade after due public notice, etc. *Held*, that the city could not be held liable in damages at the suit of a private party for not obeying this provision of its charter. Id.

Railway Law—Refusal of Passenger to Surrender Ticket.—A passenger on a railroad train, who exhibits his ticket and demands a seat, need not surrender the ticket till the seat is furnished. Davis v. K. C., St. Joe and Council Bluffs R. R. Co., 317.

———. ———. **Damage, for Expelling Passenger—Failure to Furnish Seat, etc.**—A. buys a ticket from Winthrop to Bigelow on the K. C. and St. J. R. R. The cars are crowded. He refused to surrender his ticket till provided with a seat, and is ordered to leave the train when it shall arrive at Forest City. At this point he procures a seat, and subsequently tenders his fare from thence to Bigelow; but refuses to pay fare from Winthrop or to give up his ticket. Thereupon the conductor declines the amount offered, and not receiving his ticket, ejects him from the train.

In an action for damages by A., based on the original contract for transportation entered into at Winthrop, *held*, that under the contract, A. would not be entitled to ride from Forest City to Bigelow without surrendering his ticket, or tendering his full fare from Winthrop, and could not maintain his action; although the case might be different where plaintiff set up a new contract entered into at Forest City, and based his action thereon. Id.

Township Law of Missouri.—The act of March 24, 1873, was not designed to interrupt the continuity of the act of March 24, 1872, so as to avoid or annul proceedings under it. The act of 1873 must be construed as a continuation of the act of 1872, both relating to the organization of counties into municipal corporations, the former being designed to correct supposed defects in the latter. State v. County Court Vernon County, 128.

Negligence—Liability of Owners of Real Property.—The owne or occupant of real property is bound, so far as he may be able to do so by the exercise of ordinary care, to keep it in such condition that it will not, by any insufficiency for the purpose to which it is put, injure any passer-by; and he is bound also to use care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, expressed or implied, for the transaction of business. But he is not bound to make the land or buildings thereon safe for any purpose which is unlawful or improper, or for which he could not reasonably anticipate that they would be used, or for which they obviously were never designed. A mere passive acquiescence on the part of the owner or occupant in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. No duty is imposed upon the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter, or induced to come upon them by the use for which the premises are appropriated and occupied, or by some preparatory adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter. Straub v. Soderer, 38.

———. **Liability of Municipal Corporations for Damages caused by Defective Streets.**—Municipal corporations are bound to keep their streets in a reasonably safe condition. Failing to do so, they will be liable for all injuries resulting from their negligence. Bassett v. City of St. Joseph, 290.

———. ———. **Excavations Bordering on Streets.**—The liability of municipalities for damages caused by excavations is not restricted to cases where they actually extend into the street; if travel is thereby rendered dangerous, the authorities are equally bound to protect the public, whether they encroach on the highway or not. And the city is bound for damages resulting from neglect of proper precautions, even though the excavations were not made by its own agents, provided it had received due notice of the existing facts. Id.

———. ———. ———. In a suit against a city to recover damages for injuries caused by plaintiff's falling into an excavation adjacent to a market place, where it appeared that the authorities were notified of the dangerous condition of the thoroughfare, and took no steps to guard the public from accident, and the evidence showed that plaintiff, at the time of the casualty, was exercising ordinary care and prudence, plaintiff would be entitled to recover, although it further appeared that the primary cause contributing to the injury was the attempt of a mule to kick plaintiff, and that in avoiding this peril, he fell or jumped into the excavation. Id.

———. ———. ———. **Allegations—Aider by Verdict.**—In a suit against a municipal corporation for damages caused by plaintiff's falling into a cellar adjacent to a public street, where the petition charged that the excavation was unlawfully permitted to extend into the street, but the evidence showed that it was not unlawful *per se*, but became unlawful only in event that it was unlawfully permitted to remain without protection; *held*, that the petition was good after verdict, notwithstanding such variance. Id.

———. **Liability of Railway Companies for Damages from Fire Kindled by Locomotive.**—Where grass is set burning by fire escaping from a locomotive, and the owner sues the company, negligence on the part of defendant will be presumed from the escape of the fire, and it devolves upon it, in order to rebut this presumption, to show that proper and safe locomotives and engines were used, and were conducted by the servants of the company in a proper and safe way. In such case the damages claimed would not be held too remote or speculative, although the property consumed was separated from the track by a strip of ground forty or fifty yards wide where the plat was covered with dry grass and other combustible matter. Clemens v. H. and St. J. R. R. Co., 366.

———. **Liability of Railway Company for Damages Sustained by Passenger from Jumping from Train while in Motion.**—In a suit against a railroad company to recover damages for injuries sustained by plaintiff in getting from the platform of the car upon that of the depot, the evidence showed that the train stopped at the station only a minute; that during that time plaintiff's little child alighted; that plaintiff followed without delay, but after the train was in motion, and received her injuries in consequence of jumping from the train. *Held*, that the plaintiff would not be barred of recovery by the fact that she jumped from the train while in motion. Id.

Book Notices.

AMERICAN CORPORATION CASES. Edited by THOMAS F. WITHROW, late Reporter of the Supreme Court of Iowa. Vol. 2. Municipal Corporations. Chicago: E. B. Myers. 1874.

The design of this series is to embrace the decisions of the Supreme and Circuit Courts of the United States, and the courts of last resort in the several states since January 1, 1868, of questions peculiar to the law of corporations. The ability with which this volume, as well as the previous one relating to Private Corporations, is edited, admits of no question. Mr. Withrow commenced his professional life as the Reporter of the Supreme Court of Iowa, and as such justly acquired distinction. We do not know of any reporter who surpassed him in the excellence of his work. His power to make a condensed and clear statement of a case, and to put in fewest words the exact point in judgment, is a marked characteristic and results from the logical cast of his mind. The volume before us exemplifies the truth of these observations. Though only of the usual size, it contains about twice as many cases as are ordinarily embraced in a single

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volume. Mr. Withrow has given much study to corporation law, and is actively engaged in an extensive practice having almost exclusive reference to it, and this adds to his other qualifications to edit acceptably a series of Reports of this character. While we give merited praise to the manner in which his plan is carried out, we nevertheless take the liberty to suggest the wisdom, if not the necessity, of a modification of the plan itself. If the learned editor would hereafter give only the leading cases, or those of general interest, *in full*, and the *rest*, if given at all, in a brief and condensed shape, the profession would get in the same space several times as much really valuable matter as at present. We are aware of the objections to which the plan suggested is open, but we think they would soon vanish if Mr. Withrow should demonstrate how possible it is to give the substance of a decision turning on the construction of a statute in the average compass of one or two pages. He would set out the statute, give the point decided, and in a few lines the arguments advanced by the judge in support of the conclusion. The volume before us contains cases for the year 1868, and is published in excellent style.

THE BENCH AND BAR REVIEW. January, 1874. Vol. 1. No. 1. Baltimore: ATKINSON SCHAUMBURG. Terms, $5 per annum.

We have before us the first number of this new legal quarterly, containing 200 pages. It is under the editorial management of Atkinson Schaumburg, Esq., of Baltimore. In its general character it is like the American Law Review and the Southern Law Review, a leading feature being essays upon legal topics, and an abstract of recent decisions of the higher courts in Great Britain, and of the federal and state courts of this country. This number contains a portrait of Caleb Cushing and an outline of his life and public and professional career, which we would have been glad to have seen filled up and rounded into more complete proportions. This number is, on the whole, a very excellent one, and the magazine will, in our opinion, prove a valuable addition to our periodical legal literature. We cannot but regard the name selected for it as unfortunate and liable to lead to confusion, since there has been in existence for some years a quarterly publication in Chicago by Callaghan & Co., entitled the "Bench and Bar." One or the other of our contemporaries should be re-christened. As the Chicago magazine has the older and therefore better right to its name, it would seem that the other journal would secure a distinctive name by here after calling itself the Baltimore Law Review.

Legal News and Notes.

—MR. MCCRARY'S bill to regulate inter-state commerce has passed the house of representatives, after a hard contest, by a majority of five. The main feature of this bill is that it provides for the appointment of a board of nine commissioners, who have power to regulate the maximum charges on inter-state railways for the carriage of freight and passengers. It is very doubtful whether it will pass the senate.

—THE Missouri legislature has passed what is known as the "female virtue bill." It makes seduction, under promise of marriage, a felony. We have not seen a text of this act. It is to be hoped it interposes some checks upon the conviction of persons accused of this crime on the testimony of the prosecutrix alone. The value of such evidence and the danger to which men, not more guilty than the injured female, may be subjected to in prosecutions for offences of this kind, are strongly illustrated by the case of State v. Burgdorf, 53 Mo. 65.

—THE house committee on the codification of the laws, treaties, etc., of the United States, of which Mr. Poland, of Vermont, is chairman, has about completed the arduous duty assigned to it of revising these laws. This committee has held regular evening sessions, and its chairman especially has always attended these and worked most assiduously. He has been greatly aided, too, by such members of the committee as Judge HOAR. The comprehensive code of United States laws will all be contained in a single volume of general laws, the treaties and other old matters having a separate volume devoted to them.

—IN Chicago a case has recently been tried involving the following point: A man who had over one thousand dollars stolen from him while travelling in one of the Pullman Company's sleeping cars, sued that company, and pressed his demand on the ground that they were liable both as carriers and hotel-keepers. The company contended that inasmuch as they did not receive pay for carrying passengers, but only for furnishing them with beds, they were not common carriers, and were not to be regarded in any sense as a "railway company." Furthermore, they insisted that they were not hotel-keepers, inasmuch as they supplied passengers with lodging only, and not with board. The plaintiff gained a verdict, though for only part of what he claimed, and the case has been taken to the supreme court.

—THE social evil law, just passed the Missouri legislature, prohibits the enforced examination and surveillance of prostitutes, but requires physicians to report to the board of health any venereally-diseased women they may prescribe for, whom they have reason to suspect to be prostitutes. As there is no penalty affixed to this requirement, no physician will make such reports, as it will injure his practice in such cases. It prohibits the police, under heavy penalties, from entering houses of prostitution without a warrant. It provides for the maintenance of the Social Evil Hospital and House of Industry, at the *public expense*, instead of at the expense of the class of women who are benefited by it, as heretofore, and provides that diseased prostitutes may voluntarily go there, and that those who are certified to be diseased, by physicans, may be confined there at the discretion of the board of health. In short, this law most effectually removes this class of persons from public surveillance. Every house of prostitution may be turned into a gambling den, and the police are powerless to break it up. In fact, the police being prohibited from entering such houses, unless armed with a warrant, cannot in many cases know where they are. Relieved from police surveillance and board of health "regulation," the whole business of restraining and suppressing prostitution is left to the voluntary action of citizens in swearing out warrants against this class of persons. Take it as a whole, this is a most remarkable law. Its penalties are all against the police officials; its immunities and benefits are almost entirely in favor of the prostitutes, while the expense involved by the iniquity which it shields, is borne by the general public.

—LOOK to your statute books. We mean this word of advice to our Missouri subscribers. The legislature just adjourned passed a large number of acts amending various chapters of the general statutes. Among the acts passed we note amendments to the general statutes by chapter and section as follows: Ch. 5, § 15; ch. 32, §§ 25, 26; ch. 36, § 7; ch. 63; ch. 63, § 39; ch. 70, § 1; ch. 80; ch. 143, § 51; ch. 169, § 6.

We also notice amendments to chapters of the general statutes which relate to the following subjects: Administrators; Corporations, religious and benevolent; Constables; County Treasurers; Deaf and Dumb; Dower; Dramshop Keepers; Drawing of Warrants; Education of Blind; Elections; Foreign Insurance Companies; Guardians and Curators; Inspection of Liquors; Members of General Assembly; Penitentiary; Revenue; Treasury Department; Trustees.

We also notice acts relating to the following subjects: The Practice of Pharmacy; authorizing Cities, Towns, etc., to organize for School Purposes; Fees of Witnesses and Jurors in St. Louis county; for the better protection of Rights of Minority Stockholders in Railroad Companies; to quiet Land Titles in Certain Cases; to provide for the Transcribing of Records from one county to another; Concerning Graduates of Law Department of Saint Louis University; to abolish Board of Guardians; to provide for the taking of Recognizances in certain cases; relating to Roads and Highways; relating to Juries in St. Louis county; concerning Bribery at Elections; prohibiting Railroads from charging over four cents per mile fare; Pay of Members of General Assembly; Appointment of Probate Clerks; relating to Conveyance of Personal Property; to Coroners' Inquests; Dramshop-keepers; Insurance Companies other than Life; Fees of Auction Sales under securities for Debt; to compel Clerks, Sheriffs, etc., to keep account of and pay over witnesses' fees; to prevent non-residents from grazing or herding cattle upon certain lands; for relief of Collectors of Revenue; to reorganize and provide for support of Public Schools; to prevent destruction of fish; to punish the carrying of concealed weapons; restricting the liabilities of counties, cities, towns, etc., in matters of contract; regulating the Practice of Medicine and Surgery; to destroy Gophers; to punish abuses of public trust; cost of assessing in counties having township organization prior to election in 1872; method of assessing tax on consolidated bridge companies; management of local Insurance Companies; False Receipts and Bills of Lading and Fraudulent transfers by Warehousemen; Ditches and Drains of Railroads; to regulate Traffic in Dead Animals; to regulate costs in Criminal Cases; Summoning jurors in Courts of Record; to promote the Science of Medicine and Surgery; amending Township Organization Law.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, APRIL 9, 1874.

SUBSCRIPTION: $3 PER ANNUM, in Advance

Effect of War upon the Contract of Life Insurance—Decision by the Supreme Court of the United States.

We had occasion some time since, in a note to Smith v. Charter Oak Life Ins. Co. (*ante*, pp. 79 *et seq.*), to go over the cases on this subject pretty thoroughly. Among the cases mentioned in that note were two in which the question had been determined in federal courts of first instance, namely, Hamilton v. New York Mutual Life Ins. Co., 9 Blatchford, 234, in which it was held by BLATCHFORD, J., in the United States District Court at New York City, that the war merely suspends but does not invalidate such contracts, and Tait v. New York Life Ins. Co., determined by Judge EMMONS in the United States Circuit Court at Memphis, Tennessee, in which the contrary principle is asserted. These two cases were taken to the Supreme Court of the United States, where the questions involved in them have recently been argued at great length; and the result is, that both decisions are affirmed by a divided court. Thus, the anomalous result is produced of affirming two decisions substantially the same in their facts, and precisely opposite in their conclusions upon those facts. What is right before Judge BLATCHFORD is wrong before Judge EMMONS, and *vice versa;* while the life insurance companies and their Southern policy-holders are left in the same state of perplexity as before. It is thought, however, that a way out of this wilderness may be found in the fact that the Chief Justice did not sit in these cases, and that a re-hearing will be granted in which he will take part, when his views will be decisive of the question.

Iron Mountain Railroad Tax Case—Exemption from Taxation by Legislative Contract.

We publish in this number the opinion of the Supreme Court of the United States, delivered by Mr. Justice FIELD, in the Iron Mountain Railroad tax case. It is a case of great interest and importance to the state of Missouri. The Iron Mountain company asserted a perpetual exemption from taxation by virtue of an irrepealable legislative contract granting this immunity to the prior company by that name, to whose rights the present company claimed to have succeeded. It will be observed that the court decide that the first company did possess the exemption. It will also be observed that the court say that the legislature, in 1867, undertook to transfer this exemption or immunity to the present company as an unextinguished or unmerged franchise. But the court hold that the exemption from taxation in favor of the original company ceased when the state foreclosed its lien, under the act of 1866, and purchased the property. Mr. Justice FIELD puts the point clearly. He says: "When the state became the purchaser the immunity ceased; the property stood in its hands precisely the same as any other unencumbered property of the state, exempt from taxation, not by virtue of any previous stipulation with the company, but as all property of the state is thus exempt."

Under the view of the Supreme Court, nothing but the provision of the new constitution of 1865 (art. 11, sec. 16), which wisely prohibited future legislative exemptions from taxation, prevented the Iron Mountain company from being perpetually exempt from taxation. Other companies in the state claiming a similar exemption have taken a deep interest in the Iron Mountain case, for which reason, as well as for the public interest in the controversy, we publish at this early day the full text of the opinion of the Supreme Court.

Railway Negligence—Killing Child of Tender Years—Negligence of Parent in Suffering Child to be at Large.

In Philadelphia and Reading Railroad Company v. Long (Legal Chronicle; s. c., 4 Pittsburgh Law Jour. N. S. 122), determined in the Supreme Court of Pennsylvania, Feb. 24th, a child two years and two months old ran upon the defendant's track, where it passes through the populous town of Manayunk, and was killed by a train which was running at the rate of eight miles an hour. The court below, among other things, instructed the jury that "the fact that the child is found in the streets affords a strong presumption of negligence on the part of the plaintiffs. You will therefore consider whether the mother took *reasonable care* of the child; if she did not, it was negligence."

Commenting upon this instruction, AGNEW, Ch. J., said: "To *suffer* a child to wander on the street has the sense of *permit*. If such permission or sufferance exists, it is negligence. This is the assertion of a principle. But whether the mother did suffer the child to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be *reasonable* care, dependent on the circumstances. This is a fact for the jury. If she did not exercise this care she was negligent. What more than this can be demanded of her? When a railroad runs through a populous city has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds, otherwise it is negligence? Is it negligence for the poor who congregate these crowded streets, unless, even in the summer's heat, they live shut up in the noisome vapors of their closed tenements, without a breath of healthy air? Is this the life they must lead, or be adjudged to be negligent? This mother gave her child a piece of bread to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil-cloth on the floor, and before her labor was finished, and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say that this was negligence *per se*, and that she *suffered* her child to wander into the street? What sort of justice is that which tells the mother agonizing over her dying child, '*Your* negligence caused this. You suffered your child to run into the jaws of death; we can not perceive any fault in the railroad company; a speed of eight miles an hour along this populous thoroughfare was all

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right.' We can endorse no such cruel doctrine; but we must say, as was said in Kay v. Railroad Co., that the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. 15 P. F. Smith, 276."

This case is but one of several which have been before the Supreme Court of Pennsylvania, involving the same question: Kay v. Penn. R. R. Co., 65 Penn. State, 269; Smith v. O'Connor, 48 Penn. State, 218; Philadelphia and Reading R. R. Co. v. Spearen, 47 Penn. State, 300; Rauch v. Lloyd, 31 Penn. State, 358; Pennsylvania R. R. Co. v. Kelly, ibid, 372. The subject is fruitful of nice distinctions, and the decisions, whether in this country or in England, are by no means uniform. In Ihl v. The Railway Co., 47 N. Y. 317, it was held that sending a child a little more than three years old across the track of a street railroad, attended only by another child nine and one-half years old, was not necessarily such negligence on the part of the parents as would defeat a recovery in an action brought by the child's administrator against the railroad company for damages for causing its death by negligently running over it while crossing the track. The court say (RAPALLO, J.) that all the cases in which the negligence of parents or custodians of infants not *sui juris*, is held to preclude a recovery by such infants or their representatives, necessarily assume that the conduct of the infant was such as would, in the case of a person *sui juris*, have amounted to contributory negligence, and hold that the negligence of the parent or the custodiant, but not the personal conduct of the infant, constitutes the bar. The law in such cases makes the infant responsible through others. (Hartfield v. Roper, 21 Wend. 615, 619.) The conduct of the infant may have an important bearing on the question of the defendant's negligence; but when the latter is clearly negligent, contributory personal negligence on the part of an infant obviously not *sui juris* can not be alleged, unless negligence on the part of his guardian or custodian has brought about the situation, or in some manner contributed to the injury. (Mangam v. Brooklyn Railroad Co., 38 N. Y. 460, 461.)

Law of Homicide—Character of the Slain for Violence.

We cheerfully give place in another column to a communication from Thomas G. Jones, Esq., Reporter of the Supreme Court of Alabama, in which he criticises an article which appeared in this journal for January 15th, wherein we took occasion to examine the case of Fields v. The State, 47 Ala. 603. We do this the more readily when we consider that our article was a criticism upon the performance of a judge, who from the nature of his position is himself precluded from making a reply. For this reason we recognize the rule that when a writer in a legal or other publication feels called upon to criticise an adjudicated case, he should proceed with great caution and candor. We may therefore be permitted to say, in vindication of our own good faith in making that criticism, that it was not written until we had thoroughly studied every case which it is believed the American books contain upon the subject of the admission of evidence of the character of the deceased in trials for homicide. This examination of cases convinced us so clearly that Fields' case embodies an extraordinary ruling upon this question and gives extraordinary reasons for such ruling, that we felt obliged to couch our dissent in clear language, and not to overwhelm the subject with doubts and conjectures such as serve only to perplex and task the patience of the reader.

The juncture of circumstances which warrants the admission of such evidence in trials for homicide has nowhere been more clearly defined than by the Supreme Court of Alabama in earlier cases. Thus, it was said in Quesenberry v. State, 3 Stew. & Port. 308, that "if the killing took place under circumstances that could afford the slayer no reasonable grounds to believe himself in peril, he could *derive no advantage* from the general character of the deceased for turbulence and revenge. But if the killing were such as to leave any doubt whether he had been more actuated by the principle of self-preservation than that of malice, it would be proper to admit any testimony calculated to illustrate to the jury the motive by which he had been actuated." So it is said in Pritchett v. The State, 22 Ala. 39, that "an act performed by a quick, impulsive, bloodthirsty, abandoned man may afford much stronger evidence that the life of the party assailed was in imminent peril than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation." Again, in Franklin v. The State, 29 Ala. 14, the court say: "To avoid detriment in the practical application of the rule, it must be understood neither, on the one hand, to excuse the taking of one's life because he is a bad man, nor, on the other, to be limited to those cases where the facts are such as to make it doubtful whether the homicide was committed *se defendendo. The law can not apportion the criminality of the homicide to the character of the deceased,* and it can not confine the rule to cases of doubt, because, in such cases, the defendant is entitled to an acquittal; and therefore, so to limit it would be to deny to it all practical effect. When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and the question of its effect left to the determination of the jury. It will be for the court to determine, in every case, whether the facts are such as will justify the admission of the evidence." In all of these cases it was held proper, under the facts in proof, to exclude such evidence.

How different the juncture of facts indicated by the above language is from that in Fields' case, the reader has only to glance at that case to perceive. In that case there was, according to the report, no pretence that the killing was done "from a principle of self-preservation;" but, instead of this, the defendant prepared a weapon for the occasion, and for the purpose of avenging an insult which had occured six hours before, deliberately shot and killed the deceased, who was going his own lawful way, peaceably and unarmed, and afterwards declared that he had killed him to avenge the insult. He had "shot the d—d devil, and would kill any man who would charge him with burning his gin-house and call him a thief."

We are willing to concede what we understand our correspondent to argue, that the ground on which the court in Fields' case held this evidence ought to be admitted was not for the purpose of guiding the jury in fixing the technical *degree* of the crime, but for the purpose of guiding them in

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the exercise of the *discretion*, which the law had reposed in them within certain limits, of fixing the *quantum* of punishment. We are willing to concede this, since it is urged by our correspondent, although it involves the court in the nonsense of reversing a judgment for the purpose of admitting evidence to guide the jury in doing what they had already done; for they had already fixed the punishment of the accused at the lowest limit allowed by law for the degree of crime of which they found him guilty. Conceding, then, this to be the ground of the ruling on this point, what result does it necessarily involve? It necessarily involves the conclusion—and this seems to us the doctrine which, under this view, the case necessarily decides—that where a man deliberately kills another out of revenge for a previous insult, if it turns out that the "general character of the deceased for turbulence, violence, bloodshed and recklessness of human life" was bad, the slayer ought not to be punished as severely as though the general character of the slain in these particulars was good. We can not see but that this result is substantially the same as that stated by us in our previous observations upon this case. Mr. WHARTON says—and his language has been many times quoted by judges with approbation—that "it would be a barbarous thing for A. to give as a reason for killing B., that B.'s disposition was savage and riotous." 1 Whart. Crim. Law, 7th ed., § 641. We think it would be equally barbarous to allow a man who has deliberately killed another out of revenge to urge *in mitigation of his punishment* that the deceased was a man of "general bad character for turbulence, violence, bloodshed and recklessness of human life." Such a man, until he is convicted of crime, is entitled to the same measure of protection before the law as the best or most exemplary citizen; and any rule of law which punishes the murderer of such a man less severely than the murderer of a good man, makes him unequal with the latter before the law, in respect of the right to live, and correspondingly diminishes that protection which the laws of his country promise to every citizen, without respect of persons.

But we apprehend that every judge and criminal practitioner is aware that questions of this kind are generally sprung as mere devices to excite the sympathies of ignorant jurors and to distract their attention from the real issues of the case. In England and in some of the American states where the rights of society in criminal trials are guarded, and where judges are accustomed to hold juries well in hand, we apprehend that no advocate of repute would attempt to get in such testimony under the circumstances of Fields' case. But where an unchecked rein is given to the advocate, he is never wanting in devices to perplex the judgment and excite the emotional nature of the ignorant and weak juror. He plays upon him as he would upon a musical instrument, and brings forth any desired sound. "Govern the ventages with your fingers and thumb; give it breath with your mouth, and it will discourse most eloquent music."

We may be permitted to note, in conclusion, that in running over the 47th volume of Alabama Reports a second time, we find in it no less than *ten* murder cases. Of these, one comes up on a point of practice—a motion for a discontinuance. The other nine are appealed from judgments of conviction of felonious homicide in some of its degrees; and of these nine, *eight* are *reversed*. We shall not undertake to draw any inference from this fact. At this distance we could not justly do so. It would seem, however, to argue most forcibly that where such a state of things exists, the barriers which the common law has erected for the safety of society should be by the courts vigiantly guarded and preserved.

Upon the second point adverted to by our correspondent, we cheerfully concede, upon a re-examination of the case, that the language of the learned Chief Justice that the "circumstances of the killing should be viewed in connection with the good or bad character of both the *defendant* or the deceased," probably had reference to the circumstance of the particular case, the good character of the deceased having been put in evidence; although this remark was not made in connection with that part of the opinion which discusses the error of the court below in charging upon evidence of the good character of the defendant.

The Validity of Exemption Laws which Operate upon Existing Contracts.

We publish elsewhere a brief opinion of the Supreme Court of South Carolina in the case of Cochran v. Darcy, the importance of which consists in the threefold fact that it reverses a well-considered decision of the same court in the case of *Re* Kennedy, 2 South Car. N. S. 216; that it interprets the decision of the Supreme Court of the United States in Gunn v. Barry, 15 Wall. 610, as going to the extent of holding that exemption laws which operate upon contracts in existence at the time of their passage are void; and that, in following this interpretation of that case, it runs counter to the weight of adjudications in other states.

With respect to Gunn v. Barry, there seems to be room to question whether it goes to the extent of holding that exemption laws which operate retroactively upon contracts in existence at the time of their passage are to that extent unconstitutional and void. It does hold that where a person has obtained a judgment, which by the law of the state is a *lien* upon the realty of the judgment debtor, a homestead law enacted subsequently to the rendition of such judgment and before the levy of execution, which seeks to discharge the debtor's property from such lien, is so far unconstitutional and void, and does not abridge the jurisdiction of the state courts to afford the judgment creditor satisfaction out of such property. This was the precise point in judgment, and this is what the learned reporter, in writing his head-note to the case, manifestly understood to be the scope of the question decided. But while this is true, it is possible that Mr. Justice SWAYNE, in pronouncing the opinion of the court, used language strong enough to warrant the deduction which the Supreme Court of South Carolina make as to what the case decides. He says: "The effect of the act in question, *under the circumstances of this judgment*, does not merely impair, it annihilates the remedy. There is none left. But it reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact. * * * The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them,

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provided the change involve no impairment of a substantia right. If the provisions of the constitution or the legislative act of a state fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category, and are therefore void."

If from this language, taken in connection with the facts of the case, Gunn v. Barry is to be understood as deciding that homestead laws which by their terms operate upon contracts in existence at the time of their passage, are, so far as they thus operate retroactively, void, without reference to the question whether a judgment lien has attached to the property prior to the passage of the exemption law, it is contrary to the understanding of several of the earlier judges of the same court, as expressed in *dicta* which have been quoted and relied on by the state courts in numerous instances. Thus, in Bronson v. Kinzie, 1 How. 311, 318, Chief Justice TANEY said: "A state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. * * * It may, if it think proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity and household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to secure its own citizens from unjust and harassing litigation and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts less tardy and difficult, yet it will not follow that the law is unconstitutional." In the later case of The Planters' Bank v. Sharp, 6 How. 301, 330, Mr. Justice WOODBURY enumerates laws exempting tools or household goods from seizure as an example of legislation respecting the remedy which might be applied to existing contracts. And so in Ogden v. Saunders, 12 Wheat. 213, 291, Mr. Justice JOHNSON says that "it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semblance of right and justice."

The same views have been taken by the courts of last resort in several of the states. Bigelow v. Pritchard, 21 Pick. 169; Rockwell v. Hubbell, 2 Doug. (Mich.) 197; Morse v. Goold, 11 N. Y. 281 (overruling Quackenbush v. Danks, 1 Denio, 128, 3 Denio, 594, and 1 N. Y. 129); Cusic v. Douglas, 3 Kansas, 123; Maxey v. Loyal, 38 Ga. 531; Hardiman v. Downer, 39 Ga. 425; Hill v. Kessler, 63 N. C. 437; Farley v. Dowe, 45 Ala. 324; Sneider v. Heidelberger, ibid, 126; Stephenson v. Osborn, 41 Miss. 119. In the case in Alabama the exemption law of that state (Code of Ala., § 2955) is held to be retroactive and to divest the lien of an attachment levied before its passage, but is, nevertheless, held to be constitutional and valid. Sneider v. Heidelberger, *supra*. The Court of Appeals of Virginia, however, has, in a recent exhaustive opinion by CHRISTIAN, J., in which all the judges concur, decided that the provision in the constitution of that state and the act of the general assembly passed in pursuance thereof, known as the homestead exemption law, so far as they apply to contracts entered into or debts contracted before their adoption, are in violation of the constitution of the United States, and therefore void. The Homestead Cases, 22 Grattan, 266. And the same conclusion appears to have been reached in Kentucky with reference to an exemption law of that state, in Kibbey v. Jones, 7 Bush, 243.

Some of the cases, however, which affirm the validity of the retroactive features of such laws, contain language limiting the legislative power to the enacting of exemption laws which are *reasonable*, and which go no farther than to make an exemption consistent with the humane grounds of public policy in pursuance of which such enactments are sustained. Thus, in Stephenson v. Osborne, 41 Miss. 119, 130, ELLET, J., delivering the opinion of the court, said: "The legislature exercises this power according to its own views of humanity and sound policy. But it is not without its proper limit, and it may be abused. Every party is entitled to an adequate and available remedy for the enforcement of his contract, and any legislation which impairs the value and benefit of the contract, though professing to act on its remedy, would impair its obligation. It is not competent for the legislature, under color of an exemption law, so to obstruct the remedy upon contracts as to render it nugatory or impracticable. An abuse of the legislative discretion in this respect would demand the interposition of the court. We do not undertake to intimate what would amount to such abuse; such a question would be one of great delicacy and difficulty. We only mean to say that the power of the legislature over this subject is not unrestricted by the constitution, and that cases may arise in which it will be the duty of the judiciary to arrest its exercise." So in the case in Kansas, the court say, per CROZIER, Ch. J.: "It must not be inferred that a state is omnipotent upon this subject, and that if it can fix the amount at one acre in a town, it may increase it to ten or twenty acres, and in a like proportion in the country. Its action will not be constitutional if it be apparent that its object was not so much to secure the well-being of the citizens as to enable them to hold large amounts of property with a view of making it available to their own aggrandizement for other purposes than that of homesteads. The state is the sole judge of the proper extent of the exemptions within the limits above indicated; and so long as the extent of the exemption shall be in accordance with sound policy and humanity, and no greater than shall be reasonably necessary to protect the citizens in their pursuits necessary to their existence and well-being, its action must be sustained, although it may here and there work an individual hardship." Cusic v. Douglas, *supra*. So in *Re* Kennedy, *supra*, the court (WILLARD, J.) assert that "it is within the power of the state to exempt the lands and personal property of a debtor, *to a limited amount*, from liability on account of an existing indebtedness, so long as such exemption does not, in effect and intention, impair the obligation of such contract."

For the opinion in Cochran v. Darcy, which we elsewhere publish, we are indebted to William Stone, Esq., counsellor at law, of Charleston, South Carolina.

—JUDGE R. B. WARDEN, one of the biographers of Chief Justice Chase, threatens to sue the Cincinnati Commercial for libel, on account of some criticism of his conduct by that journal in connection with the use made by him of certain papers of Chief Justice Chase.

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Legislative Exemption of Railway Property from Taxation—The Iron Mountain Railroad Case.

SPENCER TRASK v. CONSTANTINE MAGUIRE, THE ST. LOUIS AND IRON MOUNTAIN RAILROAD COMPANY, THOMAS ALLEN, S. H. LAFLIN, G. B. ALLEN, SAMUEL COPP, S. GANDY, A. TRASK, AND H. G. MARQUAND.

Supreme Court of the United States, No. 106, *October Term*, 1873.

1. **Iron Mountain Railroad—Exemption from Taxation.**—The property of the *present* Iron Mountain Railroad Company, created in 1867, is not exempt from the power of state taxation; but it was otherwise as to the property of the first corporation by that name, created in 1851.

2. ——. ——. **When the Exemption ceased.**—The exemption in favor of the original company from taxation ceased when the state foreclosed its statutory mortgage or lien, under the act of February 19, 1866, and purchased the property.

3. ——. ——. **New Constitution of Missouri.—Effect of its Prohibition against Exemptions from Taxation.**—In July, 1865, the new constitution of Missouri went into effect, by which (art 11, sec. 16) the legislature is absolutely prohibited to grant to railroad companies an immunity from taxation; and under this prohibition the legislature, although it undertook to confer upon the present company all the immunity from taxation which the old company enjoyed, had no power to do so.

Appeal from the Circuit Court of the United States for the Districts of Missouri. A brief report of the case in the court below will be found in 2 Dillon C. C. R. 182, note.

Mr. Rombauer, for the collector; *Messrs. Dryden & Dryden*, for the Iron Mountain Railroad Company.

Mr. Justice FIELD delivered the opinion of the court.

The question presented for our determination in this case is, whether the property of the present St. Louis and Iron Mountain Railroad Company, a corporation created under the laws of Missouri, is, by an irrepealable legislative grant, forever exempted from all state and county taxes. Two corporations bearing that name have existed in Missouri, the second succeeding the first in the possession and ownership of its road and property. The first was created by an act of the legislature of the state, passed in March, 1851; the second was formed in July, 1867, under an act of the previous year authorizing the incorporation of the purchaser or purchasers of any railroad, or any part, section, or branch thereof, which had previously been, or might thereafter be, forfeited to or sold by the state.

The property of the first corporation was undoubtedly exempt from state and county taxes. The act of incorporation adopted as part of it a provision of another act, which declared in terms that the stock of the company should be thus exempt. (Laws of Missouri of 1851, p. 479.) It is true that at this time a statute was in existence, passed in 1845, which declared that the charter of every corporation subsequently granted should be subject to alteration, suspension, and repeal at the discretion of the legislature. But from the operation of this provision the company was expressly exempted by an act amendatory of its charter, passed in 1853. (Laws of Missouri, of 1853, p. 296.) From that time at least the exemption of its stock from state and county taxation was placed beyond legislative interference. The amendatory act also declared that all the engines, cars, wagons, machines, and other property belonging to the company should be deemed a part of its capital stock, and be vested in its respective shareholders, according to their respective shares. All the property of the company was thus placed within the exemption which attached to the original stock; that designated was to be deemed a part of such stock, as well as that originally embraced by this term.

On the argument some attempt was made from the use of the term *stock* in the original act, and the language of the amendatory act that the property should be vested in the respective shareholders, according to their respective shares, to establish the position that the exemption extended only to the separate shares of the individual stockholders. But the argument does not strike us as possessing much force. The terms "stock of the company" imported the capital stock of such company, the subscribed fund which the company held, as distinguished from the separate interests of the individual stockholders. The language of the amendatory act did not qualify this meaning; that only declared that other property of the company should also be deemed capital stock, and the additional provision that it should be vested in the respective shareholders, according to their respective shares, only meant that they should have the interest of shareholders in the property, according to their respective shares.

The corporation in question was created to constuct a railroad from a point in the city of St. Louis to the Iron Mountain and Pilot Knob, in Missouri, with liberty to extend the road to the Mississippi river, or to the southern part of the state. The road was constructed from St. Louis to Pilot Knob, a distance of about eighty-seven miles, with a branch to Potosi. During the progress of the work, and in order to aid in its construction, the legislature of the state, previous to 1860, passed various acts providing for the loan of the bonds of the state to the company. All the acts referred for the terms of the loans to an act passed in 1851 to expedite the construction of the Pacific railroad and of the Hannibal and St. Joseph railroad. (Laws of Missouri of 1851, p. 267.) That act provided that no part of the bonds should be delivered to the company until it signified its acceptance of them to the secretary of state, by filing in his office a certificate of such acceptance under the corporate seal of the company and the signature of its president; that such acceptance should be recorded, and upon its record should become to all intents and purposes a mortgage of the road of the company, and every part and section thereof, and its appurtenances, to the people of the state, to secure the payment of the principal and interest of the bonds. That act authorized the governor, in case default was made in the payment of either the interest or principal of the bonds, to sell the road and its appurtenances at auction to the highest bidder, or to buy in the same at such sale for the use and benefit of the state, subject to such disposition in respect to the road or its proceeds as the legislature might thereafter direct.

Under the different acts, bonds of the state to a large amount were issued to the company; its acceptance of them in proper form was given to the secretary of state, and the acceptance was duly recorded, and from the date of such record the state acquired, for the payment of the principal and interest of the bonds, a lien upon the road and every part and section thereof and its appurtenances.

The company failed to pay the interest on these bonds. It does not appear for how long a period the company was thus in default, nor is this material. It is sufficient to say that in 1865 the right of the state, under the provisions of the acts cited, to interfere and sell the property, had become complete. Before a sale, however, was made the legislature passed another act for the sale of this and other railroads by the govenor, and the foreclosure of the state lien thereon. This act, which was approved in February, 1866, among other things required the governor to advertise for sale the different railroads, with their appurtenances, rolling stock, and property of every description, and all the rights and franchises thereto belonging; and to sell the same at auction to the highest bidder, in pursuance of the several acts creating a lien thereon. It also provided for the appointment of three commissioners to attend the sale of the different roads as advertised, and to bid in the same for the use and benefit of the state for an amount not exceeding the respective liens thereon; and in case the roads were struck off and sold to them, to take possession of and hold the same, with their appurtenances and property, and again, after due advertisement, inviting proposals for the purchase of the different roads, their lands, appurtenances, and franchises, to resell the same. Under this act the St. Louis and Iron Mountain railroad was advertised for sale, with its rights and privileges, and at the sale was bid in by the commissioners for the state. However

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broad the terms of the advertisement, the interest sold could not extend beyond the property upon which the state at the time held a lien, and this was the entire road of the company and its appurtenances. But as the property was sold to the state, it is unnecessary to determine whether, if the sale had been made to a third party, the immunity from taxation possessed by the company would have passed to the purchaser. When the state became the purchaser the immunity ceased; the property stood in its hands precisely the same as any other unencumbered property of the state, exempt from taxation, not by any virtue of any previous stipulation with the company, but as all property of the state is thus exempt. Subsequently the road and its appurtenances, and all the franchises, which, under the new constitution of Missouri, adopted in 1865, were transferable by the state, were sold by the commissioners to McKay, Vogel and Simmons, who conveyed the same to Thomas Allen, who with others, in July, 1867, became incorporated under the name of the St. Louis and Iron Mountain Railroad Company. That company is still in existence, and is one of the defendants herein. To it Allen transferred all the rights and privileges acquired by him from his vendors, and all of which they acquired from the state. The acts under which the sale was made provided that purchasers of the road should have all the rights, franchises, privileges, and immunities which were enjoyed by the defaulting company under its charter and laws amendatory thereof, subject to the limitations and conditions therein contained, and not inconsistent with the act authorizing the sale. The new company thus acquired all the immunity from taxation which the original company originally possessed, if it were competent for the legislature at the time, under the new constitution, to confer this privilege. The question, therefore, is whether the legislature was competent to grant the immunity claimed, under that constitution, which went into operation on the 4th of July, 1865, previous to the passage of any of the acts authorizing the proceedings under which the new company acquired its rights.

The 16th section of the 11th article of that instrument provides that "no property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state;" and the 27th section of the 4th article declares that "the general assembly shall not pass special laws * * * exempting any property of any named person or corporation from taxation."

These provisions require no explanation; they are absolute prohibitions against the grant of any new immunity from taxation, unless railroad companies of the state existing at the time are excepted from their operation. Such exception is claimed under the "Ordinance for the payment of state and railroad indebtedness" which accompanied the constitution and was adopted with it. That ordinance first provides for the levy and collection from different railroads, and among others from the St. Louis and Iron Mountain Railroad Company, an annual tax of ten per cent. on all their gross receipts for the transportation of freight or passengers (not including amounts received from and taxes paid to the United States) from the first of October, 1866, to the first of October, 1868, and fifteen per cent. thereafter; and then enacts that the tax shall be collected from the companies only for the payment of the principal and interest on the bonds of the state issued for their benefit, or on bonds guaranteed by the state; that if any of the companies refuse or neglect to pay the tax thus required, and the principal or interest of any of the bonds, or any part thereof, remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property and the franchises of such company under the lien reserved to the state; and that whenever the state becomes the purchaser of any railroad or other property, or the franchises thus sold, the general assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the company; that no railroad, or other property or franchises purchased by the state, shall be restored to the defaulting company until it shall have first paid the interest due from it, and that no sale or other disposition of any such railroad or other property, or its franchises, shall be made without reserving a lien upon the property and franchises thus sold or disposed of for all sums remaining unpaid.

Now, the argument of the appellants is that as the ordinance authorizes the legislature to provide for the sale of the franchises of a defaulting corporation, it can transfer under that designation immunity from taxation, if the company ever possessed such immunity; and that this was the effect of the sale of the St. Louis and Iron Mountain railroad and its franchises to McKay, Vogel and Simmons. And authority for this position is supposed to be found in the answers given by the judges of the Supreme Court of Missouri, in November, 1865, to certain questions propounded by the governor under a provision of the constitution authorizing him to take their opinion on important questions of constitutional law. The questions propounded were substantially these:

1st. Whether the provisions of the ordinance operated to suspend the right of the state to sell the roads named, or either of them, until there was a refusal or neglect to pay the tax imposed by the ordinance; or whether the state might order the sale of the railroads, or either of them, prior to such refusal or neglect;

2d. If the judges were of opinion that a sale of the railroads might be ordered before such refusal or neglect, whether such sale could be made "without reserving a lien upon all the property and franchises thus sold for all sums remaining unpaid," or, in other words, whether this clause constituted a condition of *all* sales of railroads ordered by the state, or referred only to sales made under the ordinance for refusal and neglect to pay the tax;

3d. If the judges should be of opinion that all sales of railroads by authority of the state were subject to the restriction mentioned, whether the words "all sums remaining unpaid" referred to the sums for which the railroad sold was in default, or to that portion of the purchase money not paid in cash at the time of sale; and

4th. Whether upon a sale of a railroad under a lien of the state the constitution authorized the state to receive, in payment of the purchase money, preferred or other shares of stock issued by a corporation purchasing the road.

None of these questions, as will be perceived, call for any opinion as to the effect of the sale of the franchises of a road, or the meaning of that term. They call only for an opinion upon the power of the legislature to order a sale of the roads, the liens to be reserved, the payments to be made, and the right to receive shares of stock of a purchasing corporation. The answer of the judges stated that the 5th section of the ordinance related to all sales of railroads, whether in default for not paying the interest on the bonds of the state or not paying the tax levied; that when the state had become the purchaser of any railroad sold under the lien of the state, the general assembly could provide in what manner such railroad could again be sold for the payment of the indebtedness which the state had incurred on account of bonds loaned to it or guaranteed for its benefit; that it would have had this power without the aid of the ordinance, but that no sale or other disposition of any such railroad, or other property, could be made by the state without reserving a lien upon the property sold for all sums remaining unpaid, and that the purchaser was required to make all payments therefor in money or in bonds or other obligations of the state; and then adds that the "legislature is left unrestricted further as to the time, terms and conditions of the sale." This language is supposed to determine that in the sale of such property the legislature is not bound by the provisions of the constitution we have cited.

But we do not think the language used justifies any such conclusion, but was rather intended to indicate that the ordinance imposes no other restrictions than those designated, and has no reference whatever to the clauses of the constitution in respect to which no opinion was asked.

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It seems to us that the plain meaning of the ordinance, when it says that the general assembly shall provide by law in what manner the railroad and its franchises may be sold, is that they shall be sold in conformity with such law as the legislature may constitutionally pass, not by any law which it could devise if it had unlimited discretion in the matter. It would conflict with well-settled rules of construction to hold that the language used authorizes any legislation regardless of the provisions of the constitution. And there is nothing in the authority conferred to provide for the sale of its franchises with the road of the defaulting company, which requires immunity from taxation to be embraced within them. The language evidently refers to such franchises as are essential to the operation of the road sold, without which the ownership of the road would be comparatively valueless, such as the franchise to run cars, to take tolls, and the like.

But if we are mistaken in this particular, we are clear that it never was intended by the ordinance to sanction, by the sale of the franchises of a defaulting corporation, the renewal of an exemption which had once ceased to exist, and which the constitution had declared should never thereafter be created. The inhibition of the constitution applies in all its force against the renewal of an exemption equally as against its original creation; and this inhibition the legislature could not disregard in providing for the sale of the property which it had purchased.

JUDGMENT AFFIRMED.

Railway-Aid Bonds—Legislative Authority—Recitals in Bonds—Previous Election.

F. W. HUIDEKOPER v. BUCHANAN COUNTY.

United States Circuit Court, Western District of Missouri, November Term, 1873.

Before DILLON and KREKEL, JJ.

1. **Railway-Aid Bonds—Defences in Hands of Bona Fide Holders—Irregularities in Holding Election.**—Where legislative authority is conferred upon a municipal or public corporation to issue bonds on the sanction of the voters to be given at an election, and the officers of the corporation are by the law to decide whether the requisite sanction has been given, and they issue bonds which recite it, no irregularity in the manner of appointing the judges of the election, or in submitting the question, is a defence to the bonds thus issued, when in the hands of *bona fide* holders for value, without actual notice.

This is an action upon coupons to bonds issued by the county court of the county of Buchanan in payment for stock subscribed to the St. Louis and St. Joseph Railroad Company. The answer sets out all the orders of the county court, from which it appears that on the 21st day of February, 1868, the county court ordered to be submitted to a vote of the qualified voters, at an election to be held on a specified day in April, 1868, the proposition whether the county court "should subscribe for 4,000 shares of the capital stock of the St. Louis and St. Joseph Railroad Company, amounting, in the aggregate, to $400,000, upon the terms following: said subscription to be paid for in the bonds of the county at par, payable twenty years after the date of their issue," etc.

Then follow conditions that the bonds shall only issue in installments as the work on the road within the county shall progress. The county court appointed certain persons named "judges of the election to be holden on, etc., for the purpose of submitting to a vote of the taxable and qualified voters of the county the question of the subscription of $400,000 to build a railroad known as the St. Louis and St. Joseph Railroad."

The record shows that the clerk of the county court "brought into court the returns of the votes cast, certified according to law," showing "that there were cast for the subscription to the St. Louis and St. Joseph Railroad, 1,968, and against it, 520 votes."

On the 13th day of April, 1868, the county court made an order of record reciting that "whereas, it appears, to the satisfaction of the court, that two-thirds of the qualified voters of Buchanan county, at said special election held therein as aforesaid, did assent to said subscription of 4,000 shares to the capital stock of the St. Louis and St. Joseph Railroad Company; therefore, it is ordered by the court that the county court of Buchanan county subscribe for and take 4,000 shares, to be paid for according to the order of this court, made on the 21st day of February, 1868." Subsequent orders of the court recite that the subscription was made, that the company complied with the terms and conditions which would entitle it to the bonds, and that the bonds were accordingly, from time to time, executed and delivered to the company to the full amount, in all, of $400,000. The record also shows that taxes were levied to raise the means to pay the interest on these bonds from time to time, and interest ordered to be paid until January 21, 1873, when the county court directed the treasurer "not to pay the interest due on the bonds of the county issued to the St. Louis and St. Joseph Railroad Company until further orders from this court."

To this answer the plaintiff demurs.

Joseph Shippen and *T. K. Skinker*, for the plaintiff; *Ensworth* and *Young*, for the county.

DILLON, Circuit Judge.—The answer shows that there was an election held to enable the voters of the county to determine whether the county court should subscribe to the stock of the St. Louis and St. Joseph Railroad Company, and pay therefor in the negotiable bonds of the county; that more than two-thirds of the voters voting at such election were in favor of the proposition; that the county court thereupon made the subscription, and from time to time issued the bonds as the railroad company became entitled thereto by the terms of the submission. It is not denied in the answer that the plaintiff is a *bona fide* holder of the coupons in suit.

The counsel for the county contends that the bonds in question are void for three reasons:

1. That the county court had no power to appoint judges of the special election to be held on the 7th day of April, 1868, to decide upon the question of subscription, but that such power, under the act of March 21, 1868 (Laws 1868, p. 131, sec. 15), belonged to the board of registration.

2. That the question was ordered to be submitted to the "taxable and qualified voters" of the county, instead of the "qualified voters," as required by the constitution. (Art. II, sec. 14.)

3. That the submission was not an unqualified one, but contained conditions. These conditions related to the manner in which the bonds should be issued in case the proposition carried, and required work to a specified amount to be done by the company before it should become entitled to the delivery of an installment of the bonds. These conditions were in the interest of the county, and the orders of the county court show that they were complied with by the company.

It will be perceived that all of these objections relate to irregularities in the submission of the question to a vote of the people, and in the manner of appointing the judges of the election. It may be remarked that the record of the county court does not sustain the position of counsel of the county that the submission was to the "taxable and qualified voters." On the contrary, the submission was to the qualified voters. The use of the words "taxable and qualified voters" occurs in that portion of the order appointing the judges of the election, and is recitative only of the order of submission, and its mis-recital is a matter of no importance.

There is, therefore, really but one objection to the validity of these bonds left to be considered, and that is whether, if the defendant's counsel be right, that the judges of election should have been appointed by the board of registration, this is a fatal defect.

It is not necessary in this case to inquire whether, if there had been no election whatever, the bonds could have been enforced against the county, notwithstanding the constitutional provision. (Art. II, sec. 14.)

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Here there was an election, and the proposition received, according to the determination of the county court entered upon its records, the assent of more than requisite two-thirds of the qualified voters of the county.

Counsel have differed as to whether the decisions of the United States Supreme Court have gone so far as to hold valid bonds issued by the municipal or public officers without any election whatever having been held, when such an election is required as a condition precedent to the exercise of the power to subscribe for stock and issue bonds to pay therefor, and we are not required to examine or discuss that question. But beyond all doubt that court has time and time again decided that no such defect or irregularity as that which is here set up is available as a defence to the *bona fide* holder of such securities. The well known doctrine of that court is that bonds, such as those here in question, are commercial paper, and when in the hands of an innocent holder no defence is available to the maker except the want of power from the legislature to issue them.

It is not needful to examine the decisions of that court upon this subject. To show, however, that the doctrines announced in the early case of The Commissioners of Knox County v. Aspinwall, 21 How. 5 ,9, and often re-affirmed, are still adhered to, we content ourselves by referring to the yet unreported cases of St. Joseph Township v. Rogers [16 Wall. 644], and Kennicott v. Wayne County [16 Wall. 644], both decided at the December term, 1872.

In the case first cited, Mr. Justice CLIFFORD, summarizing the doctrines of the court on this subject, says:

"Bonds payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid even in the hands of innocent holders. Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions or qualifications, but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defence to the corporation in a suit on the bonds or coupons if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition or qualification which it is alleged was not fulfilled."

In the case last cited (Kennicott v. Wayne County), Mr. Justice HUNT, delivering the judgment of the court, said:

"The following propositions may be considered as settled in this court:

"1. If an election or other fact is required to authorize the issue of the bonds of a municipal corporation, and if the result of that election or the existence of that fact is by law to be ascertained and declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with a recital that the election has been held, of that the fact exists or has taken place, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds. Authorities *infra*.

"2. If there be lawful authority for the municipality to issue its bonds, the omission of formalities and ceremonies, or the existence of fraud on the part of the agents of the municipality issuing the bonds, cannot be urged against a *bona fide* holder seeking to enforce them. (Grand Chute v. Winegar, 15 Wall. 355; Commissioners of Knox County v. Aspinwall, 21 How. 539; Gelpcke v. Dubuque, 1 Wall. 203; Moran v. Miami County, 2 Black, 722.)

"3. There must, however, be an original authority by statute to the municipality to issue bonds. Municipal corporations have not the power, except through the special authority of the legislature, to issue corporate bonds which will bind their towns; neither have they the power to sell or mortgage the lands belonging to such towns, without special authority. (Marsh v. Fulton County, 10 Wall. 676.)"

To the same effect see also Grand Chute v. Winegar, 15 Wall., and the recent decision of the supreme court of the state of Missouri in Smith v. Clark County, November term, 1873.

The demurrer to the answer is sustained.

JUDGMENT ACCORDINGLY.

Does the Bankrupt Law Embrace Executors of a Deceased Person's Estate?

TURNER GRAVES *et al.* v. R. H. WINTER AND W. A. STEELE, EXECUTORS OF RICHARD WINTER, DECEASED.

In the District Court of the United States for the Southern District of Mississippi, January Term, 1874.

Before Hon. ROBERT A. HILL, District Judge.

1. **Bankruptcy—Limited Executors.**—Limited executors, appointed in pursuance of the will of a testator who was a private banker, for the purpose of winding up his banking business, cannot, in the event of such banking business becoming insolvent under their management, be proceeded against under the bankrupt law.

F. B. Pratt, Esq., for petitioners; *Messrs. Johnstons*, for defendants.

HILL, J.—The questions presented for decision arise upon defendants' motion to dismiss the petition praying to have them declared bankrupts as such executors, and the assets in their hands administered under the bankrupt law.

Several grounds, insisted upon as sustaining the motion, are stated and relied upon, only one of which need be noticed; and that is whether or not the defendants, under the powers conferred upon them, are subject to the provisions of the bankrupt act.

Richard Winter made and published his last will, which has been admitted of record, in which he devised and bequeathed to his widow, Sallie F. Winter, his estate, real and personal, and nominated her as executrix, who qualified as such. Being a private banker, he made a codicil nominating the defendants his executors for the limited purpose of winding up his banking business, and clothing them for that purpose with such powers as were necessary to carry on the business to effect that object without injury either to his estate or to those dealing with him as such banker, authorizing them to receive and pay out deposits, draw drafts and checks, collect what was due to him, and pay those to whom he was indebted as such banker. This codicil was also admitted to record, and the defendants qualified as such limited executors, and they continued the business until the panic last summer or fall, when, as is alleged, they suspended and have not resumed, failing to pay their depositors and other liabilities as bankers. It is also alleged that they have made preferred payments to different individuals.

The bankrupt act embraces individuals, co-partnerships, joint stock companies and corporations of almost every class, but does not in general, embrace trustees, such as executors, administrators and guardians, and others acting strictly in a fiduciary capacity.

This is the first case, so far as I am aware, in which executors as such have been proceeded against under our bankrupt act, either the present or former acts, or who have applied for its benefits. Under the English bankrupt law there are instances in which executors who were directed by the will of the testator to carry on trade in partnership with others, or in which a specific sum has been in the hands of the executors to be employed in trade, and was so employed, and acts were committed falling un-

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der the bankrupt laws of individuals, co-partnerships or corporations, that the executors were held amenable to the bankrupt law, and the estate so employed distributed under the bankrupt law; but in all such cases the business was conducted, not for the purpose of winding up the business, but for the purpose of employing the capital for the acquisition of profits and benefit of the beneficiaries under the will.

A fair construction of the powers conferred upon the defendants under the will did not authorize them to continue the business longer than they might deem necessary to a fair liquidation and settlement of the business, and no power was intended to be conferred that did not tend to that object. The reception and use of deposits might be necessary for the purpose of paying off acceptances and other obligations for which the testator, in his capacity of banker, was liable; the drawing of drafts or checks on funds in the hands of others, due the testator as banker, might be necessary; also the drawing of such drafts or checks on such funds in favor of creditors might become the most convenient and easy mode of settling up and liquidating the debts and credits of this banking business. The banking machinery was intended only for purposes of liquidation and settlement. This was right and proper, and not inconsistent with their duties as executors under the powers conferred by the will, and though more extended than the powers usually conferred upon executors, was not inconsistent with the main object of the usual powers and duties conferred upon and intended to be attained by the appointment of and duties performed by executors.

It is insisted by petitioner's counsel that the depositors and other creditors of this banking establishment have no other sufficient remedy. In this I am of opinion there is a mistake. They are trustees, and as such are liable to be proceeded against under a creditor's bill in the chancery court of Madison county by any creditor, or if a non-resident creditor, and his demand is over five hundred dollars, in the circuit court of the United States for this district, in either of which having jurisdiction, the assets can all be marshaled and paid according to the rights of the parties, and in which every discovery may be had necessary to a full and fair collection and appropriation of the assets. This is certainly so as it relates to the banking assets and liabilities; how far the estate, in the hands of Mr. Winter, may be reached, it is not necessary now to determine.

In considering the whole case as presented by the petition and exhibits, I am satisfied that this is not one of the class of executorships designed to be administered under the bankrupt act, and therefore feel constrained to sustain the motion, and dismiss the petition at petitioner's cost.

PETITION DISMISSED.

Effect of Homestead Exemptions on Existing Debts.

JOHN C. COCHRAN, EXECUTOR, v. MICHAEL DARCY.
MICHAEL DARCY v. JOHN C. COCHRAN.

Supreme Court of South Carolina, March 12, 1874.

Hon. F. J. MOSES, Chief Justice.
" A. J. WILLARD, } Associate Justices.
" J. J. WRIGHT, }

1. **Homestead Exemption Acts—Existing Debts not Affected by**—A state constitutional ordinance and a legislative act in pursuance thereof, which create a homstead exemption, do not affect debts in existence at the time of their adoption. To give them such effect would impair the obligation of contracts.

2. **Cases Criticised.**—Gunn v. Barry, 15 Wall. 610, and Cook v. Moffat, 5 How. 308, followed. *Re* Kennedy, 2 South Car. N. S., 216, overruled.

Opinion of the court, by MOSES, Ch. J.

These cases involve the judgment of this court in *Re* Kennedy, 2 S. C. 216, and seek to reverse it under the authority of Gunn v. Barry, decided by the Supreme Court of the United States at the December term, 1873. 15 Wall. 610.

It is true, as submitted by the respondent, that in Gunn v. Barry the question directly made was as to the effect of a homestead exemption on a judgment obtained before its allowance by the constitution and act of the general assembly of the state of Georgia; still it is so apparent that, in the view of the court, the retrospective operation of such provision against all previous contracts was void, because in violation of the tenth section of the first article of the constitution of the United States, which declares "that no state shall pass any law impairing the obligation of contracts," that we feel bound to regard the opinion as expressive of the views of the court to the full extent to which the reasons which it assigns may carry it.

A respect to the duty which we owe to the highest tribunal of the country, as well as to ourselves, requires that we should not only give to the decision all proper effect in the case as presented by the facts, but that we should accept the argument of the opinion as it affects the general question involved in its judgment.

We yield a ready assent to what Mr. Justice GRIER says in Cook v. Moffat *et al.*, 5 How. 308: "The constitution of the United States is the supreme law of the land, and binds every forum, whether it derives its authority from a state or from the United States. When this court has declared state legislation to be in conflict with the constitution of the United States, and therefore void, the state tribunals are bound to conform to such decision."

The constitution of Georgia declared that each head of a family should be allowed a certain amount of realty as well as personalty, and that no court or ministerial officer should ever have jurisdiction or authority to enforce any judgment, decree or execution against such property except for taxes, and so forth. The legislature of the same state, in October, 1868, passed "An act to provide for setting apart the homestead as required by the constitution." In the cases before us the exception was claimed under the constitution and acts of the general assembly of this state, which, except as to the amount of homestead allowed and the prohibition of jurisdiction by the courts, were of the same character as those provided by the constitution and laws of Georgia. In the application of the principles which are to govern their enforcement, as proposed by the two states, no difference can be found to exist. The emphatic language of the opinion bears directly upon the general powers of the state to withdraw from a contract any substantial right which attached to at its inception, and must be viewed and accepted as the expression of the court in regard to all homestead exceptions. It is in these words: "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution or the legislative act of a state fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question are clearly within that category and are therefore void."

The contracts on which these actions are founded were entered into before the adoption of our constitution, and we can perceive in them no element in regard to the homestead law which withdraws them from the principles announced in Gunn v. Barry.

The motions are granted and the cases remanded to the circuit court.

Correspondence — Fields' Case—Audi Alteram Partem.

MONTGOMERY, ALA., March 31, 1874.

EDITORS CENTRAL LAW JOURNAL:—Your number of the 15th of January last contains a comment upon the decision in Fields v. The State, 47 Ala. 603, which, it is believed, is not justified by the decision there made. Confident that you would not *intentionally* do an injustice, and that you will readily correct any error into which you may have fallen, if it be pointed out, I propose, with your permission, to show wherein your comment is not supported by the case criticised.

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1. You say that you have read and re-read the opinion several times, and, as nearly as you can comprehend it, "it *affirms distinctly* that, in Alabama, *it is not as much of a crime* to kill a *man whose general character* for turbulence, violence and bloodshed is *bad*, as to kill one whose general character in these particulars is *good*." With all due deference it is submitted that *that* was not the decision!

It will be readily admitted by you that in construing the language of a judge, or in extracting from his opinion the legal principles controlling a decision, we must always take the expressions used in connection with the particular law and facts governing the case. It is equally well settled that the judge must enforce the law as he finds it, not as he thinks it ought to be, and that a court (in this instance one of appellate jurisdiction) is *bound* only by its ruling on points required to be decided to dispose of the case, or, if it be remanded, to guide the lower court in the further progress of the cause.

Judged by these rules, the court enunciated but two principles of law in Fields' case. The first question passed on was this: Was the general bad character of the deceased, as a violent, turbulent, bloodthirsty man, who had, but a few hours before the killing, outraged the person of his slayer, admissible and proper evidence for the consideration of the jury, under the facts in that case? The court (*for that is the effect of its judgment*) say that it was, for the reason that the jury, under the Alabama law, were vested with power not only to determine the guilt or innocence of defendant, but, if guilty, to fix the degree of his guilt and the *character*, extent and *severity* of the punishment to be inflicted, and therefore must necessarily have evidence to guide and control that discretion; and that not only the facts of the killing itself, but those immediately connected with it, and which may reasonably be supposed to have led to the killing, are proper to be considered by the jury in exercising the discretion vested in them by law.

The *second* point ruled by the court was this: The defendant having proved his character as a peaceable and law-abiding man to be good, was it proper for the court below to refuse to charge the jury that "such good character may be sufficient to create or generate a reasonable doubt of defendant's guilt, although no such doubt would have existed but for such good character"? The court ruled that the charge should have been given.

This is a fair statement of what was decided in that case, and the legal mind will see from it that nowhere did the court decide that it was not as great a crime to kill one man as another. In speaking of the discretion of the jury in assessing the punishment, PECK, Ch. J., says: "Who is prepared to say that the *punishment* should be the same where a turbulent, bloodthirsty, dangerous man, reckless of human life, has been slain—who had recently, and only a few hours before, outraged the person of his slayer—as though the party slain had been a man of good character and peaceable disposition?" He was not then speaking of the *technical magnitude* of the offence, or the technical difference between the killing of a good man or a bad man, but merely as to the *punishment*. And, as if to leave no doubt as to what reasoning the court was bound by, he continues, "for *myself*, I can not conscientiously say so" [that is, that the punishment should be the same in the cases mentioned by him]. Immediately he adds, speaking for the court, "yet *we* hold it (the evidence offered) clearly proper for the consideration of the jury in determining the *turpitude* of the crime, and what should be the measure of the punishment to be inflicted." He further adds, that although the evidence may not be sufficient to reduce the grade of the offence from murder to manslaughter in the particular case, yet it was clearly proper to enable the jury intelligently to exercise the discretion vested in them by law. See, in this connection, Flannagan v. The State, 46 Ala. 705, which you will doubtless call a more remarkable case than Fields'.

It is difficult to see from this statement how you arrived at the conclusion that either the court or the Chief Justice expressed the opinion that "it is not so much of a crime" to kill a turbulent man, etc., as to kill a good one, or as you express it in another place, "that it may not be *so heinous a crime* to kill a bad man as a good one," unless you hold that the punishment meted out, *not the act denounced by law*, makes the crime. And for this, if it be so, the court can not be held responsible. If this were so, there should be but one certain and unvarying penalty for each crime, and no power lodged anywhere to vary it according to the circumstances of the particular case. The court can not take away from the jury that discretion which permits them in the one case to hang a murderer, and in the other to imprison him for life, when both have done an act which the law denounces as murder in the first degree. Neither can court nor judge refuse to enforce the law which reduces a killing (which was murder at the common law and punishable by death) into grades of murder, allowing the jury to affix the death penalty in the one case, and to imprison for as short a term as ten years in the other.

What does the law mean when it says to a jury, you may take a murderer's life, or imprison him for life, if you find that he has committed murder in the first degree, and if you find it to be in the second degree you may imprison him as long as you please, or for as short a term as ten years? Clearly, the law "*in Alabama*" means that under some circumstances murder in the first degree *ought to be punished with more severity* than the same crime under different circumstances. It meant not only that some murders should be punished with more severity than others of the same degree of crime, but also that one class of killing denominated murder should not be as heinous an offense, nor of as high a grade, as another class of killing denominated murder. There can be but one answer when we seek the *reason* of this law, and it is this: common sense and the experience of mankind have long since taught that although two offences may be *technically the same*, yet in point of fact they differ in heinousness; that one does not deserve so severe a punishment as the other; that the *turpitude* of the one may be far blacker than that of the other; that the circumstances attending a particular case may demand for its punishment the most rigid execution of the law, while another may hardly merit the lightest punishment of the *technical grade* of crime to which the two offences equally belong. *If the crime of murder in the first degree, at least so far as punishment is considered, is always equally heinous, why should the law provide two punishments for it, one of less severity than the other?*

Speaking in a legal and technical sense, it is no "greater crime" for an able-bodied son to maliciously brain his helpless mother, or poison or starve her for the purpose of inheriting her property, than it would be for that same son, smarting under a desire for revenge, to kill one who had injured him, under circumstances constituting murder in law. For a hired nurse deliberately to drown an infant out of hatred to its parent, is murder in the first degree. For a brother deliberately to lie in wait for his sister's seducer, long after he has had cooling time, and maliciously to kill him, is also murder in the first degree. In the eye of the law the life of the mother and that of the man killed in the rencontre, the life of the murdered child and that of the seducer, are all alike equally sacred and equally protected. One has as much right, in the eye of the law, to life as the other—no more, no less. Yet who will say that, morally speaking, the assassin of his mother is not more guilty than he who kills his enemy in the rencontre? Who will deny that the one murderer ought to be visited with *severer* (human) punishment than the other? Who can conscientiously say that the slayer of his sister's seducer ought to be punished as severely or is guilty of "as heinous a crime" (as far as punishment goes) as the murderer of the helpless infant?

And yet all the cases put are equally murder in the first degree, and all, *legally* and *technically* speaking, the same crime. When, therefore, we contend that there should be less severe punishment in the case of the slayer of the seducer than of the assassin of the mother, we can not be said to hold in any legal, proper sense, that it is less "a crime," under our laws, to kill one person than another.

The law permits the good character of a defendant, especially in capital cases, to be considered by the jury in determining guilt or innocence, and even in clear cases, by the power that fixes the punishment (be it judge or jury), to determine oftentimes the extent of the punishment. Such, at least, is the principle of law in many states of the Union. Yet will any one contend that it is law in those states, because defendant can give in evidence his good character, that it is a less crime for a man of good character to violate the law than it is for a bad man to break the same law? And yet such a comment would seem to be as legitimate as the one made on the decision in Fields' case! Most assuredly, when the law gave such large discretion to the *punishing power* (the jury) it intended to afford them all proper means and evidence for the intelligent exercise of that discretion; and the court say that the character of the deceased is a fit thing to be considered by them in determining which of the several punishments allowed by law they will affix to the grade of guilt in the particular case. Besides all this, if the law permits the good character of a defendant to be given in evidence in all capital cases, even to generate a doubt of guilt, by what sound logic ought the character of the deceased to

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be excluded, if the defendant wishes to introduce it, when it tends to throw any light whatever on the *circumstances*, *animus*, or situation of the parties at the time of a homicide?

I submit that the language of PECK, Ch. J., when he asks whether the *punishment* (not the crime) in the two cases put by him should be the same, is not fairly susceptible of the meaning that, *technically* and *legally* speaking, the *crime itself* is any less in the one case than the other. He does not so argue, nor does he contend that where the same circumstances occasion a homicide, the bare fact that the person slain was a bad man would reduce a killing from murder to manslaughter, etc., when, if the person slain was a good man, it would be murder. His language must be construed with reference to the statute itself, which says the circumstances of the killing (which at the common law was murder with the death penalty attached) may reduce it from murder in the first degree to murder in the second, and measurably lessen the punishment, and to those cases which from their very nature make it proper to consider the character of the deceased. The language thus construed does not militate against the admitted law as stated by you, "that all men * * stand on an equal footing in the eye of the law in respect to the right to live, * * * and that it is as much murder to kill one man as the other," be he heathen, outlaw, infidel, Indian or negro.

2. Your other criticism on the language that the circumstances attending the killing "should be viewed in connection with the good or bad character of both *defendant* and deceased" is not exactly fair, in this, that it omits to state that in the case under discussion the *defendant* had voluntarily put his character in issue and asked a charge, which was refused, as to the effect of proof of good character, and that it was in discussing this that the Chief Justice used the language quoted. Certainly where *defendant's* character is thus lawfully in issue, it is a fit matter to be considered by the jury in deciding upon his guilt and affixing the punishment. One of the first questions asked when a bloody crime is spoken of is, "what was the character of the participants?" As far as possible, juries, in deciding capital cases of this kind, should place themselves in the situation of the parties at the time of the homicide. No such question arose in the case as whether a defendant's character could be attacked by the prosecution unless the defendant first voluntarily raised the issue, and the language of the Chief Justice can not fairly be interpreted even as an intimation of opinion on that point. The law has been long settled to the contrary in Alabama. In Brown v. The State, 46 Ala. 184, PECK, Ch. J., combated the doctrine laid down in the case of Com. v. Sackett, 22 Pick. 394, holding that "it is not permissible, in a criminal prosecution, for the state to enquire into the general character of a defendant *until he has voluntarily put it in issue*, and [contrary to the Massachusetts case] that the enquiry must be confined to a time *antecedent* to the time when the offense charged is alleged to have been committed."

Knowing that your legal instincts would make you desirous of "giving the other side a hearing," I have (as you will see) rather hastily written out my views in support of what most of our Bar deem to be sound law, probably taxing your patience and columns to an unwarrantable extent.

Respectfully, THOMAS G. JONES.

Book Notice.

THE DOCTOR AND STUDENT: or, Dialogues between a Doctor of Divinity and a Student on the Laws of England. Containing the grounds of those laws, together with questions and cases concerning the equity thereof. Revised and corrected by WILLIAM MUCHALL, Gent. To which are added two pieces concerning suits in chancery by Subpena. 8vo., pp. 401. Cincinnati: R. Clarke & Co. 1874.

If we were asked to name one treatise on English law of more interest than any other in the long series that extends through the seven centuries from Glanvil to our own day, with reference to the development of that law and the history of legal doctrine, we should certainly select The Doctor and Student. Bracton is no doubt more instructive upon the origin and first forms of the common law; Coke's First Institute covers a wider field, to say nothing of Blackstone and other modern writers upon the entire system. But as marking an epoch in the life of the law, and throwing light upon the modes of thought and reasoning, upon the accepted principles and the unconscious tendencies of doctrine, no one of them seems better worth the careful study of a scientific lawyer than the modest little dialogues of St. Germain. It is no credit to our profession that it has of late years passed so completety out of use as to become one of the rarest of law books. Its title was kept familiar to the profession by two or three well-known quotations, but many of our younger members of the bar will no doubt see it for the first time in this neat edition.

The work was first printed in 1523 (not 1518, as erroneously stated in the preface), and its early repute may be judged from the fact that it went through no less than seventeen editions before the end of 1787. From that time we believe there has been but one printed in England, in 1815; and that, like the present, was a verbatim reprint from the edition "revised and corrected by William Muchall, Gent," in 1787. Muchall showed a good taste, none too common in his time, in leaving the fine old English of the author's own day unchanged (except in spelling) as he found it in the earlier editions; and to the lovers of good idiomatic sixteenth-century English this handsome reprint will have scarcely less interest than it has for the professional reader. Between the two classes of readers we may hope for a demand which at no far-off day will give us a well-edited critical edition, such as European lawyers love to bestow on their legal classics. The present notes (from Muchall's edition) are of the most trivial kind. But if some of the accomplished lawyers who are now busy with the improvement of our law by importing all kinds of novelties from other systems would spare a little time to study the history of our own, and embody the results in appropriate notes to books like this upon such topics as we have already referred to in speaking of the value of the work, they would indeed be "visiting and strengthening the roots and foundation of the science itself," in the impressive words of Lord Bacon.

So we cannot help thinking that if Lord Holt had spent the same labor in illustrating and extending the excellent sketch of the law of bailments (Dialogue second, chapter 38) that he did in importing cumbrous Latin phrases and fragments of civilian doctrine in his famous opinion in Coggs v. Bernard; and if, comparing this work with Bracton, he had shown the remarkable development of the common law on that subject, instead of going back to recast the law of his own day into the form of those sources from which Bracton borrowed—in that case our law of bailments would be far simpler, more harmonious, more logical than it is at present. Other passages to illustrate the same point may be found almost at random through the work. The discussion of a lawyer's duty in cases of doubtful morality (pp. 115–121), of the duties of executors (pp. 128–135), of the origin of uses (pp. 165–175), of the consideration of promises (pp. 174–181), of ignorance of law and fact (pp. 248–255), are exceedingly instructive and would repay careful annotation, showing by what regular and logical processes the law of our own day has for the most part been developed from purely indigenous sources. We have no space for extracts, but must quote a brief one from the chapter first above referred to, because it states in the most distinct and pithy form a doctrine to which our highest courts have but recently returned, after a long conflict and confusion of decided cases, as to the right of a carrier to limit his liability by notice or contract:

"And if [the carrier] would percase refuse to carry it, unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were *void*, *for it were against reason and against good manners*, and so it is in all other cases like. And all these diversities be granted by secondary conclusions derived upon the law of reason, without any statute made in that behalf. And peradventure, law and the conclusions therein be the more plain and the more open. For i any statute were made therein, I think verily more doubts and questions would arise upon the statute than doth now when they be only argued and judged after the common law." (p. 221).

Even for the mere practitioner, who cares for nothing in any book except the quotable "points" that may be used to garnish a brief, The Doctor and Student has its own value. It abounds with pithy, clear expressions of those fundamental doctrines of the common law which have been so long recognized that it is almost impossible to find a modern decision affirming them, or a modern treatise expressing them in their original form—*e. g.*, that the heir or next of kin, as such, shall have no meddling with the goods of deceased (p. 225); that the essence of a consideration lies in the charge to the promisee, not in the profit to the promisor (p. 177); that no prescription in lands maketh a right (p. 27); that no manner of chattel, neither real nor personal, shall, after the law of the realm, descend unto the heir (p. 137). True, these are mingled with a great deal of obsolete matter—questions about fines and entails, villeins and neifs, abbots and courts christian

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Mr. Muchall was careful to note all that was obsolete in his day, but we are thankful that he did not venture to omit it; for many of these passages are among the most valuable in the book to a thorough student. The work, as a whole, its purpose, method, spirit and effects, will be seen as much in these chapters as in those of modern application. The author's purpose in writing such a work is of itself a question of much interest, and worthy a careful examination. But we have already far exceeded the proper limits of a notice.

Messrs. Robert Clarke & Co. have produced the volume in a handsome dress, with clear white paper and an open, legible page. But the proof-reader has been very careless. W. E. H.

Legal News and Notes.

—THE bill for compulsory education has been defeated in the Illinois legislature, after an exciting contest.

—THE Supreme Court of the United States will hear no arguments after the 24th inst., and will adjourn for the term on the 28th of May.

—THE president has nominated William J. Wallace United States district judge for the northern district of New York, in place of the late Judge Hall.

—JUDGE CALDWELL, of the federal district court at Little Rock, has ruled that a single member of a firm who are the petitioning creditors is competent to depose to the act of bankruptcy.

—THE Supreme Court of Arkansas has recently decided, in Pinson v. State, that a suit on a bail bond is a common action to enforce a civil contract, and that the law applicable to it will not be more strictly construed than that relating to any other class of civil contracts.

—WE are greatly indebted to J. B. F. Thomas, Esq., of Boston, Mass., for a recent decision of Judge LOWELL, of the federal circuit court for Massachusetts, expounding the recent shipping law. We are also indebted to an unknown friend in New York city for a decision of Judge WOODRUFF in the federal circuit court for that district, expounding the same act. These we shall endeavor to publish next week.

—A DISPATCH from Forest City, Arkansas, states that Judge John W. Fox, judge of the eleventh judicial district, was shot, on the 22d ult., by J. R. Aldrich, a lawyer, and died in the afternoon. Judge Fox was passing along the street, when Aldrich stepped out and said, "Now, Judge Fox," and fired. Aldrich fired the second barrel after Fox had fallen. Aldrich delivered himself up to the sheriff. The origin of the difficulty is not known, though it is thought it grew out of some remarks to Aldrich by Fox while the latter was on the bench.

—THE Daily Register says of the Sanborn trial: "We cannot understand by what process of reasoning the United States district attorney in Brooklyn arrived at the conclusion that Sanborn and his assistants, acting under authority of law, could conspire together to perpetrate frauds. His Honor Judge Benedict very properly dismissed the case after it was made clear that Sanborn was acting in pursuance of an act of Congress. There never was, perhaps, a more complete failure to establish a ground whereon he prosecution could stand in court. This looks bad for the district attorney. How can he explain to the law department at Washington this attempt to hamper the operations of an officer of the general government?"

—THE will of the late Lord WESTBURY has already been before the courts three times. At present it takes the shape of an amicable suit brough before the Master of the Rolls. It is claimed that this is not done on account of any obscurity in the will, but because it is deemed best, for reasons of a private nature, that the administration of the estate should be accomplished in the Court of Chancery. Singularly enough, however, the Master of the Rolls, Sir GEORGE JESSEL, has been obliged, by a decision of Lord WESTBURY himself, to put an interpretation upon his Lordship's will which is conjectural and probably contrary to the testator's intentions. If a Lord Chancellor of England cannot make a will which shall safely pass the gauntlet of judicial interpretation, who can?

—MR. ALBERT G. BROWNE, jr., who, since the year 1867, has been the reporter of the Supreme Judicial Court of Massachusetts, has resigned his situation, and Mr. John Lathrop, of Boston, has been appointed in his stead. Mr. Browne's reports begin with the 97th volume. The 108th is published, and the 109th will soon appear. There will be five other volumes, making seventeen volumes of Browne's Reports, or from the 97th to the 114th Massachusetts Reports, inclusive. Mr. Browne has proved to be a most excellent reporter. We understand he goes on to the New York Evening Post. In the preparation of the unpublished reports he will be aided by Mr. John C. Gray, jr. Mr. Lathrop, the new reporter, is a lawyer of good repute, and withal, we learn, a fine writer.

—THE following is the order of the Supreme Court of the United States allotting the justices since the appointment of chief justice. It will be seen that the allotments remain unchanged, the chief justice being assigned to the circuit occupied by his predecessor:

There having been a chief justice of this court appointed since the commencement of this term, it is ordered that the following allottment be made of the chief justice and associate justices of said court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:.

For the first circuit, Nathan Clifford, associate justice; second circuit, Ward Hunt, associate justice; third circuit, William Strong, associate justice; fourth circuit, Morrison R. Waite, chief justice; fifth circuit, Joseph P. Bradley, associate justice; sixth circuit, Noah H. Swayne, associate justice; seventh circuit, David Davis, associate justice; eighth circuit, Samuel F. Miller, associate justice; ninth circuit, Stephen J. Field, associate justice.

—UNDER existing treaties with non-Christian powers, Christian governments exercise exclusive jurisdiction over the lives and liberties of their subjects in those countries. Thus, an American who commits a breach of the peace or other offence against the law in the streets of Cairo or Pekin is arrested by the native police and taken, not before one of their own courts, but before the proper American diplomatic agent, by whom he is tried. Under treaty arrangements of this kind have come into existence what are termed "consular courts," the jurisdiction of which is quite an interesting topic of the law. It is patent at a glance that this arrangement is all one-sided, in favor of the Christian powers and their citizens or subjects residing in "infidel" or "heathen" countries. The present Khedive of Egypt ranks in progressiveness and liberality of sentiment with the most enlightened princes of Europe, and this system of consular courts in his dominions has for some time been felt to be an injustice to him. A bill has recently passed Congress authorizing the president to accept for citizens of the United States the jurisdiction of certain tribunals established or to be established under the authority of the Sublime Porte and the government of Egypt, within the dominions of the Porte and those of the Viceroy. Under the new arrangement, courts will be established composed of two subjects of the Porte and five Franks or non-Turks, the latter being nominated to the sultan by the Christian powers consenting to this arrangement. The United States will probably nominate one of these commissioners.

—THE forthcoming volume of Alabama Reports will contain a memoir of Hon. ABRAM J. WALKER, formerly a Justice of the Supreme Court of Alabama. He was born in Davidson county, Tennessee, November 24th, 1819, and was graduated from the university at Nashville ere he reached his twentieth year. After his graduation he studied law in the office of John Trimble, Esq., until the fall of 1841, when, having been admitted to the bar, he removed to Benton (now Calhoun) county, Ala., and there commenced his professional career. In 1845, without any solicitation on his part, he was nominated and elected to the house of representatives in the general assembly of the state, and in 1848 was an elector on the Cass and Butler ticket. In the exciting canvass of 1851–2 he was elected state senator from Benton county.

In 1852 he formed a law partnership with John T. Morgan, and removed to Talladega, Ala. In 1854 he was elected Chancellor of the Northern Chancery Division of that state. His career as Chancellor won for him great reputation, and as the fruits thereof he was in 1856, on the resignation of Judge Chilton, elected Justice of the Supreme Court. In 1859 he was elected Chief Justice, *vice* Judge Rice, resigned. Judge WALKER continued upon the bench by successive re-elections until July, 1868, when, his office having been vacated by operation of the reconstruction acts, he returned to the bar. He died at Montgomery, April 25, 1872, in the 53d year of his age.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, APRIL 16, 1874.

SUBSCRIPTION: $3 PER ANNUM, in Advance

Liability of Railroad Company for Injuries to Children Caused by an Unfastened Turntable.

The question as to the liability of a railroad company for injuries to children caused by an unsecured and unguarded turntable upon their own land, with knowledge that children are in the habit of playing with it, is before the Supreme Court of Minnesota in the case of Patrick Keffe v. The Milwaukee and St. Paul R. R. Co. The lower court decided in favor of the company, mainly on the ground that the children were trespassers. See Stout v. Railroad Company, 2 Dillon, C. C. 294, in which the company was held liable under the circumstances there disclosed by the circuit court, whose judgment was affirmed by the U. S. Supreme Court. CENTRAL LAW JOURNAL, *ante*, p. 76.

The Doctor and Student.

The review which was printed in our last issue of Messrs. Robert Clarke & Co.'s new edition of this legal classic, has attracted considerable attention, and we have been several times asked "who is W. E. H.?" We take the liberty of stating that that notice was written by Prof. William G. Hammond. of the law department of the Iowa State University—an able lawyer and a ripe scholar. Prof. Hammond modestly sent the manuscript to the JOURNAL without his initials attached, and by a painful error of the assistant editor they were written at the end of the manuscript, W. E. H., instead of W. G. H. The attention of the reader who peruses that notice will be struck no less by the familiar and easy acquaintance with the book itself which Prof. Hammond exhibits, than by the excellent sense and scholarly taste with which it is written. Prof. Hammond writes to us that although he has written nothing for publication for three years past, yet he esteems it an honor to be numbered among the occasional contributors of this journal. It is an honor to us, and not to him.

Chief Justice Waite's First Decision.

Mr. Chief Justice WAITE delivered his first opinion on the bench of the Supreme Court on the 13th instant in the case of Tappan, collector of taxes at Chicago, v. The First National Bank of Chicago, from the Circuit Court for Illinois. The members of the bar who heard it, and his brethren on the bench, speak of it in eulogistic terms. Reverdy Johnson was complimentary in his remarks, both as to the merits of the opinion and the manner of delivery. The case presented the question as to whether the legislature of Illinois could, in 1867, provide for the taxation of owners of shares of capital stock of a national bank in that state, at a place within the state where the bank was located, without regard to their places of residence. The court below decided that a tax could not thus be laid, and the decree was against the collector. The decree is reversed by the Supreme Court, this court holding that shares of stock in national banks are personal property, under the national banking act. They are a species of personal property, say the court, which is in one sense intangible and incorporeal, but the law which creates them may separate them from the person of the owner for the purpose of taxation.

Railway Transportation of Live Stock.

Railway companies transport for thousands of miles nearly all the live stock of the country destined for distant markets. In the case of The Louisville, etc., R. R. Co. v. Hedges, reported 13 Am. Law Reg. (N. S.) 145, March, 1874, the Kentucky Court of Appeals considers the peculiar liabilities of carriers of live stock. There is an instructive note to the case by Judge REDFIELD. 1. It would seem that the authorities have settled the doctrine that a stock carrier may by special contract with the owner protect himself from all liability except that which arises from the carrier's own negligence. 2. Without any special contract to that effect, the carrier of live stock is not an insurer of safe transportation to the same extent as in the case of ordinary merchandise, and is not liable for such accidents as are necessarily incident to the transportation of live animals, that is, for damages caused by the inherent nature or "proper vice" of the animal, such as kicking, goring, etc., if the carrier has taken every reasonable precaution to prevent such accidents and damages by providing proper cars and appliances, and keeping the same in safe and proper condition. 3. Loss or injury to the animals, according to the opinion of the Kentucky Court of Appeals, when in the custody of the carrier, is presumptive evidence of his negligence; but when, by agreement between the owner and carrier, the owner takes charge of his stock during transportation, negligence must be proved to establish a liability on the part of the carrier, but the latter is still bound to provide proper cars, chutes, etc.

The Late John W. Edmonds.

This distinguished jurist died at his residence in New York city on the 5th instant. Judge EDMONDS' name is doubtless familiar to most of the lawyers throughout the country, not only from the fact of his acknowledged ability and purity as a judge, but also from the fact that his name has been frequently brought before the public in connection with his peculiar religious belief. He was a firm believer in spiritualism, and, as he supposed, held constant communication with departed friends. So far as we are aware, there never was any complaint that these vagaries, if such we may be privileged to call them, influenced in any degree his professional conduct. The following brief sketch of his life we take from the Daily Register:

"He was born in Hudson, in March, 1799, was graduated at Union College, in 1816, and in 1820 began the practice of law in his native city. In 1831 he was a member of the assembly from Columbia county. In 1832 he was elected to the senate from the old third district and served four years. In the legislature he was prominent as a debater. In 1837 Judge EDMONDS came to this city and engaged in the practice of his profession. In 1843 he was inspector of state prisons, and was successful in reforming discipline, and the old system of corporal punishment was exchanged for the present. In

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1845 Judge EDMONDS was appointed a circuit judge, in 1847 he was elected to the Supreme Court, and in 1852 reached the Court of Appeals. He retired from the bench in 1853, and has since practiced law."

We may add that he published in 1869 a volume of his decisions at *nisi prius*, entitled Edmonds' Select Cases. The *great* work of his life was, however, the edition of the Statutes at Large of New York, in five volumes, with elaborate notes.

Municipal Taxation of Rolling Stock.

The case of The City of St. Joseph against the Kansas City, St. Joseph & Council Bluffs Railroad Company, in which right was claimed to tax all the company's rolling stock in the city where the company's headquarters are, came up before Judge WAGNER, of the Missouri Supreme Court, for decision lately. The power was denied. Judge WAGNER said:

"The proposition is undoubtedly true that where a corporation has residence, their property of this description is liable to assessment and taxation if the law has prescribed no different rule and regulation on the subject. This notion of certain personal property following personal residence of a corporation is a legal fiction, but it is not an unbending and uncontrollable principle of law. It may be modified by the legislature. The rolling stock of the company is in a constant state of transit, and has no more real local existence in one county than another. A county through whose whole length it runs might well think that it had as much right to tax it as a city that it passed through but a mile or two at most, but both would have no right to levy tax, for that would be double taxation upon the same property. This machinery by which the road is operated is constantly passing from one to the other, the entire road, and to save all cavil and dispute in respect to it, it was perfectly competent for the legislature to say that it should become a part of the road itself and become property the same as the road, and that for purposes of taxation should be equally distributed through counties, cities or towns through which it passed, in proportion to its length in those respective localities."

As to the taxation of rolling stock and railroad property by municipalities, see cases cited, Dillon Munic. Corp. § 629, note.

Transfers of Municipal Subscriptions to Railroads.

The Supreme Court of Kansas has rendered a decision in the case of The Missouri River, Fort Scott & Gulf Railroad v. The County Commissioners of Miami County, reversing the decision of the lower court. The following is the syllabus:

1. Under the laws of 1862 the county commissioners could, without any specific legislation, and without any express authority of the voters, make a valid sale and transfer of stock in a railroad company belonging to the county and issued to it by such company in pursuance of a duly authorized subscription.

2. In making such sale the commissioners are the agents of the county.

3. Any sale may be avoided when accomplished by fraud on the part of the purchaser, or by collusion between the purchaser and agent.

4. Where both parties to an executory non-negotiable contract for the sale and transfer of personal property have failed to perform any of the stipulations of the contract, neither party can make the mere fact of non-performance ground for the interposition of a court of chancery to declare the contract null and void.

5. A court of equity will not declare a contract between two corporations, otherwise valid, void because the seals of the corporations are not affixed to it, but if necessary will rather compel the parties to affix their seals.

6. Mere inadequacy of price affords no ground to set aside a contract of sale, unless it be of so gross a nature and given under such circumstances as to afford a necessary presumption of fraud or imposition.

7. Where part of the consideration is money and part the doing of certain work within the specified time, proof that the cash consideration is grossly inadequate, without any showing as to the nature and value of the work to be done, raises no presumption of fraud or imposition.

Testimony of Defendants in Criminal Cases.

Chief Justice APPLETON, of Maine, is, it is well known, a warm advocate of the policy and justice of allowing defendants in criminal cases to testify in their own behalf. The law of Maine makes such defendants competent witnesses for themselves. In the Reed murder case, lately tried before him, the prisoner testified, and alluding to this circumstance the Chief Justice made, *inter alia*, the following remarks to the jury:

"The prisoner has been a witness. He is either innocent or guilty. If innocent, the truth is his only protection. Truth is one and eternal. All true facts are consistent with each other. There is no reason for his withholding the truth. There is every reason for its utterance. If guilty, if he utters truth, it necessitates his conviction. The resort of the criminal, then, in all cases, is or must ever be to falsehood, to evasion or silence. But falsehood to exonerate is evidence of crime. An innocent man does not resort to falsehood, for falsehood is evidence tending to show guilt. Each falsehood uttered by way of exculpation becomes an article of circumstantial evidence, of greater or lesser inculpatory force, as you may judge. The deceased, Ray, was last seen Tuesday night, 20th. His body was found on Wednesday, the 28th. The prisoner and Mrs. Ray were arrested. Were there any suspicions attaching to any one else? The prisoner was examined then under oath, at a time when every event was recent. His examination was reduced to writing, signed, and I suppose sworn to by him. With a charge of murder resting upon him, you will consider whether he would affix his signature to any paper, or whether his vigilant counsel would permit him so to affix it, without full knowledge of its contents. He has been on the stand before you. As before remarked, statements of untruth, by way of defence, when proved to be untruths, at once become articles of circumstantial evidence, probative in their tendency of guilt."

Chief Justice Chase and his Biographer.

The late Chief Justice CHASE kept a diary from early manhood to the time of his death, and his biography by Judge WORDEN contains copious extracts from it, published with a bad taste that justifies the relatives of the deceased Chief Justice in their attempt to prevent his use of it. It will, however, no doubt make the book a great success from the publisher's standpoint. Among the entries from this diary which a biog-

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rapher who possessed a proper regard for the great trust committed to him by his departed friend would never have allowed to see the light, is one dated September 12, 1862, in which Mr. CHASE expresses his opinions in language which would indicate that his disposition to complain had become chronic:

"Expenses are enormous, increasing instead of diminishing, and the ill-successes in the field have so affected government stocks that it is impossible to obtain money except on temporary deposit, and these deposits very little exceed——. We are forced, therefore, to rely on the increased issue of the United States notes, which hurts almost as much as it helps; for the omission of congress to take any measures to restrict bank note circulation makes the issue of these notes a stimulant to its increase, so that the augmentation of the currency proceeds by a double action and prices rise proportionably. It is a bad state of things, but neither the president, his counsellors nor his commanding general seem to care. They rush on from expense to expense and from defeat to defeat, heedless of the abyss of bankruptcy and ruin which yawns before us. May God open the eyes of those who control us before it is too late!"

Perhaps, however, Judge WORDEN has proceeded with reference to the maxim *suppressio veri suggestio falsi*, and, like a witness upon the stand, has felt himself under obligations to the public and to the cause of impartial history, to tell the truth, the whole truth, and nothing but the truth. The above extract would seem in some degree to corroborate what has frequently been asserted, that the chief justiceship was a sort of honorable exile resorted to by Mr. Lincoln in order to relieve Mr. CHASE from duty in his cabinet.

The Supreme Bench of Minnesota.

Just before going to press we learn that the Supreme Court of Minnesota has been reorganized by the appointment of Hon. S. J. R. MCMILLAN, one of the associate justices, to be chief justice, vice Chief Justice RIPLEY, resigned. Chief Justice MCMILLAN has been for a number of years an associate justice of the court, and his promotion will give general satisfaction. To fill the vacancy occasioned by the promotion of Mr. Justice MCMILLAN, the governor has appointed GEORGE B. YOUNG, Esq., of Minneapolis, to be an associate justice. This appointment created considerable surprise to the bar and to the public as Mr. YOUNG is quite a young man to be called to so exalted a position, being but thirty-five years of age. We are, however, informed by those who know him intimately, that he is a man of brilliant talents and of a judicial temperament, and that his conduct on the bench will justify the governor's choice. The only objection which has been made to his appointment, so far as we know, is his youth, and this is in his favor rather than otherwise. Many of the most brilliant and enduring achievements of the most noted men were performed in their youth. Examples like Alexander, Hannibal and Napoleon in arms, and Pitt and Patrick Henry in the forum, are only selections from a great multitude of like instances. Nor has it been on the field of battle or in the forum alone that great men have exhibited their greatness in their earlier years. The more tedious and plodding walks of the law have not been less prolific of such examples. BLACKSTONE wrote his great Commentaries when he was a young and briefless barrister. SMITH, author of the Leading Cases, died at thirty-six. Sir WILLIAM JONES wrote his famous work on Bailments when in his thirties. Coming nearer our own time, we find among the class-mates of Mr. Justice YOUNG, at Harvard University, or graduating at nearly the same time, MORSE, the distinguished author of Banks and Banking and of Arbitration and Awards; SCHOULER, author of Personal Property and Domestic Relations; BALCH, editor of Story's Equity Jurisprudence and of the second edition of Blackwell's Tax Titles; JOHN C. GRAY, Jr., late editor of the American Law Review and editor of Story on Partnership; and last, though not least, OLIVER WENDELL HOLMES, Jr., editor of the American Law Review and of the last and best edition of Kent's Commentaries. To these we may add ISAAC GRANT THOMPSON, who edits with such consummate skill and success the American Reports, the New York Supreme Court Reports and the Albany Law Journal, who is quite a young man, and MELVILLE M. BIGELOW, author of the Law of Estoppel—a book which we have never heard spoken of except in praise—scarcely above thirty. The fact is, young men, or men not far advanced in life—other things being equal—make the best judges as well as the best soldiers. The desire of winning an honorable name is always greater in youth than in old age. If the accumulation of knowledge and experience is not as great, the intellect is clearer, while it is in early life alone that one possesses the physical vigor equal to the great labors of the judicial office. No one understood this better than Mr. WEBSTER when he recommended Mr. B. R. CURTIS, then about forty, as the successor of Mr. Justice STORY in preference to RUFUS CHOATE, and placed his preference upon the sole ground that Mr. CURTIS was a young man.

Removal of Causes from State to Federal Court under the Act of 1867—Time when Petition for Removal must be Filed.

The act of congress of 1867, in respect to the removal of causes from the state court to the federal court, contains the provision that upon filing the required affidavit of prejudice or local influence, the petition for the removal may be filed "at *any time before the final hearing or trial* of the suit." This language has been recently construed by the Supreme Judicial Court of Massachusetts, and viewed in the light of the anterior legislation of congress upon the same subject, the court reached the conclusion that under the act of congress of 1867, it was too late to apply to remove a cause after a trial in the state court on the merits, although such trial resulted in a disagreement of the jury. Chief Justice GRAY, who delivered the opinion of the court, says: "'Trial' appropriately designates a trial by jury of an issue which will determine the facts in an action at law; and 'final hearing,' in contradistinction to hearings upon interlocutory matters, the hearing of the cause upon its merits by a judge sitting in equity." "The whole effect of the change of the statute [of 1867] in this respect seems to us," he adds, "to have been to allow the defendant the same time to elect whether he will remove the cause into the federal court, as he has to prepare for a trial at law or a hearing upon the merits in equity in the state court; * * * but not to allow him, after the experiment of entering upon one such trial or hearing in the court in which the suit is commenced, to transfer the case to another jurisdiction." * * * "It follows that, when the plaintiff went to a trial upon the merits of this action in the

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Superior Court, his right to remove the case into the Circuit Court of the U. S. ceased, and was not revived by the failure of the jury to agree, nor would it have been if a verdict had been returned by them and set aside by the court;" and by parity of reasoning it would not be if the judgment had been reversed by the Supreme Court of the state and the cause remanded for a new trial. This construction of the act of 1867 conflicts with that given by Mr. Justice MILLER in Johnson v. Monell, Wool. C. C. R. 390, who held that the cause might be transferred after a verdict had been returned and set aside by the court. The opinion of the Supreme Judicial Court of Massachusetts will be found reported in the March number, 1874, of the Am. Law Register, 137, with a note from the pen of Judge REDFIELD. Judge REDFIELD seems inclined to the opinion that the application for the removal may be made at any time before the *final* trial, where more than one for any reason should occur. It seems to us that this is the fair and natural construction of the act, and we doubt whether the more restricted view of the Massachusetts court will be approved by the Supreme Court of the United States. In Waggener v. Cheek, 2 Dillon, C. C. 565, it was held that it was too late in an equity cause to apply in an appellate court for its removal, although in one sense the *final* hearing had not been had. See also upon the subject here discussed: Ackerly v. Vilas, 24 Wis. 165; Waggener v. Cheek, *supra*, and cases cited; Home Life Ins. Co. v. Dunn, 20 Ohio State, 175; Dart v. McKinney, 9 Blatchf. C. C. 359; Adams Express Co. v. Trego, 35 Md. 47; Johnson v. Monell, *supra;* Grover & Baker Sew. Mach. Co. v. Florence Sew. Mach. Co., Supreme Court U. S., Dec. 1873, and cases cited by Mr. Justice CLIFFORD.

Cases in this Number.

We publish in this number a well-considered opinion of the Supreme Court of Tennessee upon the question of the liability of an express company for goods captured by an armed force in time of war. The opinion is also important from the fact that it declares and illustrates the principle that in expounding contracts with common carriers the courts will look to the circumstances surrounding the transaction, and to the course of business of the company and the shipper, as well as to the contract itself. The statement of the facts as given in the opinion of the court involves the case in some obscurity, from the fact that it does not show who C. B. Buckly was. If, as seems probable, this name, which occurs twice in the opinion, is a clerical error for J. C. Buckles, then the whole case becomes clear. For this opinion we are indebted to Hon. Joseph B. Heiskell, attorney-general of Tennessee, and reporter of the supreme court of that state.

Our readers in the seaboard cities who practice in the courts of admiralty will be interested in the two opinions which we publish, expounding those provisions of the shipping act of 1872, which require contracts with seamen to be in writing and entered into with certain formalities through the intervention of a shipping commissioner, and which prescribe penalties for the shipment of seamen by parol contract. The act would not, perhaps, have been difficult of construction were it not for the act of 1873, which repealed the stringent provisions of sec. 12 of the act of 1872 so far as they relate to voyages to the British North American possessions, the West Indies and Mexico. It will be seen that the opinions take opposing views of these statutes so far as they relate to such voyages. For the opinion of Circuit Judge WOODRUFF in the case of The City of Mexico, we are indebted to some unknown friend in New York City. For the opinion of District Judge LOWELL in the case of The Grace Lathrop, we are indebted to J. B. S. Thomas, Esq., of the Boston bar.

We add four pages to the JOURNAL this week to lay before our readers a very important and elaborate opinion of the Supreme Court of Indiana, expounding the statute of that state with reference to the liens of mechanics, laborers and materrial-men upon the building or structure erected or improvement made, where the contract was entered into with or the materials were furnished to a sub-contractor. Two points are uled: 1. That the lien attaches notwithstanding the contract may have been made with or the materials furnished to a subcontractor. 2. That if the lien is asserted within the time prescribed by the statute, it binds the property, although the owner in the meantime may have paid the contractor in full before receiving notice of the intention of the mechanic or material-man to rely upon the lien. The questions thus determined have, it is thought, arisen in nearly every state in the Union, and the decisions are by no means uniform. The case which we print was determined after very full argument by counsel interested in a number of cases involving the same questions. It affirms Barker v. Buell, 35 Ind. 297. The result is concurred in by the full bench, and the case will be decisive of a large number of others pending in that state. This opinion was furnished by our traveling correspondent, G. I. Jones, Esq.

We also an publish abridgment of a valuable opinion of the Supreme Judicial Court of New Hampshire, determining the important question of constitutional law that a fund granted by a state legislature to a municipal corporation can not be diverted or taken away by subsequent legislation.

Liability of Express Companies for Losses Incident to a Time of War—Power of Common Carriers to Limit their Liabilities.

L. OLWELL v. THE ADAMS EXPRESS COMPANY.

Supreme Court of Tennessee, Nashville, Feb. 7, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED,
" THOMAS J. FREEMAN,

1. **Liability of Common Carriers, etc.—Case in Judgment.**—During the late war the plaintiff resided in Nashville, Tenn. He purchased goods in New York and had them shipped by the defendant's company, marked as follows, according to the express company's receipt: "L. Olwell, Nashville, care of J. C. Buckles, Louisville, Ky., which it is mutually agreed is to be forwarded to our agency nearest and most convenient to place of destination." The goods were duly carried to Louisville and received by Buckles, who paid the freight to that point, and again shipped them to the plaintiff at Nashville by the defendant's company, taking a receipt which provided against liability on the part of the company "for any loss or damage arising from the damages of railroad, steam or river navigation, leakage, fire, or from the acts of God or of the enemies of the government, mobs, riots or insurrections; pirates, or from any of the damages incident to a time of war, unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company in any event." It also contained an agreement on its back, relieving the express company from all liability as carriers, forwarders or bailees. This agreement was signed by C. B. Buckly, "per Memp," who was his clerk. The receipt did not show that the goods were specially insured. It was in proof that before goods could be shipped to civilians living as far south as Nashville, it was necessary to procure a "permit" from the United States treasury agent at Louisville, the goods passing through his hands. This the express company did not undertake to procure; but it was its

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course of business to forward goods to Louisville only, where, upon the proper permit being obtained, the company forwarded them under a new contract to their destination. It was also in proof that Buckles acted as agent of the plaintiff to receive his goods at Louisville and forward them to Nashville. The train which carried the goods in question was attacked by a small band of armed men, and the goods were destroyed, and the plaintiff brings this action for their value. Upon these facts it is *held*:

(1.) **Interpretation of Contracts a Question of Law.**—That it was the duty of the court to determine the effect of the first contract of shipment, and not to submit its construction to the jury; but although the judge submitted the construction of the contract to the jury, yet as he afterwards, in charging the jury, expressed the correct view of its meaning, the error was thereby cured.

(2.) **Interpretation—Ambiguity.**—That the first contract being uncertain in its meaning, is not to be interpreted by its terms alone, but in view of the circumstances surrounding the whole transaction.

(3.) **The Contract in Judgment Construed.**—That, viewed in the light of these facts, the first contract of shipment was an agreement simply to carry the goods to Louisville, and that for the time being was their destination.

(4.) **Loss of Goods by Robbery.**—That the limitations and restrictions contained in the second contract are to be interpreted as relieving the express company from liability for a loss of the goods by a robbery such as that shown in the proof.

(5.) **Power of Common Carriers to Limit Liability.**—That it was in the power of the company to limit its liability against damages for a loss sustained in this way.

(6.) **Contract with Carriers—Assent of Shipper's Agent.**—That the assent of the agent, Buckles, to the stipulations on the face of the contract is to be presumed from the fact that these terms of the contract were in accordance with the course of business of the company, to which the shipper had assented in previous transactions, and also from the fact of his signing the agreement on the back of the receipt; but it is admitted that the shipper's assent to the terms of such a special contract would not probably be held binding if given under circumstances showing that he was so in the power of the carrier as to leave him no discretion.

(7.) ——. ——. That Buckles had authority as the plaintiff's agent to make any contract according to the usual course of business to procure the goods to be reshipped from Louisville, and that he had authority to release the company from their common-law liability according to the contract of reshipment, and that such a contract made by the clerk of Buckles in the course of business was equally binding upon the plaintiff.

(8.) **Conclusion upon the Facts.**—That the plaintiff could not recover in respect of the goods that were saved, and that the defendant is not liable for the goods that were lost.

McFARLAND, J., delivered the opinion of the court.

The plaintiff brought this action to recover the value of certain goods, which he alleges were delivered to the defendant as a common carrier in the city of New York, to be carried and delivered to him at Nashville, which was never done. He has appealed in error.

There are two counts in the declaration; one averring the delivery of the goods in New York, the other their delivery to the company at Louisville, Ky.; in both counts charging a contract to carry and deliver them to the plaintiff at Nashville.

The plaintiff only offered evidence under the first count. He proved by the testimony of certain witnesses simply that the goods in four boxes were shipped from New York to the plaintiff by the Adams Express Company. The plaintiff offered no receipts or bills of lading in evidence; but the defendant moved the court to compel the plaintiff to deliver up receipts in his possession, and under this order receipts for two of the boxes were delivered up, which were read in evidence by the defendant. They show the boxes were marked "L. Olwell, Nashville, care of J. C. Buckles, Louisville, Ky.," and the receipts contain limitations and restrictions upon the company's common law liability, particularly against loss from causes incident to a time of war.

The proof tends to show that the goods were duly carried to Louisville and were there received by J. C. Buckles, who acted as the agent of the plaintiff. He paid the freight up to that point, and reshipped the goods to the plaintiff at Nashville under a new contract, and took a receipt, on the back of which was an agreement in writing relieving the company from all liability and obligations as forwarders, carriers or bailees. This agreement was signed by C. B. Buckly, "per Memp," who was his clerk. It appears that at the time, which was in February, 1865, during the late war, the express company ran an express line between New York and Louisville. From Louisville to Nashville they had two lines, one by the passenger trains, the other by freight trains known as the army freight lines. Upon these two lines different freights were charged. At this time, by a regulation of the treasury department, goods could not be shipped to civilians living as far south as Nashville without a special permit, and this permit had to be obtained at Louisville from the agent of the department, the goods passing through his hands.

Buckles was the agent of the plaintiff for this purpose at Louisville. The plaintiff had previously shipped other goods in this way, and Buckles had made similar contracts for their shipment from Louisville, which do not appear to have been objected to by the plaintiff; on the contrary, his assent appears very manifest.

It is shown in the proof that between Louisville and Nashville the train was attacked by a small band of armed men and captured; a large amount of the goods taken or destroyed, and the remainder torn from the boxes and destroyed. There was a large amount of goods in the train belonging to other parties. The agents of the company on the next day gathered up all that could be found and brought them to Nashville, and after giving notice, no owner could identify them; they were then sold, and the company held the proceeds.

A large mass of testimony was heard upon the question whether the squad that captured the train was composed of Confederate soldiers, and therefore the "public enemy" in the sense of the law. On the part of the plaintiff it was maintained that they were simply robbers. Such is the general outline of the case. The case appears to have received in the court below, as it has here, an elaborate examination by the counsel. The charge of the judge is of great length, upon which very many criticisms have been made; and if each of these questions were taken up and discussed in relation to its various bearings upon the case, it would extend this opinion to an unreasonable length. It is deemed better to dispose of the vital questions as they are raised and presented by the facts of the record, and in this way determine whether any error affecting the merits of the controversy occurred in the court below.

A question very much discussed is whether or not the undertaking of the company in the first instance was to transport the goods from New York to Louisville; and upon this it is earnestly argued that the charge is erroneous. The circuit judge was of opinion that the meaning of these receipts, as to the place to which the goods were to be carried under this contract, was so indefinite that he could not determine the question, and he left it to the jury to determine this in the light of the surrounding circumstances; but the charge indicated that the opinion of the judge was that Louisville and not Nashville was the terminus.

As a general rule it is the province of the judge to construe and ascertain the meaning of a written contract. A receipt or bill of lading of this character has generally been held to be a written contract fixing the duties and liabilities of a carrier. 3 Wall. 107, and authorities. The difficulty as to the meaning of these contracts is in determining to what point the goods are to be carried. The language of these receipts as to this is, "Received of Paten & Co. one case of mdse., ——— value, marked L. Olwell, Nashville, Tennessee, care of J. C. Buckles, Louisville, Ky., which it is mutually agreed is to forwarded to our agency nearest or most convenient to destination," etc. But for the words "care of J. C. Buckles, Louisville, Ky.," we would have no difficulty in understanding that the destination was Nashville, and even with these words, ordinarily the same meaning would be given. If the point to which the goods were to be carried was clearly expressed in the receipt, it probably could not be changed by parol proof. As it is not clearly expressed, we may interpret the meaning in the light of surrounding circumstances. It was contrary to orders and regulations of the treasury department to ship goods from New York to a civilian at Nashville without a special permit. The permit was not obtained at New York in this instance. It was the uniform course of business of the company in such cases not to undertake to carry the goods further than Louisville. At this point, upon permit first being obtained, they would, under a new contract, undertake to carry the goods to their destination. This course of business was well known to the plaintiff. He had

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in former cases adopted this course. From Louisville to Nashville the company had two lines at different rates, and the shipper could take his choice.

In the light of these facts we should construe these receipts to be agreements to carry the goods to Louisville, and for the time being that was their destination. The previous course of business between the parties shows that this was their understanding of it. These facts would also fully authorize the jury to find that the two other boxes were carried under a similar contract, although no receipts are shown for these. The plaintiff failed to introduce these two receipts until called for by the defendant. Such transportation being prohibited without a permit, a contract to so transport without the permit would be illegal as against public policy, and the presumption is that such contract was not made.

We think the action of the court in leaving the construction of the receipt to the jury on this question was erroneous; but as we hold that he should have construed the contracts in this respect as he substantially told the jury to construe them, the error does not affect the plaintiff. He should have been more positive than he was.

It would seem that as the plaintiff rested his case upon the proof of a contract to carry the goods from New York to Nashville, which turns out to have been a contract to carry them from New York to Louisville, and that this undertaking was complied with, this might have ended the case.

Other questions, however, have been earnestly argued. The liability of the company under the contract for reshipment from Louisville next arises. As we have seen, the receipt given by the company at Louisville contains upon its face this provision: "It is further agreed, and is part of the consideration of this contract, that the Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the damages of railroad, steam or river navigation, leakage, fire, or from the acts of God or of the enemies of the government, mobs, riots, insurrections, pirates, or from any of the damages incident to a time of war, unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company in any event." The receipt does not show that the property was specially insured.

It is now well settled by authority that common carriers may by special contract limit the measure of their liability. Such is the general current of American authority. See Story on Bailments, § 549; Angell on Com. Carriers, § 239; York Co. v. Central R. R., 3 Wall. 107; 48 N. Y. 498; 16 Wall. 318. The remark in Wormack v. Southern Express Co., 1 Heisk., is not authority against the proposition. The question, then, arises, is the receipt given at Louisville (leaving out of view for the present the agreement on the face of the receipt) a special contract relieving the company from loss occasioned by robbery, of character attributable to this transaction? There can be no question that the language we have quoted above is comprehensive enough to bear this meaning. None other can be given to it.

Was this assented to by both parties as the contract? It is settled that a general notice to shippers that the carrier will not be liable for certain dangers or losses, will not release the carrier. There must be a special contract. There are authorities holding that receipts thrust upon shippers in the hurry of business, containing printed conditions and restrictions upon the carrier's liability, under circumstances indicating that the shipper's attention was not called to these terms or his assent given, are not special contracts. See Southern Express v. Moore, 39 Miss.; Lumbager v. Westcott, 49 Barbour; Blossom v. Dodd, 3 Am. Rep. 701. And in a recent case before the Supreme Court of the United States it was held that a printed notice on the back of the receipt was not, upon the facts of the case, a part of the contract, although it was referred to in the face of the receipt. The court held that it not being expressly assented to, had no other effect than a general notice to shippers. The case, however, fully recognizes the doctrine that the carrier's liability may be limited by special contract. It has not been regarded as essential that the contract shall be executed or signed by the shipper as well as the carrier; it is sufficient if he assents to it. In the case of York Co. v. Central R. R. Co., 3 Wall. 107, it was held that a bill of lading by which the carriers agreed to deliver the property, "fire and the unavoidable dangers of the river only excepted," was a special contract, under which the carrier was not liable for loss accruing from fire, although the shipper proved that his attention was not called to the fire clause, and that the goods were shipped before the bills of lading were signed. The distinction between a stipulation made in the body of the receipt and one made upon the back of the receipt is not clear; but the latter is treated as a mere notice, which by the authorities is not sufficient to release the carrier unless it be expressly assented to as part of the contract. Ordinarily we would suppose that if there be nothing to raise a contrary presumption, the natural presumption would be that the shipper was apprised of the contents of the receipt and assents to its terms. This, we think, would certainly be so where the terms of the contract were in accordance with the course of business of the company, to which the shipper had assented in previous transactions. Such was the present case, as we think; and in this view the stipulations on the face of the receipt, if assented to, would be effectual to release the carrier, without regard to the agreement signed on the back of the receipt; but the signing of this endorsement would be evidence of assent to the terms of contract expressed in the face of the receipt as well as the back of the receipt, provided that Buckly, the agent, had authority to make the contract. As to how far a carrier may be released from his common-law liability, we think if he may stipulate not to be chargeable for loss by fire, as in the case in 3 Wallace, he may also stipulate not to be liable for loss by robbery. We do not hold, however, that the carrier could in any event be relieved from the consequences of fraud or the want of due diligence and good faith. We add, also, that the shipper's assent to the special contract would probably not be held binding if given under circumstances showing that he was so in the power of the carrier as to leave him no discretion.

But it is argued that Buckles had no authority to make a contract for shipment by which the company were released. Upon the assumption that the first contract was to carry from New York and deliver to Buckles, then Buckles having possession of the goods, for shipment, had authority to make any contract according to the usual course of business to procure these shipments; and we may add, a contract made by his clerk in the course of business would be equally binding. See Nelson v. Hudson River R. R., 48 New York, 498. And, again, if it be conceded that the first contract was to carry to Nashville, still this might be changed by the contract at Louisville, and the record contains ample evidence showing the plaintiff's authority to bind him by contracts of this character. His correspondence shows that the terms upon which the company made shipments were well known to him.

But it is again argued that the contract by Buckly at Louisville releasing the company from liability was without consideration. The authorities upon this question seem to be that if the company carry goods at one rate, holding themselves to the ordinary liability of carriers, then in a contract to carry at the *same rate*, the company being released from liability, the release is without consideration. To make the release binding it should be upon the condition of a lower rate, or something equivalent. See 48 New York, 512. It appears in this case that the rates were different; that the company charged higher rates when the goods were insured. The court correctly charged the jury that notwithstanding the contract, the company would not be released from the consequences of the fraud, or want of diligence or good faith, of its agents. And we think his charge in regard to the degree of dili-

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gence required of the company's agents is not subject to objection, and that the proof shows no fault upon the part of the company's agents.

We do not see any grounds on which the plaintiff could recover in respect to the goods that were saved. *Prima facie* the loss of the plaintiff's goods is fully shown by the proof. The goods recovered were in a loose condition, and the company could not be supposed to know that they belonged to plaintiff, especially as the plaintiff would not undertake himself to say that they did.

There are, perhaps, abstract errors in the charge, but upon a careful consideration of the case we think they do not affect the merits. It is a case where by the contract, as we construe it, the company would not be liable for any losses accruing from causes incident to a time of war, without regard to whether the parties destroying the goods were the "public enemy" or not. And we think there was nothing to show fraud or bad faith upon the part of its agents.

Upon the whole case we affirm the judgment.

The Shipping Act of 1872—Construction by District Judge Lowell—When Contracts with Seamen must be in Writing.

THE GRACE LATHROP.

Circuit Court of the United States, District of Massachusetts, 1874.

Before Hon. JOHN LOWELL, District Judge.

1. **Shipping Act of 1872—Construction of § 13.**—Section 13 of the act of June 7, 1872, 17 Stats. 262, requiring agreements of seamen to be signed in the presence of a shipping commissioner, refers only to the agreements mentioned in section 12 of that act.

2. **———. Construction of Clause 2 of § 14.**—The second clause of section 14, which punishes taking on board of a merchant ship any seaman who has been engaged or supplied contrary to the provisions of the act, does not refer to seamen who have agreed to make a voyage not mentioned in section 12, and have not signed the agreement in presence of a shipping commissioner.

3. **———. Construction of § 8.** Section 8 of the statute authorizes the master, owner or consignee of a ship about to make a voyage not mentioned in section 12 to be his own shipping commissioner; and this section is not controlled by anything in sections 13 and 14.

E. L. Barney, assistant district attorney, for the United States; *S. J. Thomas*, for the ship.

LOWELL, J.—This libel is brought by the district attorney in behalf of the United States, to enforce a penalty not exceeding one thousand dollars for five seamen alleged to have been engaged or supplied contrary to the provisions of the act for the appointment of shipping commissioners, approved June 7, 1872, 17 Stats. 262, and to have been knowingly received on board the Grace Lathrop, by the master of said vessel, at Boston, on the eighteenth day of December last. The particular charge is that the agreement with the men was not signed in the presence of a shipping commissioner, although there was such an officer at Boston, duly qualified and ready to act. The voyage was from Boston to one or more ports in the West Indies and back to Boston.

The answer admits the shipment of the men, but denies that the voyage was one within that part of the statute requiring agreements to be signed before a shipping commissioner.

The first section of the shipping act which mentions agreements is section 12, which prescribes a particular form of agreement to be entered into by the master with his crew before he proceeds on any foreign voyage, or on one from the Atlantic to the Pacific coast, or *vice versa*. This section was amended in January, 1873, 17 Stats. 410, so as to remove from its scope voyages to the West India Islands or to Mexico. Section 13 of the principal act then goes on to require that all agreements shall be signed in the presence of a shipping commissioner. Section 14 makes the ship liable to penalties; first, if any person shall be carried to sea as one of the crew on board of any ship making a voyage as before specified, "without entering into an agreement with the master in the form and manner and the place and time hereby in such cases required;" and secondly, if any master, mate or other officer of any ship knowingly receive to be entered on board of any merchant ship any seaman, who has been engaged or supplied contrary to the provisions of the act.

The argument of the United States is: That the language of section 13 is very broad, and is intended to include not only the agreements mentioned in the act itself, but all those which may be made under the act of 1790, which takes in all voyages of any importance excepting in the fisheries; that the first penal clause of section 14 punishes a non-compliance with the act of 1872, by carrying seamen to sea who have not signed an agreement in all respects as required by section 12; and the second penal clause punishing the taking on board seamen illegally engaged or supplied must refer to something, and why not, then, to seamen who come within the act of 1790, and have signed an agreement as required by that act, but not before a shipping commissioner? I shall presently show that neither of these sections has the meaning contended for, but my decision of the case is based largely upon section 8, which provides, in so many words, that nothing in the act contained shall be construed to prevent the owner, master, or consignee of any ship, except as described in section 12, from performing himself, so far as such ship is concerned, the duties of shipping commissioner under this act. This is a controlling section which governs sections 13 and 14 and all others, and explicitly declares that nothing contained in them, or any of them, shall be construed to prevent the master, in such a case as this, from shipping his own crew. Granting, therefore, that the construction of sections 13 and 14 contended for by the prosecution is sound, then all agreements not mentioned in section 12, must be signed in the presence either of the official commissioner or of the master, owner or consignee, and the libel in this case does not allege anything except the absence of the duly qualified official. It does not say that the master, owner or consignee did not act as shipping commissioner, and act fully and with all due form in that capacity. This was the point ruled on in argument before me.

Recurring now to section 13. It is as follows: "The following rules shall be observed respecting agreements: first, every agreement (excepting such cases of agreements as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping commissioner;" secondly, they are to be signed in duplicate, one part of which shall be retained by the shipping commissioner, and the other shall contain a special form or place for the description and signatures of persons engaged subsequently to the first departure of the ship; thirdly, there is to be an acknowledgment and certificate, under the hand and official seal of the commissioner, endorsed on the agreement, testifying to all the acknowledgments, and to the intelligent and sober appreciation by the men of the contract they have signed.

Now, it is tolerably clear, I think, that all this apparatus was not intended to be brought into operation, four times a week, for voyages between this port and New York. This I say merely by way of illustration. It must apply to all coasting voyages, if it applies to any voyages not mentioned in section 12. I am not sure that I can express my opinion as clearly as I hold it, but it does seem to me that sections 12 and 13 are one enactment, concerning one and the same subject matter, and no other; that the former requires agreements to be made in certain cases, and the latter provides how they shall be signed and acknowledged. Any search for a further meaning is an unauthorized exercise of ingenuity.

It is said the expression "every agreement" is broad enough to cover all those required in coasting voyages by the act of 1790. This is true. But it is much broader than that. It will cover every agreement made by a seaman for any voyage, or indeed for anything else; there is nothing in section 13 itself to limit it to any subject matter. It is simply that every agreement shall

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be signed by the seamen in the presence of the shipping commissioner. It is confined to seamen signing agreements, and that is all. Of course it must be limited, and by the context, and the only context is section 12.

The well-known statute of July 20, 1790, § 1, 1 Stats. 131, requires the master of every ship or vessel bound on any sort of a voyage, coasting or other, with very trifling exceptions, before he proceeds on the voyage, to make an agreement in writing or print with every seaman, under a penalty of twenty dollars. This has been held not to include whaling and fishing voyages. The argument of the United States, as I have said, imports this statute into section 13 of the act of 1872, by the words "agreements and every agreement."

Another objection to this construction is that under it, if a master about to proceed on a coasting, Mexican, or West Indian voyage (which is admitted to come under the act of 1790, and not under section 12 of the act of 1872), makes no written agreement with any of his crew, he is liable to a penalty of twenty dollars for each seaman carried to sea; while if he makes one in strict and careful conformity with that statute, but not in presence of a shipping commissioner, the penalty is two hundred dollars for each seaman. For it has not been contended and can not be successfully maintained that the act of 1872 punishes the neglect to make any written agreement at all, except as required by section 12. Nay, more, the act of June 19, 1813, 3 Stats. 2, requires a written agreement for the cod fishery, and imposes no penalty for a breach; whaling voyages, and those for mackerel, are always made under written agreements, though no statute requires it. All these agreements are within section 13, if those under the statute of 1790 are included; for an agreement is an agreement. If this be the true construction of the act, it holds out a strong inducement against making written contracts in any of those cases, because the whole real and actual contest is a question of the fees of the shipping commissioner, and the trouble and formality attending the shipments before him.

It is said that it would operate beneficially if all agreements were signed before a commissioner. This may be so. As regards foreign voyages I agree to it most heartily. But the protection which the commissioner would afford is of comparatively little importance in the coasting trade, in which the crew have frequent opportunities to obtain a redress of any wrongs they may suffer, because they are never many days' sail from a home port, and in which they seldom suffer any wrongs. It is a fact well known to all judges in commercial ports, that there is very little complaint or litigation between officers and men, growing out of the voyages not mentioned in section 12. Scarcely a term passes that I do not try several indictments for offences said to have been committed on foreign voyages, and I can recall but one criminal case that I ever tried in which the complaint related to a coasting voyage. I doubt whether the supposed advantages of applying the section to coasting voyages would make up for the expense incurred by such a practice. The same sort of protection which would be afforded by shipping seamen for the coasting trade in presence of a commissioner, would be derived by discharging them before that officer; but the necessity for this is expressly negatived by section 22. I shall speak in a moment of the suggestion that there is no such express exception in section 13.

To me it is plain that Congress, as shown by sections 8, 12, 22, and many others, did not intend to hamper our enormous coastwise trade, with its constantly-recurring voyages, by the burden of paying the fees of shipping commissioners. And some one has prevailed on the legislature to class West Indian and Mexican voyages with the coasting trade in this respect.

It is said that if it was intended to limit the broad and general language of section 13, it would have been easy to say so in the section. It appears to me that the limitation is plain enough; but if not, the remark is quite as pertinent, and more so, that if Congress intended to include in section 13 agreements which are not mentioned in the act, it was not only easy but highly necessary to point them out.

I do not mean to be understood that section 13 is free of difficulty. The main question of its construction is now pending before the supreme court on a certificate of division of opinion from this circuit and district; and with whatever decision is made I shall not only be bound to be, but shall be entirely content.

The next point is whether the second clause of section 14 punishes the taking on board ship a seaman who has signed such an agreement as is required by the act of 1790, but has not signed it before a shipping commissioner. We here concede, of course, for the purposes of the argument, that section 13 requires such signing. I consider it tolerably certain that section 14 has no such intent. The offence is receiving on board seamen who have been engaged or supplied contrary to the provisions of the act. Now there is nothing in the act which regulates the engaging or supplying of seamen before they are taken on board ship. The acts of 1790 and 1872 require certain agreements to be made *before the voyage is begun;* but it is entirely consistent with those laws, and is the practice in some trades, to make the written agreements on board the ship after the seamen have been orally engaged. How, then, can this offence be committed? I do not know. But I do see that there is nothing in the act of 1872 contrary to which seamen can be received on board a merchant ship.

This penal clause, excepting in the amount of the penalty and the person who is to pay it, is taken literally from the merchant shipping act of Great Britain of 1854, section 147, in which it has a totally different sense from that now proposed for it. That statute provides not only for shipping commissioners (called shipping masters in that act) before whom agreements are to be signed and men discharged, etc., but also that a certain number of persons may be licensed in a certain way to procure and supply seamen for merchant ships, that is to say, to make the original and general oral engagement with them; and there is a penalty on any unlicensed person who shall procure or supply seamen, and on the master who receives on board persons unlawfully engaged or supplied, which is the clause now under review. The meaning in that act is plain and intelligible, and has nothing to do with the written agreements one way or another.

Now, I admit that our statute does not provide for any such licenses, and therefore can not have the meaning given to it in England, and I admit we must try to give a meaning to every part of every act of Congress; but I can not admit that I ought to exercise a great deal of ingenuity to find a secondary or conjectural sense for a set of words which have been taken bodily from a place where their intent is obvious, and put into one where there is no apparent meaning for them; because I know, in point of fact, that the act must have been adopted for what it might turn out to be worth in its new quarters. I agree, further, that the word "engagement" might include a written agreement, but when the defined offence is the receiving on board a ship seamen not duly engaged or supplied, and there is no law regulating their supply, and no law which requires the written engagement—if we choose to call it so—to be made *before they are received on board*, and when the natural and obvious and historical meaning of the word does not refer to any written agreement, and if it be construed to mean a written agreement, the offence must depend on whether the master chooses to make the written agreement on shore or on board. I conclude that "seamen engaged or supplied" does not mean seamen who happen to have signed one sort of contract or another before the time when there is any necessity for them to sign anything.

I have seen copies of the judgments of the district and circuit courts for the eastern district of New York, in the case of The City of Mexico, which sustain the position of the prosecution. It is hardly necessary for me to say that these judgments have received my most careful and respectful consideration; and were it not for those decisions I should not consider this case a very doubtful

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one. I venture to remark, however, that, as far as may be gathered from the opinions of the judges, the case was very imperfectly presented by the defence; and what argument there was took up the wholly untenable ground that the act of 1790, so far as Mexican voyages are concerned, had been repealed, and a great part of the opinions is occupied in an able and convincing refutation of this argument. No allusion is made to section 8, nor to any of the arguments which seem to me to have force in construing sections 13 and 14. It is impossible for me, therefore, to ascertain whether these arguments might not have had some weight, and even a controlling weight, in the case if they had been presented or suggested.

Sitting here under a responsibility which I cannot transfer, except when a decision has been made which is of binding authority upon this court, my best judgment is:

1. It is doubtful whether section 13 refers to any agreements not mentioned in section 12. In my opinion it does not.

2. It is doubtful whether section 14, second penal clause, has any reference to the signing of written agreements. In my opinion it has not.

3. Section 8 expressly declares that on a voyage of the kind now in judgment the master may be his own shipping commissioner, and the libel does not negative the master of the Grace Lathrop's acting as such commissioner on this occasion.

LIBEL DISMISSED.

The Shipping Act of 1872—Construction by Circuit Judge Woodruff—When Contracts with Seamen must be in Writing.

THE UNITED STATES OF AMERICA v. THE STEAMSHIP CITY OF MEXICO.

Circuit Court of the United States, Eastern District of New York, February 21, 1874.

Before Hon. LEWIS B. WOODRUFF, Circuit Judge.

1. Shipping Act of 1872—Contracts with Seamen.—The shipping act of 1872 expounded, and it is held that under this act the masters of all ships which are described in the navigation act of 1790 must, on shipping seamen for a voyage, make with them an agreement in writing or in print. Some of these agreements may still be made in the form prescribed by the act of 1790, while others must be made in the more detailed form prescribed by the 12th section of the shipping law of 1872; but no ship is permitted to go to sea without a written or printed agreement with the seamen.

3. ——. ——. Amendatory Act of 1873.—The amendatory shipping act of January 15, 1873 which exempts voyages to the British North American Possessions, Mexico and the West Indies from the operation of the 12th section of the act of 1872, does not do away with the necessity of entering into written contracts with seamen shipped for such voyages.

——. ——. Case in Judgment.—The steamship City of Mexico performed a voyage "from New York to Vera Cruz and one or more ports in Mexico, back to New York, with privilege of trading at intermediate ports." Seamen were shipped for this voyage without signing their names as required by the 13th section of the shipping act of 1872. *Held*, that the ship incurred the penalty declared in the second clause of the 14th section of the act of 1872, and decree was entered accordingly.

WOODRUFF, J.—The libel in this case is founded on the provisions of the fourteenth section of the act of congress entitled "An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." (17 U. S. Statutes at Large, 262-265.)

That section imposes a penalty upon any ship, not exceeding two hundred dollars, for each offence therein specified, and it separately specifies offences which shall subject the ship to penalty, by two distinct clauses. First, if any person shall be carried to sea as one of the crew on board of any ship making a voyage as hereinbefore specified, without entering into an agreement with the master of said ship, in the form and manner and at the place and times hereby in such cases required, the ship shall be held liable, and for every such offence shall incur a penalty not exceeding $200. Provided always that the ship shall not be held liable for any person carried to sea," &c., &c. [describing certain cases of secretion on board without the knowledge of any officer of the ship, or false personation, &c.]

"Secondly, if any master, mate or other officer of a ship knowingly receives or accepts to be entered on board of any merchant ship any seaman who has been engaged or supplied contrary to the provisions of this act, the ship on board of which such seaman shall be found shall, for every such seaman, be liable to and incur the penalty of a sum not exceeding two hundred dollars: Provided further, that in case of desertion or of casualty resulting in the loss of one or more seamen, the master may ship * * * and report the same to the United States consul at the first port at which he shall arrive, without incurring such penalty."

Here are described two separate penalties in distinct clauses of the section, and, as will presently be seen, the enquiry why both were inserted is very importont and significant, for the cases mentioned therein do not on their face seem to differ. Looking at the description of the cases, without consulting any other provisions of this or other statutes or requirements of law, it may well be suggested that no person can be carried to sea as one of the crew, with the knowledge of the officers of the ship, without being received, accepted or entered on board, and hence the two clauses would seem to be tautological or repetitions, prescribing two penalties for the same violations of law, one for each offence not exceeding two hundred dollars, and the other for every such seaman, not exceeding two hundred dollars. But this declaration in these separate clauses will, I think, be found a significant and important aid to the construction of the statute when the facts of this case, the other provisions of this statute and the former law and the claims here made by the counsel for the parties are more fully brought into view.

From as early as the year 1729 the statutes of England for the protection of seamen, as well as the security of ship-owners, have required under penalty that no master bound to parts beyond seas shall carry any seaman or mariner to sea without first coming to an agreement with such seaman or mariner for their wages, time of service and other particulars specified, which agreement shall be in writing, &c. (act of 2d Geo. II, chap 36, § 1), and providing expressly that the seaman shall sign such agreement (ib., sec. 2). By subsequent statutes having the interest and protection of seamen constantly in view, the provisions of the act referred to have been enlarged and carried into greater detail, and down to the present time the policy and even the necessity of such agreements has been recognized and this requirement kept in full force.

This subject very early engaged the attention of the Congress of the United States, and by act of July 20, 1790 (1 U. S. Statutes at Large, p. 131), it was enacted that from and after the first day of December then next, "Every master or commander of any ship or vessel bound from a port of the United States to a foreign port, or of any ship or vessel of the burthen of fifty tons or upward, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners), declaring the voyage, term or terms of time for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen or mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage within three months next before the time of such shipping; provided such seaman or mariner shall perform such voyage, or if not, then for such time as he shall continue to do duty on board

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such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and such seaman or mariner not having signed such contract shall not be bound by the regulations nor subject to the penalties and forfeitures contained in this act." Other provisions follow, designed to secure both the seaman and the master or owners to the performance of their reciprocal duties. The act of April 14, 1792 (1 Statutes at Large, 254, chap. 24), among other things provides for the return of seamen, bound by agreement to serve, to their homes, in certain cases, through the consuls of the United States. Other and subsequent acts exhibit the desire of congress to watch over and protect the interests of seamen.

In 1872 the act under which this proceeding was instituted was passed. It provides for the appointment of a shipping commissioner, and makes numerous and extensive provisions for carrying out the intention expressed in its title above recited. Section 12 relates to ships bound from a port in the United States to a foreign port, or from a port on the Atlantic to a port on the Pacific, or *vice versa*, and provides that the master of every such ship "shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be in the form as near as may be, as hereunto in table 'D' in the schedule annexed, and shall be dated at the time of the first signature thereto, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars, that is to say." Here follow numerous particulars, including all that were contained in the act of 1790, and very many which were not required by the law of 1790, or otherwise, in respect to other vessels than those in this section specified and the form of agreement annexed. Table "D" contains many other specific details. Provisos to the section authorize the master to perform the duties of a shipping commissioner, as provided in a previous section, when in a port for which no shipping commissioner has been appointed; and further, that this section should not apply to masters of vessels where the seamen are by custom or agreement entitled to participate in the profits or results of a cruise or voyage; nor to masters of coastwise; nor to take-going vessels that touched at foreign ports. It will there be seen that the duty of the master to enter into written or printed agreement with seamen is continued, and that, as to ships bound on certain specific voyages, the agreement must contain the details specifically mentioned in this section, while the masters of other vessels not included in this section satisfied their duty by making an agreement in writing signed by the seamen, containing what was prescribed in the former law. The masters of all ships described in the act of 1790 must make the agreement with the seamen in writing or in print—some in the form prescribed by that act, and others in the much more detailed form prescribed in this twelfth section, but none were permitted to go to sea without a written or printed agreement with the seamen.

Hereupon follows section 13, which declares that the following rules shall be observed with respect to agreements:

First—Every agreement (except in such cases of agreements as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping commissioner.

Second—When the crew are first engaged the agreement shall be signed in duplicate, and one part shall be retained by the shipping commissioner, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship, and shall be delivered to the master.

Third—Every agreement entered into before the commissioner shall be acknowledged and certified under the hand and official seal of such commissioner, and shall be endorsed on or annexed to such "agreement" * * * [and the form of acknowledgment and certificate is given.] It is claimed that the words "every agreement" in the first clause of this thirteenth section mean only those agreements which masters of certain specified vessels named in the twelfth section are by that section required to make. But that is not the literal reading of the section. If that had been its intent, nothing was easier than to have so expressed it. Throughout the act, wherever it was intended to limit a provision to the voyages described in the twelfth section, the limitation is made in express terms. (*Vide* §§ 8, 22, 24, 35, 36, 40, 58, and others which are connected therewith in these provisions.) Nor is there anything in the design and object of the law which implies such a limitation. If there were no other provisions in the various sections of the statute except such as relate to the particular vessels included in the twelfth section, much plausibility would be given to the claim; but many of the sections—probably the greatest number of them—are general, referring alike to other seamen as well as to those named in the twelfth section. (§§ 9, 11, 23, 25, 26, 31, 32, 43 to 50, 51 to 54, 61 to 63 and others.) Section 15 is especially significant, and the special exceptions in section 13, of agreements hereinafter specially provided for, greatly strengthen this interpretation; for, when after the use of the terms "every agreement," congress declared certain agreements to be excepted, the presumption is against any other exceptions. Nor does the nature of the provisions in the 13th section indicate such an intent. The purpose of the act is fittingly declared in its title to be for the protection of seamen. They need protection against being compelled or reduced to sign agreements to serve without properly understanding the provisions of the agreement, the term of service, the nature of the voyage or voyages, the compensation they are to receive, and the time of payment. They are frequently in danger of being approached and led into engagements when intoxicated. All this congress knew, and wisely provided that every agreement should be signed by them in the presence of the commissioner and be duly acknowledged. Certainly this court can not say that this was not as important in reference to the agreements which are required by the act of 1790, as to those specified in the twelfth section. The two clauses of the fourteenth section above recited apply to this construction of the thirteenth section with especial significance. The first clause refers to the crew of a ship "making a voyage as hereinbefore specified," *i. e.* making the voyages mentioned in the twelfth section, and annexes the penalty to taking to sea without an agreement "in the form," &c., hereby "in such cases" required. The form hereby required is prescribed in the twelfth section, and is required only in the cases therein specified. The vessel here was not condemned under that clause. But the second part of the section is more general. It refers in terms to the officers of "any merchant ship," and to "any seaman" who has been engaged or supplied contrary to the provisions of this act. There are several provisions relating to that subject, and probably none more important than the thirteenth section, which provides for their signing agreements to serve for a voyage, in the presence of a commissioner, and so guards them from imposition and deception therein, as the case may be, when they are in a condition wholly unfit to take care of themselves. Sailors are so often likened to children in reference to the ease with which they may be deceived or influenced, and their recklessness or inability to protect themselves, that the value of these provisions needs no further illustration.

Unless this second clause is to have such general scope and effect, extending beyond the twelfth section and to cases not within it, it is difficult to assign to it any useful meaning. The cases arising under the twelfth section are provided for in the first clause. These circumstances lead to the conclusion that not only the agreements mentioned in the twelfth section, but all other agreements with seamen required by law to be in writing (though not included in the twelfth section), must be signed by the seamen in the presence of the commissioners, or the penalty declared in

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the second clause of the fourteenth section is incurred by the ship.

To apply this conclusion to the case now under consideration:

By an act of congress passed on the 15th of January, 1873 (17 Statutes at Large, 410), the act to authorize the appointment of shipping commissioners, now under consideration, was amended by adding to the above mentioned twelfth section a further proviso, namely: "Provided, further, that this section shall not apply to masters of vessels when engaged in trade between the United States and the British North American possessions, or the West India Islands, or the Republic of Mexico." By this proviso the number or class of vessels whose master is required to make with seamen the written or printed agreement specified in that section, is greatly reduced. The voyage of the steamship City of Mexico, for which seamen were shipped without their signing the same, as required in the thirteenth section of the said act, was so proved on the trial of this cause, "from the port of New York via Vera Cruz, and one or more ports in Mexico, and back to New York, with privilege of trading at any intermediate ports." This was a case within the proviso, introduced by the amendment of 1873, so that section twelve of the act has no application thereto. "So far as this voyage is concerned, the act and the amendment are to be read together, and the master of the City of Mexico was under no duty to make with his seamen an agreement in the form and with the numerous details of its contents and time of signing by the master, which the twelfth section prescribes. But applying to the case the conclusion herein above stated, the master was within the section which requires that every agreement shall be signed by the seamen in the presence of the shipping commissioners, unless it can be shown that he was under no legal obligation to make any written or printed agreement whatever with his seamen. That proposition can not be maintained.

Upon that point I concur fully in the reasoning of the judge of the district court, the effect of the amendment was to withdraw the voyage of the City of Mexico from the operation of the twelfth section, and to leave it in the same condition and subject it to all the duties and obligations to which it would have been subject if the twelfth section of the act had been originally passed in its now amended form. An actual intention of the minds of the legislators to withdraw a very large proportion of our seamen from the protection of written shipping articles, which it has been the intention and policy of England for more than one hundred and fifty years to provide, and which this country adopted in its earliest history, and has since consistently maintained, and will not, I think, be for a moment contended. The argument is that whatever we may suppose to have been in the minds of our legislators, we are bound by what is involved in the word and legal effect of their enactment, and thereupon it is claimed that when the terms of the twelfth section of the act of 1872 were, as originally passed, made broad enough to embrace the voyage in question, that operated by implication as a repeal of the act of 1790, so far as relates to such voyages, and hence, when in 1873, congress withdrew such voyages from the operation of the twelfth section, that act necessarily left such voyages wholly unprovided for by any existing law; that although it is possible to say that this legislation created a *casus omissus*, which the legislators did not, probably, in their minds contemplate, the court is nevertheless bound to construe statutes according to the meaning and legal effect disclosed by the statutes themselves, andnot by any speculative enquiry into the actual intention of the legislators. This may be conceded, but if it is claimed that the legislative intent may not be gathered from the nature of the subject, the consequences which would flow from a proposed construction and the admitted policy of the government, the claim goes too far. Whenever the construction of statutes and their legal effect is doubtful or susceptible of a double interpretation, these considerations are of great force and often conclusive.

The act of 1790 (with some few exceptions) applied to the masters of all vesseis. Section 12 of the act of 1872 selected some of those vessels and applied to them its more stringent and particular provisions. From these latter provisions the voyage now in question was relieved. Now I do not deem it very material to say whether the voyages to the West Indies were always under the operation of both statutes, and so when relieved from the operation of the twelfth section, were simply left under the influence of the statute of 1790, or whether the twelfth section operated as a technical or constructive repeal of the act of 1790 in respect to such voyages, but that the amendments operated to revive the act of 1790, thus constructively repealed. Either view works the same result. Repeals by construction are not favored. There was no repugnance or inconsistency between the requirements of the act of 1790 and the requirements of the twelfth section of the act of 1873.

To the requirements of the act of 1790 that twelfth section refers in special cases. When the voyage now in question was withdrawn from among those cases, it remained under the operation of the act of 1790 as fully as if the act of 1873 had not been passed.

It follows that the City of Mexico incurred the penalty declared in the second clause of the fourteenth section of the act of 1872, for which the decree was pronounced in the district court, and it must be so here decreed with costs.

DECREE FOR LIBELLANT.

Liens of Mechanics, Laborers and Material-Men Under the Indiana Statute—Enforcement of the Lien where a Material-Man Furnishes Materials to a Sub-Contractor.

RICHARD S. COULTER v. CHARLES FRESE, CHARLES F. HAHN, JOHN A. LYONS, AND INDIANAPOLIS MANUFACTURERS AND CARPENTERS' UNION.

Supreme Court of Judicature of Indiana, No. 3508, *April* 11, 1874.

JOHN PETTIT, LL. D.,
ANDREW L. OSBORNE, LL. D.,
ALEXANDER C. DOWNEY, LL D.,
JAMES L. WORDEN, LL. D.,
SAMUEL H. BUSHKIRK, LL. D, } Judges.

1. **Furnisher's Lien for Materials Furnished to Sub-Contractor.**—To give a person furnishing materials for a new building a right to acquire a lien on the building and real estate, to the extent of the value of the materials furnished, it is not necessary that the materials should be furnished to the owner of the real estate who is erecting the building, or to his immediate contractor; but section 647 of the code, as qualified by section 648, gives such right to any person furnishing materials for a new building to a sub-contractor.

2. ——. **Payment by Owner to Contractor before Notice of Lien.**—A lien thus acquired is not defeated by payment in full by the owner to the contractor of the entire amount due him, before notice of the intention to hold the lien has been filed, it being filed within the time limited therefor.

3. **The Indiana Statute** relating to the liens of mechanics, laborers and material-men expounded at length, and the construction put upon it in Barker v. Buell, 35 Ind. 297, re-affirmed.

4. ——. **Constitutional Law.**—Said statute is not unconstitutional for the reason that the subject matter is not expressed in the title.

From the Marion Superior Court.

WORDEN, J.—This was an action by Charles Frese and Charles F. Hahn against Richard S. Coulter, to enforce a supposed lien which the plaintiffs had acquired upon certain real estate described in the complaint, owned by Coulter, for material furnished by the plaintiffs to Green and Taylor, who were contractors with Coulter for the erection of a house upon the premises described. John A. Lyons and the Indianapolis Manufacturers and Carpenters' Union were made parties defendant, and they each filed a cross-complaint against Coulter to enforce a like lien. Coulter filed separate answers to the original and cross-complaints. The third par-

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agraph of each of these answers alleged, in substance, that he, Coulter, was the owner of the premises; that he made a contract with Green & Taylor, and no one else, for the furnishing of the materials and the erection of the house; that in pursuance of the contract Green & Taylor furnished the material and erected the house, and that before notices of intention to hold said lien were filed in the recorder's office he fully paid and satisfied Green & Taylor for the work done and materials furnished. Demurrers were filed respectively to each of these paragraphs of answer, for want of sufficient facts, but were overruled and exception taken. Issues of fact were formed and the cause submitted to the court for trial.

The court made a special finding which it is not necessary to set out in full. The finding embraces all the facts necessary to the establishment of the lien of the original plaintiffs, as well as of Lyons and the other cross-complainant, if as material-men furnishing materials to the contractor of Coulter, they are entitled to such lien, and unless they are precluded by the fact that before notice of the intent to hold the liens were filed in the proper office, Coulter settled with and paid off his contractors in full.

The court held as a conclusion of law from the facts found, that neither the original plaintiffs nor the cross-complainants were entitled to maintain their supposed lien, and rendered judgment against all of them in favor of Coulter. Due exceptions were taken to the conclusion of law. On appeal to the general term the judgment rendered at special term was reversed, the court holding that error was committed in overruling the demurrers to the paragraphs of answer mentioned, and in the conclusion of law. From the judgment of reversal thus rendered at general term, an appeal has been taken to this court, and the same questions are presented here as were presented to the court below at general term.

The two questions thus presented have been elaborately argued by counsel. They may be stated as follows: First, can a material-man who furnishes materials, not to the owners but to the contractor, for the erection of a new building, acquire and enforce a lien on the building and on the interest of the owner of the lot on which it stands, to the extent of the value of the material furnished? Second, if such lien can be acquired, is it defeated by the fact that the owner, before the filing of the notice of intention to hold the lien, it being filed within the time limited, has paid off the contractors in full for the work and materials?

That such lien can be acquired was decided by this court in the case of Barker v. Buell, 35 Ind. 297. We have been earnestly pressed to reconsider the decision in that case. We have done so, but have again reached the same conclusion. In that case the original and amended sections of the entire statute relating to mechanics' liens were brought together and set out. At the risk of some prolixity we again transcribe two of the sections, being those on which the questions here involved mainly depend.

"Sec. 647. Mechanics and all persons performing labor or furnishing material for the construction or repair of any building, or who may have furnished any engine or other machinery for any mill, distillery or other manufactory, may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any building, mill, distillery, or other manufactory for which they may have furnished materials of and description, and on the interest of the owner of the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both.

"Sec. 648. The provisions of this act shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs, or to the engine or other machinery furnished for any mill, distillery, or other manufactory, unless furnished to the owner of the land on which the same may be situate, and not to any contract made with the tenant, except only to the extent of his interest."

Sec. 649 provides for a personal liability of the owner of a building in favor of any sub-contractor, journeyman or laborer employed in the construction or repair, or furnishing materials for any buildings, not to exceed, however, the amount due, or that may become due, from the owner to the employer. This section is confined to the subject of personal liability, and has no relation whatever to liens on property. The other sections of the article provide for the manner of acquiring and enforcing the liens.

If the original plaintiffs and the cross-complainants are not entitled respectively to their liens, it must be in consequence of the circumstance that the materials were furnished by them to Green & Taylor, the contractors of Coulter, and not to Coulter himself. But upon reviewing the statute and again considering its terms, we find ourselves utterly unable to give it a construction that will limit the material-man. It must be so as to mechanics and all persons performing labor, right of lien to cases where the materials are furnished to the owner. If such is the case as to material-men, for they all stand upon the same ground, so far as this provision of the statute is concerned. Section 647 provides that mechanics and all persons performing labor or furnishing materials for the construction or repair of any building, shall have a lien, without any limitation in respect to the person to whom the materials are furnished or for whom the labor may be performed. But the meaning of this section is placed beyond doubt by the next. We quote the following paragraph from the opinion of this court in the case of Baylies v. Sinex, 21 Ind. 45, in relation to the two sections: "It is evident that the 647th section, above set out, does not give a lien upon the engine or other machinery furnished as distinct from the building, but only upon the building or lot upon which it stands. The 648th section is somewhat obscurely worded, but it does not, as we think, extend the remedy given by the preceding section, but rather limits or qualifies it. It limits the remedy given by the preceding section, first, to cases where work has been done or materials furnished on new buildings; second, to cases where contracts have been entered into with the owners of buildings for repairs; third, to cases where engines or other machinery have been furnished, &c., to the owners of the land, excluding all contracts with tenants, except only to the extent of their interests. Its object was, undoubtedly, to prevent a tenant from encumbering property with liens, except to the extent of his interest in the property. Lynam v. King, 9 Ind. 3."

The legislature limited what would otherwise perhaps have been the effect of section 647, by providing in section 648, in substance, that tenants shall not encumber property with liens exeept as to their interest in the property, by requiring the contract for repairs to be made with the owner of the property and not with the tenant merely, or that the engine or other machinery be furnished to the owner, in order to create a lien as against his interest in the property, leaving the implication irresistible that where a new building is erected by the owner, whether he lets the work to a contractor or pursues any other mode of accomplishing the result, the person performing labor on or furnishing materials for the building, may have a lien whether the labor be performed for the owner or the materials be furnished directly to him or his contractor. The building must be erected by the authority and direction of the owner, in order that any lien may be acquired as against him. No one by committing a trespass upon another's land can acquire a lien upon it; nor can one, by furnishing materials for the erection of a building which the owner of the land has not authorized to be built, acquire such lien. But where the owner causes a building to be erected, whether he lets the work and the furnishing of the materials as an entire contract or pursues some other course, those performing labor on or furnishing materials for the building are entitled to a lien as provided for. This is in accordance with the plain and unequivocal provisions of the statute.

We shall, before closing this opinion, return to this proposition

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again, but we will, for convenience, here notice the second question, as the first and second are in some degree blended together. Is the lien of the mechanic, laborer or material-man defeated by the payment to the contractor by the owner of the whole amount due the contractors, before notice of an intention to hold a lien has been filed? Section 650 provides for acquiring a lien by filing in the recorder's office of the county a notice of intention to hold a lien on the property, and that "the lien so created shall relate to the time when the work upon said building or repairs began, and to the time when the person furnishing materials began to furnish the same." We have already seen that by the provisions of section 647 the mechanic, laborer or material-man may have a lien, not to the extent of what may be due from the owner to the contractor, but "to the extent of the value of any labor done or materials funished, or for both." By the next section the lien of the material-man is made to relate to the time when he began to furnish materials. The extent of the material-man's lien being the value of the material furnished, and the time it attaches being the time when he began to furnish materials, it would, in our opinion, be an utter perversion of the law to hold that though he filed his notice within the prescribed time, yet his lien shall be defeated by full payment by the owner to the contractor before the expiration of the time limited for the filing of the notice. This proposition seems to us to be too plain to admit of much argument or illustration. That such payment should defeat the lien confounds all ideas of the force and legal effect of a lien. Indeed, if such is the case there is no lien, and the statute which attempts to confer it is a dead letter.

Many arguments have been pressed upon our consideration in respect to this point, as well as upon the question whether a lien can be acquired on account of work done for or materials furnished to a contractor and not the owner. The most of them are based upon the real or supposed hardships of the law, as we construe it, in this, that in many cases it subjects the owner to the liability of making double payments for the same work or materials, and prevents him from making contracts for the erection of buildings and the furnishing of materials therefor, to be paid for otherwise than in money, and other similar inconveniences. These arguments might have much force if addressed to the legislature, whose province is to make the laws, but can have little weight against the clear and unequivocal terms of a statute when addressed to a court whose province it is to determine what the law is, and not what it ought to be. The statute in question speaks for itself in unmistakable language. No arguments can change its significance. An act of the legislature is not of such plastic nature as that it may be moulded at pleasure by the courts into such form as will make it agree with the standard of expediency, or of right and wrong, which the judges may have created. When the legislative will has been clearly and constitutionally expressed, the courts have no alternative but to follow it. If an enactment is wrong or inexpedient the legislature may repeal or modify it, but it is not the province of the courts to avoid its effect by construction contrary to its plain intent and meaning. While much has been said against the statute, construed as we think it must be, much may be said in its favor. Its object is to secure to the mechanic, laborer or material-man, compensation for his work or materials. It prevents the owners of real estate from securing to themselves, without compensation, the benefits of the labor and the materials of others by means of low contracts with irresponsible, or perhaps dishonest contractors. The inconveniences of the law do not seem to us to be insuperable. The owner may withhold from the contractor, for the period of sixty days after the completion of the work, enough to protect the property from liens for work or materials. If full payment is made at the end of that time, it is perhaps quite as prompt as payments are usually made.

It is urged that inasmuch as section 649 provides that sub-contractors, journeymen, laborers and material-men may have a personal action against the owners for their work or material, by giving him the notice therein provided for, to the extent of what is due or may become due from him to the contractors, they should not be held to have the right to acquire a lien. We find nothing, however, in this section that, in our opinion, indicates an intent on the part of the legislature to withhold from them the right to acquire a lien as provided for in the two preceding sections. The contractor has the right to a lien and also to his personal action against the owner. The object of the law was to place the sub-contractor, journeyman, laborer and material-man upon the same footing with the contractor, except that the personal action against the owner in favor of the sub-contractor, etc., is limited by the amount that may be due or may become due from the owner to the employer, the lien given might be an inadequate remedy, as the property might be previously encumbered to an extent that would render the lien unavoidable; hence the right of a personal action against the owner is conferred to the extent indicated.

It has been urged that as the law had been in force for nearly twenty years before any one sought to place such construction upon it as would authorize a sub-contractor, etc. to acquire, a lien, such construction should not prevail; that the absence of any such attempt to acquire and enforce such lien, during so long a period of time, is evidence of general acquiescence that it can not be acquired. This argument has some force, but it can not prevail over the clear and explicit terms of the satute conferring the right. We are not aware that the question was ever raised in the state until the case of Barker v. Buell, *supra*. See also O'Hallaran v. Leachy, 39 Ind. 150. But new points frequently arise upon statutes a great length of time after their passage. Thus it was not until the year 1840 that the question arose in England whether a promise by the defendant to the plaintiff to pay to A. B. a debt which the plaintiff owed to A. B., was within the statute of frauds passed in the 29th year of CHARLES II, which was the year 1676. Thus the statute had been in force 164 years before the question arose. Eastwood v. Kenyon, 11 A. and E. 438; Smith on Cont., 5th ed., 108.

We have also been referred to some elementary books as authority that a sub-contractor, etc., can not acquire a lien under the statute set out. The statute never having received construction by the courts upon the point here involved, it is obvious that any comments upon it in this respect could only express the individual views of the party making them; and however much we may respect the authors referred to, we can not yield our convictions to theirs. Moreover, elementary books are often prepared with haste, and sometimes express views which the authors themselves would disclaim upon a fuller consideration of the subject.

There is a striking analogy between the statute and the principles of the civil law, including the maritime, in respect to liens. Thus, says Domat, vol. 1, p. 683, § 9. par. 1744: "Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those have who have advanced money for these kinds of works, and which the seller has for the price of the thing sold." The "privilege" of the seller is mentioned in a preceding section (4), p. 681, as follows: "He who has sold an immovable thing for which he has not received the price, is preferred before the other creditors of the purchaser and before all others, as to the thing that is sold. For the sale implied the condition that the purchaser should not be master of the thing till he had paid the price. Thus the seller, who has not received the price, may either keep the land or tenement if the price was to be paid before delivery, or he may follow it into what hands

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soever it may have passed, if he has delivered it before payment."

There are in many of the other states statutes similar to that in question here. An elaborate and well prepared brief intended for another cause, has been filed in this, to which we are indebted for a reference to many decisions of other states under similar statutes. Those decisions are in harmony with the conclusions herein arrived at. It would extend this opinion to an unreasonable length to notice them all in detail, but a few may be glanced at. In the case of Parker v. Bell, 7 Gray, 429, it was held, under a statute not unlike our own, that a plasterer employed by a builder who has made a written contract with the owner of land to build a house thereon, is entitled to a lien on the house and land. The court say: "The object of the provision of the statute is to create and preserve to the laborer security for the payment of the wages which he earns. It is manifest, from a consideration of the provisions of the successive statutes in relation to the lien of mechanics upon the estates upon which their labor has been expended, that the legislature have regarded it as a sound principle, that all those who have by consent of the owner, or in pursuance of contract with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services shall have been paid and discharged." In White v. Miller, 18 Penn. State, 52, it was held under the Pennsylvania statute, that one who furnished lumber and window sash to a contractor to be used in the erection of a building had a lien therefor. GIBSON, Ch. J., in delivering the opinion of the court, said: "As soon as owners of lots ceased to be their own builders, they put it in the power of persons employed by them to occasion losses to mechanics and material-men which they ought not to bear; and it was to remedy this mischief that the legislature established the principle that materials and labor are to be considered as having been furnished on the credit of the building, and not of the contractor. The principle is not only a just, but a convenient one. Whether the builder be the agent of the owner or an independent contractor, his appointment to the job creates a confidence in him which was not had before; and the consequence of a false confidence ought not to be borne by those who had no hand in occasioning it. Nor does the rule of the legislature bear hard on the owner. He has it in his power to detain the price of the building while there are outstanding charges against it, or to stipulate for security against those that might afterwards turn up; and if he uses common prudence, any loss which occurs will eventually fall on the author of it. If he do not, he can not charge the mechanic or material-man with the consequences of his own supineness. The adoption of these lien laws was imperfect, and they worked ill for the owner at first; but amended and expounded by experience, they work justly and well for all parties." See also the case of Lee v. Burke, 66 Penn. State, 336. So also in New York, under a statute certainly no more explicit than our own, it is held that a sub-contractor may acquire a lien for work and materials, and that the owner can not defeat the lien by a subsequent conveyance of the property. Blauvelt v. Woodworth, 31 N. Y. 285. See also Morrison v. Hancock, 40 Mo. 561; McCrea v. Craig, 23 Cal. 522.

In the case of Sodini v. Winter, 32 Md. 130, the court say, among other things, that "In a case like the present, of a material-man furnishing material to a contractor to be used in the erection of a building, the law contemplates a contract of purchase between these two, and that credit may be given to the latter, and whilst there is no contract express or implied between the founder and the owner, or credit given to the owner, yet the law provides a lien upon the building as a security for the material-man in case the contractor fails to pay for the materials; and this is done without affecting the liability of the contractor on his contract of purchase which still exists. Indeed, it was the liability to and frequency of loss sustained by mechanics and dealers in consequence of the employment of a middle-man or contractor which induced the legislature to give a lien on the building. Such being its character, and such the provision of law for its enforcement, the mere fact that the materials were furnished on the credit of the contractor, and not on the credit of the building, is not in our opinion either a waiver or extinguishment of the lien." In the case last cited proof was offered of payment in full by the owner to the contractor, but was rejected. This was held to be no error.

There are other authorities tending more or less strongly to sustain the lien; but we pass them over and proceed to the examination of those which seem to be relied upon to sustain the opposite views. The case of Spaulding v. Thompson, 27 Conn. 573, may be best stated in the language of the court in pronouncing the opinion. "The plaintiff," says the court, "by his bill, seeks to foreclose a mechanics' lien, which he claims, on the ground of his having furnished materials and rendered services in the erection of the defendants' church edifice. It appears, however, that the work was not done at the request of the defendants or even for their benefit. On the contrary, it was done against their express prohibition to the original contractors, and was also done after the contractors had been fully paid the contract price for the erection and completion of the whole church. Under the circumstances we cannot think the plaintiff entitled, as against the defendants, to any lien upon the church. It is true the language of the act of 1855 is very broad, but it could not have been intended to create a lien against a party who has not contracted either directly or indirectly for the work, but on the contrary, has expressly prohibited it." This case does not seem to us to militate essentially against the maintenance of the lien under a state of facts entirely different from those set forth.

The case of Hollingsworth v. Dow, 19 Pick. 228, involved nothing but a question of lien arising upon the principles of the common law, where a mechanic had been employed by a contractor to do certain work upon a machine, and had no application whatever to the question involved here.

In the case of Whitney v. Joslin, 108 Mass. 103, one Bourassee had taken a contract from Ebenezer L. Joslin to build a barn on land of his wife. Whitney & Sons had furnished Bourassee with material, who commenced the work but abandoned it before it was finished. Whitney & Sons then made a new contract with Emily J. Joslin, wife or widow of Ebenezer, whereby they agreed to finish the barn, etc., and she agreed, amongst other things, to pay them for the material they had furnished to Bourassee. It was held that if Whitney & Sons ever had any lien for material furnished Bourassee, they had waived it by the new contract. This case in no manner conflicts with the construction we place upon the statute.

The case of Wood v. Donaldson, 17 Wend. 550; S. C. 22 Wend. 395, was this: One Russell contracted with Wood for the erection of a building, engaging to do the mason and carpenter work. Russell made a contract with Tingley whereby the latter engaged to do the mason work of the building as a sub contractor. Tingley absconded before the work was finished. Donaldson, the plaintiff in the case, was employed by Tingley, and did work and furnished material, for which he claimed to hold Wood under the lien law. The court say that the first section of the law gives color to the claim, but that the other sections of the act "clearly show that this new and extraordinary remedy was intended to be limited to the persons employed by him who contracted with the owner. The second section provides that the owner shall furnish his contractor with copy of the account, so that if there shall be any disagreement between him and his creditor, they may adjust the amount. By the next section, if the adjustment can not be amicably made, they shall submit the difference to arbitrators; and the fourth section declares that if the contractor shall not pay the sum found due to his cred-

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itor, with costs, the owner shall pay the same out of the funds in his hands; and in case of default, it may be recovered in an action for money had and received, to the use of the cred itor, etc. Nothing can be more explicit than these provisions, and they limit the right to a lien upon the funds of the contractor in the hands of the owner to *his creditors*—persons who have performed work, etc., under a contract with *him*." We agree with the decision in the cause, and all that was said by the eminent jurist delivering the opinion, NELSON, Ch. J., but we fail to see that it has any application whatever to the case here. There is nothing in any of the sections that follows those hereinbefore set out, that tends in the slightest degree to qualify them in respect to the point here involved, or to show that the legislature did not intend that the persons therein mentioned should have a lien as therein provided for.

In the case of McAlpin v. Duncan, 16 Cal. 126, the statute under which the decision was made is not set out or stated. The court say: "We think all that can be gathered from this act is, that material-men, sub-contractors, etc., have a lien upon the property described in the act to the extent (if so much is necessary) of the contract price of the principal contractor; that these persons must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt; that by giving notice, the owner becomes liable to pay the sub-contractor, etc. (as on garnishment or assignment, etc.), but that if the owner pays according to his contract, in ignorance of such claims, the payment is good." The case does not seem to throw any light upon the question under consideration.

In the case of Knowles v. Joost, 13 Cal. 620, a statute is in part set out, which authorizes the owner, upon being served with proper notice, "to withhold from the contractor, out of the first money due, or to become due, to him, under the contract, a sufficient sum to cover the lien claimed by such sub-contractor, journeyman or other person performing labor or furnishing materials, until the validity of the lien shall be determined by the proper tribunals, if it be contested." It was held that "it was not the design of the legislature to make him responsible, except upon notice, or to a greater extent than the sum due the contract tor at the date of the notice." We do not perceive that the case is at all in conflict with the construction we place upon our statute. By the statute copied in the opinion in the case cited, it would seem that the rights of the parties were to be determined by the state of things existing at the time of notice. Not so, however, under our statute, inasmuch as, if the notice is filed within the time limited, the lien relates back, as before shown.

The case of Jacobs v. Knapp, 50 N. H. 71, was an action of assumpsit for hauling wood, and a lien on the wood was claimed. The facts were that the wood belonged to the defendant, who had contracted with one Fifield to haul it. Fifield employed the plaintiff to haul it, there being no contract express or implied between the plaintiff and defendant. There was a statute which provides that "any person who labors at cutting, hauling, or drawing wood, bark, logs, or lumber, shall have a lien thereon for his personal services, which lien shall take precedence of all other claims except liens on account of public taxes, to continue sixty days after the services are performed, and may be secured by attachment." The court, after some discussion of the statute, say: "Upon the whole, therefore, we are inclined to the opinion that the lien of laborers in the class to which the plaintiff belongs, can attach *only* in case and by virtue of a contract, express or implied, *with the owners* of the property upon which the labor is bestowed." In a previous portion of the opinion the court, after having discussed the matter of liens in respect to buildings, says: "In such a case, to give not only the master-builder, but also all the various under-workmen, each an independent lien, without preference or precedence, upon the same property, would disastrously embarrass the useful construction of the work." This impracticability of giving separate and independent liens upon the same property "without preference or precedence" would seem to be the chief ground for the construction adopted, for the court proceed immediately to say: "In short, there would seem to be no practicable rule by which to interpert this statute, other than the one which should limit the subsistence of the lien to the party above who specially contracts with the owner of the property upon which the labor of the contractor and all his sub-contractors is expended." But this difficulty is entirely obviated by our statute, which makes provision for making all persons having such liens, parties to an action to enforce them, and if the property should not sell for sufficient to pay all, the proceeds of the sale are to be apportioned to each according to the amount due him. §§ 652, 653. The court, after speaking of the statutes of some other states, giving sub-contractors leins, say: "These provisions usuually require by way of proviso, that if the work is done under a contract with the owner, no person who may have done work or furnished materials for such contractor shall have the benefit of the lien, *unless* within a prescribed time after his employment by the contractor, *he shall give notice to the owner that he is employed, and will claim the benefit of the lien.*" It will be seen that the law in that case did not provide for any notice to the owner; which was, perhaps, a strong reason for the adopting the construction placed upon it; while our statute provides for notice by filing it in the recorder's office. The court say further: "Such a law as we have indicated, and have found in other jurisdictions, would, perhaps, be of public advantage. It would tend to protect the laborer against the fraud, dishonesty, or insolvency of owners and contractors; but if evils exist by reason of the present state of the law, the legistature alone can, and that body most effectually may provide the remedy." We learn from a note to the case that the legislature subsequently took action upon the subject; but we have not seen the enactment. Taking the case in New Hampshire altogether, we are of the opinion that it does not seriously conflict with the conclusion of the case before us.

It has been suggested that the statute, with the construction we place upon it, is unconstitutional, for the reason that the subject matter is not expressed in the title. This, we think, was settled by the case of Hall v. Bunte, 20 Ind. 304 In that case it was held that the statute giving the lien was one that conferred a remedy for a debt, and was valid. In that case the debt was against the party against whom the lien was sought to be enforced. Here the debts are not, but this, we think, makes no material difference.

For these reasons we are of opinion that the original plaintiffs and the cross-complainants were entitled to their liens, and that the liens were not defeatəd by the payment to the contractor. It follows that the judgment below at general term, reversing the judgment rendered at special term, was right, and must be affirmed.

The judgment below is affirmed with costs.

Legislative Power Over Municipal Corporations.

We are greatly indebted to the learned reporter of the Supreme Court of New Hampshire for the subjoined abstract of a recent decision of that court upon the extent of legislative power, under the constitution, over funds granted to municipal and public corporations.

The following letter from Mr. Shirley accompanied the abstract of the case:

OFFICE OF THE STATE REPORTER,
ANDOVER, N. H., MARCH 23, 1874.

EDITORS CENTRAL LAW JOURNAL:—I herewith send you an abstract of Spaulding v. Andover, decided March 13th, 1874. Its great length prevents my sending you a transcript of the entire opinion. It comments at length upon the views in Dillon on Municipal Corporations, and of Judge COOLEY

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in his Const. Limitations. It occurred to me that the abstract might interest you, although the court forbore passing upon several other interesting points.

Very truly yours,

JOHN M. SHIRLEY.

CHARLES W. SPAULDING v. THE TOWN OF ANDOVER.

Supreme Judicial Court of New Hampshire, March 13th, 1874.

1. **Legislative Grant to Municipal Corporation a Contract.**—A fund granted to a municipal body by the legislature of a state, cannot be taken away or diverted to other purposes by subsequent legislation.

2. ———. Such diversion is prohibited by that clause of the federal constitution, which provides that "no state" shall pass any "law impairing the obligation of contracts."

3. Dicta in Darlington v. Mayor, etc., 31 N. Y. 164, disapproved.

The action was assumpsit for a re-imbursement state bond *or* the par value thereof in money, under the act of July 3, 1872.

At various times during the war the legislature of New Hampshire passed acts authorizing the several towns to raise money for the payment of bounties to those enlisting to fill their quotas. In this way the town of Andover, with other towns, incurred a large debt.

In 1870 and 1871 the legislature provided that from $2,000,000 to $3,000,000 in state bonds should be granted to such towns as a "reimbursement" for such war debts, and "in part payment" thereof, and a board of commissioners duly appointed for that purpose fixed the amount due each town, and the assignment of the same was duly made by them and entered by the state treasurer upon his books before July 3, 1872, and was duly reported by him as a liability of the state; but neither the specific bonds, nor the money in lieu of them had actually been taken by the town from the state treasury before the commencement of this and other suits. $100 00 was so assigned to Andover on account of the plaintiff.

The plaintiff enlisted early in the war, before towns paid bounties; afterwards re-enlisted; was counted upon the quota of the town: deserted while on his re-enlistment furlough; never returned; was never restored, and received no bounty from the town.

The act of July 3, 1872, provides that if "any town or city has received, or shall receive the sum of one hundred dollars or part thereof, either in money or bonds, for any person counted as part of the quota of such town or city, who has not received any bounty from such town, city or place, the sum of money or bonds received shall belong to and be the property of the person so counted, or his legal representatives, and may be recovered of such town or city in an action of *assumpsit*, as for money had and received."

At the October trial term, 1873, Chief Justice SARGENT directed a verdict for the defendants, and the judgment was reversed. The court unanimously decided that the act of July 3, 1872, was a "law impairing the obligation of contracts," and as such was prohibited by the constitution of the United States, and was therefore unconstitutional and void.

The opinion of the court by FOSTER, J., was an elaborate exposition of the two-fold public and private character of municipal corporations, and of legislative control over them.

The following are the concluding paragraphs of the opinion:

"By the act of 1870 the state granted to the town of Andover a certain amount of bonds to be devoted exclusively toward the re imbursement of the expenditures incurred by the town for war purposes during the rebellion, upon the basis that the amount of such bonds should be at the rate of $100 00 for every man furnished for the military service of the United States, after a specific period of time.

This was an unqualified, unlimited, unencumbered grant, possessing all the incidents of an executed and irrevocable contract, 1 Pars. Cont. 235.

A constitutional act of legislation, which is equivalent to a contract, and is perfected, requiring nothing further to be done in order to its entire completion, is a contract executed. Whatever rights are thereby created a subsequent legislature can not impair. If the proviso, condition or limitation, enacted in 1872, had been engrafted upon or made a part of the re-imbursement act it would, perhaps, have been binding, and the town would take the benefits of the act with its burdens. Potter's Dwarris on Statutes, 477.

The same rule applies to an obligation created by a constitutional law which is in the nature of an executory contract, if supported by a sufficient consideration.

The law of 1872, declaring a portion of the fund which had been solemnly granted to the town of Andover, to belong to and be the property of certain individuals, is invalid, as being contrary to that provision of the federal constitution, art. 1, § 10. which declares that no state shall pass any law impairing the obligation of contracts.

We have reached this result fully sensible of the duty which requires of the judicial branch of the government great circumspection in passing upon the validity of the acts and doings of the legislature, but mindful also of the paramount authority of the fundamental decree of the general government and of the necessity for the preservation and protection of the inestimable principle that has been invaded by the legislation which we are thus constrained to declare null and void.

We have not deemed it essential to comment upon the remarkable character of this legislation with regard to its assumption of judicial function. By declaring in express terms that a person counted on the quota of the town, who has not received a bounty, shall be entitled at all events to a portion of the reimbursement fund assigned to the town under a legislative grant, thus assuming to adjudicate concerning the validity of such person's claim in an *ex parte* hearing before a tribunal not recognized by the law, the legislature of 1872 certainly proceeded with a degree of boldness and assumption which was not generated in very profound or deliberate reflection.

This result renders unnecessary the consideration of all the other questions of law raised by the case transferred.

JUDGMENT ON THE VERDICT.

Legal News and Notes.

—GENERAL LEGGETT, commissioner of patents, has tendered his resignation.

—THE judiciary committee of the New York state assembly has reported favorably a bill providing that no person shall be confined in the county jail on arrest upon process in civil suits, unless there be paid by the person causing the arrest twenty-five dollars every twenty days for the board of the prisoner.

—THE senate has confirmed the following judicial nominations: William Wallace, to be United States district judge for the northern district of New York; Orange Jacobs, to be chief justice of the Supreme Court for Washington territory; Moses Hallett, to be chief justice of Colorado; Joshua G. Heath, to be United States attorney for New Hampshire.

—THE legislature of Illinois has passed an act providing that whenever a total loss shall occur upon any risk insured in that state (mercantile stocks excepted), the amount insured shall be taken and deemed the true value of the property at the time of such loss, and of the amount of loss sustained by the insured, and that the same shall be recovered without any deduction whatever. Similar bills have been before the legislatures of Illinois and Missouri, but we are unable at this writing to state the result.

—IN the course of the financial debate in the house on the 7th instant, Mr. Hoar, the late attorney general, disposed of the oft-repeated assertion that Justices BRADLEY and STRONG of the Supreme Court owe their appointments to the fact of a knowledge on the part of the President that they entertained opinions favorable to the validity of the legal tender act, by asserting positively that both of these gentlemen had been selected by the President before anything was known of the opinion of the court on that question.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, APRIL 23, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

THE Supreme Court of Missouri, in session at St. Louis, met on Monday and delivered over fifty opinions. Owing to the crowded state of our columns, we are unable to give a synopsis of any of these decisions this week. The court adjourned for one week to enable the judges to write other opinions.

WE publish in this number, by request of several subscribers, the case of Sioux City and Pacific Railroad Company v. Stout, to which we have heretofore made reference (*ante*, p. 76), involving the question of the liability of a railway company for injuries to children by an unguarded and unfastened turntable. The very full statement of facts we take from the Legal Gazette.

We publish in this number an interesting opinion of Hon. ARNOLD KREKEL, in the United States District Court at Jefferson City, asserting the validity of proceedings by information instead of indictment, in the prosecution of offences under the internal revenue laws. Our correspondent at Jefferson City, Hon. H. B. Johnson, in sending this opinion, states that heretofore there has been much doubt, even by the Attorney General, as to the validity of this mode of proceeding. The opinion will no doubt prove acceptable and interesting to those of our readers who practice in the federal courts.

The Fourteenth Amendment and the Public Schools.

We learn from an exchange that the Supreme Court of Indiana has pronounced an important decision affecting the rights of colored children of that state to attend the public schools. Indiana had, at an early period, provided by law for the instruction in the public schools, free of charge, of all white children under twenty-one years of age, being children of citizens of the state. The Supreme Court has decided that the adoption of the fourteenth amendment to the constitution of the United States conferred on colored children the same rights in this respect possessed by white children, and that they had a right to enter as pupils the white schools, until separate schools, substantially equal in educational advantages, were provided for them.

The same question has been decided in substantially the same way by the Supreme Court of California in the case of Ward v. Flood, 7 Pacific Law Reporter, 85. The court hold that the latter clause of the first section of the fourteenth amendment to the federal constitution—"nor shall any state * * * deny to any person within its jurisdiction the equal protection of the laws"—secures to each child in California, regardless of the race or color of such child, a legal right to attend as a pupil and receive instruction at the public schools in the state, under the law providing for common schools; that the act of the legislature providing for the maintenance of *separate schools* for the education of children of African or Indian descent, and excluding them from schools where white children are educated, is not obnoxious to constitutional objection. But unless such separate schools be *actually maintained* for the education of colored children, then the latter have a legal right to resort to schools where white children are instructed, and can not be legally excluded therefrom by reason of race or color.

A Lay Opinion of Litigation.

The remark of the Solicitor's Journal that "the prejudice against lawyers is nothing new, nor has it become more reasonable by lapse of time," calls to mind an extremely well-written article from the pen of WALTER B. HILL, Esq., of Macon, Ga., in the January number of the Southern Law Review, showing by a multitude of humorous and sarcastic quotations, what a poor opinion men of letters have had of lawyers in all ages and countries. Lawyers may, however, console themselves with the reflection that men of letters have not generally thought worse of lawyers than of the members of other learned professions or of each other. We all remember the terms in which Swift makes his hero, Gulliver, describe the legal profession of his country to his master, the Houyhnhnm. That was perhaps the most bitter and cutting satire upon our profession that has ever been written. Scarcely less emphatic, but more true to nature, and overflowing with the drollest Western humor, was a speech delivered some years since by a Mr. Elmore, in the Wisconsin legislature, in support of a bill which he had introduced to repeal all laws for the collection of debts.

"Mr. Elmore proceeded to review the present system of collecting debts. It was all a humbug and a cheat, a matter of technicalities and legal shuffling. Lawyers gave advice in order to obtain fees and encourage litigation. Judges made blunders and mistakes. He had a little experience in law, and that was rich. [Laughter.] He would give a history of it. The speaker then related how he had purchased a yoke of oxen about fifteen years ago, paid fifty dollars for them. A few days after, the son of the man of whom he bought the oxen came to him and said the oxen were his. He insisted on having pay over again, and commenced a suit before a justice. The jury didn't agree. Finally, through the basswood justice of the peace, the case went against him. He appealed to the circuit court in Milwaukee. There I lost again, and said to my lawyer: 'I will give you ten dollars to quote Pennsylvania law to Judge MILLER and get a new trial ordered.' [Great laughter.] He took the ten dollars and performed his duty.

"A new trial was then granted and the venue changed to Walworth county. Judge IRVIN was then the judge. Any man who wanted to gain a cause in his court had either to go hunting with him and let the judge claim all the game that was shot, or else pat his dog. I patted his dog. [Laughter.] I fed that dog on crackers. [Renewed laughter.] The case was decided in my favor. When I heard the decision I thought the dog had followed me about long enough. I turned around and gave him a kick. [Laughter.] The yelp of the dog had hardly subsided ere I heard the judge say, 'Mr. Clerk, this judgment is set aside and a new trial granted.' [Great laughter.] Mr. Speaker, that kick cost me $200! [Convulsive laughter.] You have no doubt seen a suit in a justice's court in the country. There is time spent by jurors

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and hangers-on, besides other costs, at least $50, besides the ill-feeling and dissensions caused by it. It is all a cheat. The litigants had better sit down and play a game of old sledge to decide the case. It would be more sure to settle the dispute justly."

Grain Gambling—"Options" and "Puts"—"Seller next Month."

Business men will remember that in June, 1872, Peyton Chandler, of the firm of Chandler, Pomeroy & Co., produce brokers and commission merchants of Chicago, made a formidable attempt to make a fortune at other people's expense, by getting up a "corner" in oats. To accomplish this, Chandler purchased, between the 15th of May and the 18th of June, 2,500,000 bushels of cash oats, being all, or substantially all, the cash oats in the market, and also bought June options to the amount of 2,939,400 bushels. The total amount of oats in store in the city on the 18th of June was only 2,700,000 bushels, from which it will be seen that Chandler practically controlled the market up to that time, and the total amount received during the remainder of the month was only 800,000 bushels. As incidental to and part of the machinery of this corner, Chandler also sold what he called "puts," or privileges of delivery to him of oats during the month of June for forty-one cents a bushel, receiving half a cent per bushel for these "puts" or privileges. These "put" contracts were substantially alike in form, and read as follows:

"Received of A. D. $50 in consideration of which we give him or the holder of this contract the privilege of delivering to us or not, at any time prior to three o'clock P. M. of June 30, 1872, by notification or delivery, 10,000 bushels of No. 2 oats, regular receipts, at forty-one cents per bushel in store, and, if received, we agree to pay for the same at the above price. Signed, Chandler, Pomeroy & Co.

"PEYTON R. CHANDLER."

It will be seen by an inspection of this contract that the purchaser of a "put" paid a bonus of one-half cent per bushel for the chance of making or losing which the contract afforded him. The contract meant simply this: that if at any time prior to three o'clock P. M. of the 30th of June, oats should be worth more than forty-one cents per bushel in the market, Chandler should have the privilege of demanding from the holder of the "put" the difference between forty-one cents per bushel and the market price; but that, if at any time during such period, oats should be worth less than forty-one cents per bushel in the market, then the holder of the "put" should be entitled to make a like demand against Chandler. The well-known effort of Chandler to get up a corner in oats produced a powerful combination against him. This combination was aided by a decline in oats at New York, so that on the 18th of June, twelve days before the date of his expected triumph—with "puts" outstanding against him representing 3,700,000 bushels—Chandler and his brokers, Chandler, Pomeroy & Co., failed. The price declined before the close of business on that day from thirtyn-ine to thirty-one cents, and declined during the month of June, so that at one time they were as low as twenty-six cents per bushel. Between the time of the failure and three o'clock on the 30th of June, the holders of the "put" claims made tender to the bankrupt of the quantity of the oats called for by their respective tickets, and the oats not being accepted and paid for, they were sold upon the market on that day or the next, under the rules of the board of trade.

Chandler and his brokers of course were thrown into bankruptcy, and the holders of the "puts" modestly proved up as their claims the difference between the price named in the "put" contract and that for which the cash was made. That is to say, they had the effrontery to ask a court of justice to sanction a gaming contract of the worst and most profligate character; because it was not only, equally with other gaming contracts, pernicious to the parties engaged in it, but also because, by suddenly changing values, it was liable to involve the ruin of many innocent persons. The total amount of claims thus proved up was about $400,000, while the total amount of "margins" or forfeits paid for these "puts" was less than $19,000.

Upon these facts District Judge BLODGETT holds that the contracts were simply wagers, illegal, immoral and against public policy, and such as a court of justice will not aid in enforcing. But he also holds that they fall within the statute of Illinois which permits the recovery of money lost at gaming, and that therefore the claimants will be entitled to prove against the bankrupts' estate the money actually paid as "margins" on those "puts."

It is to be observed, however, that Judge BLODGETT does not go so far as to declare all option contracts void. On the contrary, he says:

"I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every "put" is necessarily void, *but only that all these contracts, in the light of the testimony before the court,* were in their essential features gambling contracts. The parties when they made them did not intend to deliver the grain, but only at the utmost to settle the differences. They knew they could not obtain the grain to deliver if Chandler sustained his corner, and their action in buying a "put" was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do—that is, keep up the price through June to his own figures—and virtually a bet on his part that he could do so.

Judge BLODGETT'S opinion will be found interesting throughout, not only to the lawyer, but also to the general reader. The story of the effort of the bankrupt to get up the corner is exceedingly well told, and the principles of law applicable to the case are clearly brought out. It will be found in the Chicago Legal News of April 11.

Lawyers as Legislators.

A recent attempt of the junior fellows of Trinity College to elect one of their own number, a doctor of medicine, to parliament, upon the avowed principle of the "disestablishment of lawyers," calls forth the following observations from the Solicitor's Journal:

"The prejudice against lawyers is nothing new, nor has it become more reasonable by lapse of time. We have all heard of the '*parliamentum indoctum*' from which all lawyers were excluded, and which Lord Coke dismisses with the remark, 'Never a good law was made thereat.'

"From that day to this the lawyers have been from time to time made the butts of meagre witticisms, and occasionally the victims of the same persistent prejudice. And yet upon their honesty, skill and fidelity, all the most important interests

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throughout the kingdom mainly depend. The very men who chatter obscure calumnies against lawyers as a body, are compelled to confide, and do undoubtingly and safely confide their characters, their property, the honor of their families, and, very often, secrets which they scarcely like to acknowledge to themselves, to the keeping of their legal advisers. One would imagine that those who habitually prove themselves worthy of so high a trust can hardly be so unworthy of public confidence as the college trio (emulous, apparently, of the fame of their prototypes of Tooley street) would have the world believe.

"But, further, not only is there no case made for the 'disestablishment' of lawyers, but the exigencies of the public service imperatively demand their establishment. Anyone who has taken the trouble to follow the course of legislation, particularly in the house of commons, can hardly fail to have been struck by the manner in which the whole house, with exceptions so few as to be inconsiderable, leaves all the practical details of legislation in the hands of the lawyers. The house at large may join in a debate on a question of general interest or public policy, but when the second reading has been passed, and the bill has to be put into a workable form in committee, it is upon the lawyers that all the real work falls, and those few lay members who occasionally try their hand at an amendment find the house but too ready to accept the off-hand statement of some practical lawyer that the clause 'wouldn't work,' as an amply sufficient reason for refusing even to consider the question. And we must own that the constituencies at large show themselves fully alive to this consideration, and generally give a lawyer, *cæteris paribus*, the preference.

"But there is a further ground on which it seems to us that lawyers are peculiarly appropriate representatives of a university. As the county members are properly chosen from the owners of property who have great local interests, and the representatives of commerce and industry are naturally found in the members for great towns, so the distinctly 'educated' element in society finds its appropriate entrance into parliament through the universities. Of this element one principal, though not by any means exclusive, test is academical distinction, and it is perhaps not too much to say that no such constituency can safely, except in the case of rare eminence in after life, dispense with this qualification in a candidate for their suffrages But the most distinguished students of every university are found, with trifling exceptions, in the ranks of the clergy or the bar, and as the former are disqualified by law from sitting in the house of commons, the choice of the electors is almost of necessity limited to the latter. Here and there a physician of distinction may be found who could worthily, so far as professional eminence goes, fill this post, but the training of his life, which more or less secludes him from the arena of wordy contest, is not usually of a kind to fit him to take the lead in debate which ought to be required from the representative of a university. Such cases as Mr. Gladstone and Mr. Beresford Hope are no real exceptions to this rule; brilliant scholars of the highest academical distinction, who are able *at once* to devote themselves to political life, and who, after winning their spurs as members for less important constituencies, are called upon to receive their reward at the hands of their universities, constitute a class always rare, and whose position is entirely exceptional. And it is worthy of remark that certainly one (we believe both) of the gentlemen named had entered upon a course of training for the bar.

"Lastly, in this case *res ipsa loquitur:* any one who will look down the list of the representatives of any university in the kingdom for the last seventy years will, if he has any acquaintance with the modern history of his country, be struck by three reflections: one, how very large a proportion of these representatives have left their mark upon the legislation of the age; another, with how few exceptions they have been selected from the ranks of the lawyers; and the last, that except in one or two remarkable instances, the undistinguished minority includes all the non-lawyers."

Fifty years ago in the United States the law was almost universally regarded by ambitious young men as a stepping-stone to political distinction, and distinction in politics was of equal assistance in acquiring practice at the bar. Accordingly it was common for young lawyers, in the outset of their professional career, to engage actively in politics with the view of promoting their advancement in the way of acquiring business and clients. At the present day this state of things is reversed. Business men who have great interests at stake are, as a general rule, careful not to commit them to lawyers who divide their time between professional business and the labor and excitement of politics. To this rule there are, of course, many and some distinguished exceptions. But it remains, as a general thing true, that old lawyers, solicitous for the professional advancement of their students, do not fail to advise them to let politics alone, at least in the earlier stages of their career.

It is equally true that the influence of the legal profession upon the politics of the country is declining sensibly of late years. The causes of this decline afford a curious theme for speculation. Whether it is due to the fact that the great mass of able and successful lawyers voluntarily avoid politics and devote themselves exclusively to the practice of their profession, or whether it is due to a more general diffusion of intelligence in other ranks of society; or whether this apparent loss of influence is an evidence of the general degradation of the legal profession;—these, and perhaps other things, will have to be considered in coming to an intelligent conclusion upon the question. It is doubtless true that forensic skill and power have much less influence in promoting success at the bar than formerly. The growing disposition on the part of attorneys to waive juries and to submit causes to the final decision of the judge, and the introduction in many states of the referee system in the place of trial by jury, have been a sore decayer of the spread-eagle oratory of former years. years. The decline of forensic eloquence is further promoted by the fact that the experience of every successful counsellor teaches him that success before the highest tribunals depends far more upon that skillful attention to details by which the record is made to exhibit in a clear light the questions in dispute, and upon his skill in the preparation of a written argument which shall not weary the court with irrelevant or unimportant matters, but which shall seize at once upon the chief points in controversy, and present his views of them in clear and forcible language and with logical method. The decline of oratory at the bar and in the legislative councils is further promoted by the great circulation and influence of the press. At this day the humblest citizen looks to the columns of his daily or weekly paper for information as to what is taking place in public affairs; whereas fifty years ago

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the stump orator was the great oracle from whose mouth the masses of the people received their political wisdom. To the decline of the forensic power among the members of the legal profession, may doubtless be attributed chiefly the decline of the influence of the profession in the politics of the country. The lawyer being no longer an orator, but simply a scholarly man of business, other men of business are placed in any forensic contest more nearly upon a footing with him.

But there is nothing in this decline of influence to create any alarm on the part of the legal profession. The lawyer never can and never will be dispensed with as a legislator. While the general policy of legislation will henceforth be shaped according to the demands of men of business—merchants, manufacturers and agriculturists; and while the country will never again (if it ever has heretofore) submit to the domination of any one class, or yield to any one class without great jealousy an undue influence in legislation, yet the presence of the practical lawyer will always be necessary in the legislative counsels of the state and nation. In those counsels he will occupy to men of business a relation similar to that of lawyer and client elsewhere. The lay members, preponderating in numbers, will, subject of course to the proper influence of the professional members, dictate the general policy of legislation; while to the professional members will still be assigned most of its technical details. To them, in short, will always belong the highly important duty—a duty which can never be discharged by any but skillful lawyers—of putting legislative bills in such shape that they "will work." Notwithstanding the great learning of the legal profession, and the fact that it is the sympathetic representative of all other classes, it will be an ill day for the country if the work of legislation shall ever be exclusively trusted to lawyers; but it will be a worse day if lawyers shall ever be entirely "disestablished" as legislators, and if legislation shall be entirely committed to those who must be in a great measure ignorant of the laws which already exist. A *parliamentum indoctum* such as Lord Coke denounced, would present a spectacle far more alarming to the well-wisher of his country than a legislature composed exclusively of lawyers.

Negligence—Liability of a Railway Company for an Injury to a Child Caused by an Unguarded and Unfastened Turntable.

SIOUX CITY & PACIFIC RAILROAD COMPANY v. STOUT.

Supreme Court of the United States. October Term, 1873.

1. **Railway Negligence—Injury to Child by Unguarded and Unfastened Turntable—Case in Judgment**—Under certain circumstances a railroad company may be liable, on the ground of negligence, for a personal injury to a child of tender years, in a town or city, caused by a turntable built by the company upon its own unmolosed land, and which is left unguarded and unlocked in a situation which is likely to canse injury to children.

2. **Rule as to Negligence in Case of Children of Tender Years**—While it is the general rule in regard to an adult that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case. (Railroad Co. v. Gladmon, 15 Wallace, 401, affirmed.)

3. **Railway Negligence—Injury to Strangers.**—While a railway company is not bound to the same degree of care in regard to mere strangers, who are even unlawfully upon its premises, that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence, or from its tortious acts.

4. **Negligence, when a Question for the Jury.**—It is true, in many cases, that here the facts are undisputed, the effect of them is for the judgment of the court and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question, rather than where deductions or inferences are to be made from them. And whether the fact be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury.

Error to the Circuit Court for the District of Nebraska. A report of the case in the court below will be found in 2 Dillon, C. C. 294.

Henry Stout, a child six years of age, and living with his parents, sued by his next friend the Sioux City and Pacific Railroad Company, in the court below, to recover damages for an injury sustained upon a turntable belonging to the said company. The turntable was in an open space, about eighty rods from the company's depot, in a hamlet or settlememt of one hundred to one hundred and fifty persons. Near the turntable was a travelled road passing through the depot grounds, and another travelled road near by. On the railroad ground, which was not enclosed or visibly separated from the adjoining property, was situated the company's station-house, and about a quarter of a mile distant from this was the turntable on which the plaintiff was injured. There were but few houses in the neighborhood of the turntable, and the child's parents lived in another part of the town, and about three-fourths of a mile distant. The child, without the knowledge of his parents, set off with two other boys, the one nine and the other ten years of age, to go to the depot, with no definite purpose in view. When the boys arrived there, it was proposed by some of them to go to the turntable to play. The turntable was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. Two of the boys began to turn it, and in attempting to get upon it the foot of the child (he being at the time upon the railroad track) was caught between the end of the rail on the turntable as it was revolving, and the end of the iron rail on the main track of the road, and was crushed.

One witness, then a servant of the company, testified that he had previously seen boys playing at the turntable, and had forbidden them from playing there. But the witness had no charge of the table, and did not communicate the fact of having seen boys playing there to any of the officers or servants of the company having the table in charge.

One of the boys, who was with the child when injured, had previously played upon the turntable when the railroad men were working on the track, in sight and not far distant.

It appeared from the testimony that the child had not, before the day on which he was row injured, played at the turntable, or had, indeed, ever been there.

The table was constructed on the railroad company's own land, and, the testimony tended to show, in the ordinary way. It was a skeleton turntable; that is to say, it was not planked between the rails, though it had one or two loose boards upon the ties. There was an iron latch fastened to it which turned on a hinge, and, when in order, dropped into an iron socket on the track, and held the table in position while using. The catch of this latch was broken at the time of the accident. The latch, which weighed eight or ten pounds, could be easily lifted out of the catch and thrown back on the table, and the table was allowed to be moved about. This latch was not locked or in any way fastened down before it was broken, and all the testimony on that subject tended to show that it was not usual for railroad companies to lock or guard turntables, but that it was usual to have a latch with a catch, or draw-bolt, to keep them in position when used.

The record stated that "the counsel for the defendant disclaimed resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rested their defence on the ground that the company was not negligent, and asserted that the injury to the plaintiff was accidental or brought upon himself."

On the question whether there was negligence on the part of

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the railway company in the management or condition of its turntable, the judge charged the jury:

"That to maintain the action it must appear by the evidence that the turntable, in the condition, situation and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner in which it was left, it was not dangerous in its nature, the defendant was not liable for negligence; that they were further to consider whether, situated as it was, as the defendant's property in a small town somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The jury found a verdict of $7,500 for the plaintiff, from the judgment upon which this writ of error was brought.

Mr. *Isaac Cook*, for the plaintiff in error, insisted:

1st. That the party injured was himself in fault, that his own negligence produced the result, and that upon well-settled principles, a party thus situated is not entitled to recover.

2d. That there was no negligence proved on the part of the defendant in the condition or management of the table.

3d. That the facts being undisputed, the question of evidence was one of law, to be passed upon by the court, and should not have been submitted to the jury.

Mr. *S. A. Strickland, contra.*

Mr. Justice HUNT delivered the opinion of the court.

1st. It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case. Railroad Co. v. Gladmon, 15 Wallace, 401.

But it is not necessary to pursue this subject. The record expressly states that "the counsel for the defendant disclaim resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defence on the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental or brought upon himself"

This disclaimer ought to dispose of the question of the plaintiff's negligence, whether made in a direct form or indirectly under the allegation that the plaintiff was a trespasser upon the railroad premises, and therefore can not recover.

A reference to some of the authorities on the last suggestion may, however, be useful.

In the well-known case of Lynch v. Nurdin, 1 Adolphus and Ellis (New Series, 29), the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.

In Birge v. Gardener, 19 Conn. 507, the same judgment was given and the same principle laid down. In the most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser.

In Daily v. Norwich and Worcester Railroad Company, 26 Connecticut, 591, it is said the fact that the person was trespassing at the time was no excuse, unless he thereby invited the act, or his negligent conduct contributed to it.

In Bird v. Holbrook, 4 Bingham, 628 (see also Loomis v. Terry, 17 Wendell. 496; Wright v. Ramscot, 1 Saunders, 83; Johnson v. Patterson, 14 Conn. 1; State v. Moore, 31 id. 479), the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser, the defendant was held liable.

There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: that while a railway company is not bound to the same degree of care in regard to mere strangers, who are unlawfully upon its premises, that it owes to passengers conveyed by it, that it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts.

2d. Was there negligence on the part of the railway company in the management or condition of its turntable?

The charge on this point (see *supra*) was an impartial and an intelligent one. Unless the defendant was entitled to an order that the plaintiff be non-suited, or, as it is expressed in the practice of the United States courts, to an order directing a verdict in its favor, the submission was right. If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant was not entitled to this order, and the judgment can not be disturbed. To express it affirmatively—if, from the evidence given, it might justly be inferred by the jury that the defendant, in the construction, location, management or condition of its machine, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents.

So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch, which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given—that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors. The charge was in all respects sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it.

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3d. It is true, in many cases, that where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw an unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

In Redfield on the Law of Railways, vol. 2, p. 231, it is said: "And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury." Quimby v. Vermont Central Railroad, 23 Vermont, 387; Pfau v. Reynolds, 53 Illinois, 212; Patterson v. Wallace, 1 McQueen's House of Lords Cases, 748.

In Patterson v. Wallace, 1 McQueen's House of Lords Cases, 748, there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The judge at the trial withdrew the case from the jury, but it was held in the house of lords to be a pure question of fact for the jury, and the judgment was reversed.

In Mangam v. Brooklyn Railroad, 38 New York, 455, the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a non-suit, holding that these facts established negligence in those having the custody of the child. The Court of Appeals of the State of New York held that the case should have been submitted to the jury, and set aside the non-suit.

In Detroit and W. R. R. Co. v. Van Steinburg, 17 Michigan, 99, the cases are largely examined, and the rule laid down that when the facts are disputed, or when they are not disputed, but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination. See among other cases cited, the following: Carsley v. White, 21 Pickering, 256; Rindge v. Inhabitants of Coleraine, 11 Gray, 157; Langhoff v. Milwaukee and P. R. R. Co., 19 Wisconsin, 497; Macon and Western Railroad v. Davis, 13 Georgia, 68; Renwick v. New York Central Railroad, 36 New York, 132.

It has been already shown that the facts proved justified the jury in finding that the defendant was guilty of negligence, and we are of the opinion that it was properly left to the jury to determine that point.

Upon the whole case, the judgment must be affirmed.

JUDGMENT AFFIRMED.

Negligence—Liability of Municipal Corporations for Injuries Resulting from Failure to Keep Streets in Repair.

HULL v. CITY OF KANSAS.

Supreme Court of Missouri, Jefferson City, January Term, 1874.

Present, Hon. WASH ADAMS, " W. B. NAPTON, " H. M. VORIES, } Judges.

1. **Rule Where the Injury is in Part Caused by Unmanageable Horse** — Where, in driving a buggy on the street of an incorporated town, the plaintiff's horse became uncontrollable by reason of the lines getting entangled under his tail, so that, in backing, the horse fell into a hole which the city authorities had negligently left open, whereby the horse and buggy were injured, it was held that the plaintiff was entitled to recover damages of the municipal corporation, although the fact that the horse became for the time unmanageable contributed to the producing of the injury.

2. **Case Affirmed.**—The principle laid down in Hunt v. Pownall, 9 Vt. 411, applicable to such cases, affirmed.

Napton, J., delivered the opinion of the court.

This action was to recover damages for an injury to a horse and buggy, alleged to have been occasioned by a hole in a street, negligently left uncovered by the city authorities. The facts appeared to be that the driver of the buggy, when attempting to turn from one street into another, got one of the lines entangled under the horse's tail, which caused the horse to commence backing, and, as the driver was about to jump out, the horse fell into the hole in the embankment on which the street was built.

The court, on the trial, declared the law to be "that it was the duty of the defendant to keep its streets in a proper state of repair, so that they should be reasonably safe for travel, and if the defendant permitted one of its streets to be and remain out of repair, and that at the time said street was so out of repair the plaintiff's horse and buggy was being driven along the same, and, without the fault of the driver, the horse and buggy of plaintiff was injured by reason of said street being out of repair, then the plaintiff is entitled to recover, even though such injury was the combined result of accident and of the defendant's neglect to keep said street in repair, *provided* the driver of said horse was in no fault."

The court refused to declare the law as asked by the defendant, that if the defect in the street was not the sole cause of the injury, no recovery could be had, and therefore if before the accident the driver of the horse had lost all control over him, and the

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horse continued uncontrollable at the time of the accident, the plaintiff could not recover.

Another instruction was asked, that if this occurred on Sunday, and the plaintiff was the owner of the horse and buggy, and had hired them out on that day from his livery stable, no recovery could be had.

There was a verdict and judgment for plaintiff.

The point presented by the instructions in this case, I understand, was decided at the last term at St. Joseph in the case of Bassett v. City of St. Joseph,* in which case this court adopted the view taken by the New Hampshire court in Winship v. Enfield (42 N. H. 202), and declined to follow the decisions in Massachusetts, referred to in the brief of defendant's counsel. The Circuit Court of Jackson County evidently adopted the views of the New Hampshire cases, and determined that although the injury was the result of accident in the temporary loss of control over the horse, yet if that accident would have resulted in no damage had the street been in proper repair, the city must be held responsible.

Indeed, it is not very clear that the Massachusetts cases go to the extent of holding that a mere temporary loss of control over the horse driven along the street would relieve the city from responsibility. It is held that where the horse escapes from the driver entirely, or is totally ungovernable, or is a vicious animal, the damage occasioned is not chargeable to the city or town, because it ultimately occurs in a street or at a place where the street is out of repair.

In this case the driver had not lost the control of the horse except during the short period of his backing into the hole, and if no such hole had been there, no damage would have occurred.

In the case of Hunt v. Pownall (9 Vt. 411) Redfield, J., said: "In every case of damage occurring on a highway, we could suppose a state of circumstances in which the injury would not have occurred. If the team had not been too young or restive, or too old, or too headstrong, or the harness had not been defective, or the carriage insufficient, no loss would have intervened. It is against these constantly occurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. If he could be always sure of all this, he would not require any further guarantee of his safety, unless the road were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road conspiring with some accidental cause, the defendants are liable.

This is in substance the position of the Circuit Court in its instructions in this case.

Judgment affirmed.

Judges Wagner and Sherwood absent.

Prosecutions by Information of Offences under the Internal Revenue Laws.

THE UNITED STATES v. EBERT.

District Court of the United States, Western District of Missouri, March Term, 1874.

Before Hon. ARNOLD KREKEL, District Judge.

1. **Criminal Practice—Information.**—Offences arising under the internal revenue laws being misdemeanors merely, and not "infamous," may be prosecuted by information filed by the district attorney.

The facts sufficiently appear from the opinion of the court.

* Since reported, 53 Mo. 290.

E. L. King, for the motion, relied on the fifth amendment to the constitution.

Jas. S. Botsford, district attorney, relied on and cited 1 Bish. Crim. Proc. §§ 624, 611; Comm. v. Waterborough, 5 Mass. 257; Adams v. Woods, 2 Cranch, 336; *Ex parte* Marquand, 2 Gall. 552; Walsh v. United States, 3 Wood. & M. 341; Levy v. Burley, 2 Sumn. 355; Parsons v. Hunter, ib. 419; United States v. Mann, 1 Gall. 3; Territory v. Lockwood, 3 Wall. 236; United States v. Shephard, 1 Abb. U. S. R. 431; United States v. Waller, 1 Sawyer C. C. 701; 1 Stat. at Large, 119, § 32; 13 Stat. at Large, 305, § 179; 14 Stat. at Large. 145 § 179.

KREKEL, J.—This is an information filed by the district attorney alleging that defendant was a manufacturer of cigars, and as such had failed to execute bond as required by law. To this, defendant files his motion to quash, alleging, in substance, that cases of the kind can not be prosecuted by information, but must be by indictment. This brings up the question—first, is the case here presented within the act of July 13, 1866, which provides that "all fines, penalties and forfeitures which may be imposed or incurred shall and may be sued for and recovered, when not otherwise provided, in the name of the United States, in any proper form of action or by any appropriate form of proceeding before any circuit or district court."

The provision cited is found in the revenue act, and there can be no doubt that the intention of congress was to sanction or provide for a class of cases most frequently occurring under the revenue laws. Looking at the language employed—"a proper form of action"—it is obvious that congress here had reference to existing forms of action, and when using the terms immediately following—"or by any appropriate form of proceeding"—it intended to enlarge the former by giving authority to provide new and suitable forms and proceedings to meet cases as they might arise. It is well known that at the time of framing and adopting the constitution, fines and penalties could be and were largely recovered by information; and there can scarcely be any doubt but that congress had reference, when speaking of "a proper form of action," to that practice which at the time of the enactment of the law cited, prevailed in a number of the states. It must, then, be taken that the case under consideration, and the class of cases to which it belongs, comes within the provisions of the statute cited.

The second question is, had congress the power to pass the act of 1866, and especially the provision cited, thereby doing away with the necessity of a grand jury passing upon cases arising under internal revenue laws? The fifth article of the amendments of the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury." It will be observed that this provision covers infamous crimes only. It is not necessary to define what is here meant by infamous, for it is an undisputed point that misdemeanors, such as the one for which the information under consideration is filed, can not, by any construction or interpretation given by courts, be brought within the term "infamous." At the time of the adoption of the amendment cited, attention was no doubt called to existing constitutional provisions; and had the requirement that all classes of crimes should be passed on by grand juries before trial been intended, suitable language for that purpose would have been employed. Indeed, by the use of the words "capital or otherwise infamous crimes" it may be readily inferred that a grand jury was to pass upon such, and such only; and while the legislature was not bound to limit the holding to answer to that class of cases, but might extend the requirement to any offences, yet the decision of a grandjury was secured only to the person or persons charged with thehigher classes of crimes specified.

The act of March 30, 1790, passed by congress soon after the adoption of the constitution, strongly supports the view here

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taken. In the thirty-second section of said act, providing the time within which prosecutions shall be commenced, it enacts, "nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or *information* for the same shall have been found or instituted," thus affirming that there existed the distinction between crimes and other offences contended for. As sustaining these views, see United States v. Shephard, 1 Abb. U. S. 431, and United States v. Waller, 1 Sawyer C. C. 701.

Under these views of the court, the case under consideration may be prosecuted by information, and the motion to quash is overruled.

Action by Insurance Company Against Incendiary —In Whose Name Brought.

ÆTNA INS. CO. v. HANNIBAL & ST. JOSEPH R. R. CO.

U. S. Circuit Court, Eastern District of Mo., March Term, 1874.

Before DILLON AND TREAT, JJ.

1. **Insurance—Subrogation—Assignment—Action**—Where insured property has been destroyed by a wrong-doer and the insurer has paid to the owner on the policy less than the value of his loss, and taken a partial assignment of his right, he can not sue the wrong-doer in his own name for the injury, either as at common law or under the statute of Missouri. The action must be in the name of the owner of the property destroyed.

The plaintiff insured the personal property of one Myron H. Balcom, situate adjoining the defendant's railway, for $1,900. Within the lifetime of the policy, property covered by it to the value of $2,214 was destroyed by the carelessness of the defendant's servants in the use of its locomotive engine. The insurance company paid Balcom in full satisfaction for all claim under his policy $1,050, and received from him a written instrument reciting the foregoing facts, and assigning to it all his right to recover on account of said loss against the railroad company, reserving all rights in excess of the $1,050.

The petition, which is in the name of the insurance company, sets forth the foregoing facts and asks a judgment against the railroad company for the $1,050. The defendant demurs because the cause of action is not assignable either by operation of law or by act of the parties, and because the plaintiff is not entitled to maintain an action in its own name.

Lucien Eaton, for the plaintiff; *James Carr*, for the defendant.

DILLON, Circuit Judge—The property destroyed exceeded in value the amount insured, and the rule of law has been long settled that the insurance company, on the payment of the loss, can not sue the wrong doer who occasioned it in its own name. The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible, and gives rise to but one liability. If one insurer may sue, then if there are a dozen each may sue, and if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago in a case whose authority has been recognized ever since, both in Great Britain and in this country. London Assurance Co. v. Sainsbury, 3 Doug. 245, 1783, in which the Exchequer Chamber unanimously affirmed the judgment of the K. B. for the defendant; Rockingham, etc., Ins. Co. v. Bosher, 39 Maine, 253, and cases cited; Hart v. Western Railroad Corporation, 13 Metc. 99, where the subject is fully gone into by Chief Justice SHAW: Conn., etc., Ins. Co. v. N. Y., etc., R. R. Co., 25 Conn. 265, 278; Peoria, etc., Insurance Company v. Frost, 37 Ills, 333. Flanders on Ins. pp. 360, 481, 591. But it is insisted that the provision of the Missouri statute, that every action shall be prosecuted in the name of the real party in interest, though it declares that the provision shall not authorize the assignment of a thing in action not arising out of contract (Gen. Stats. 1865, p. 651, sec. 2.), changes the rule. However it might be if the amount paid by the insurer to the assured had equalled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within all the reasons of the rule itself, as expounded by Buller and Mansfield in the case in Douglas above cited, and which is the foundation of the law on this subject. The demurrer to the petition is sustained.

JUDGMENT ACCORDINGLY.

Leave was given the plaintiff to amend and make Balcom plaintiff on the record, but as the latter, as well as the defendant, was a citizen of Missouri, no amendment, so as to give the court jurisdiction, was practicable, and the plaintiff submitted to a non-suit

Negligence—Servants of Corporation—Evidence.

CAROLINE T. PARKER v. BOSTON & HINGHAM STEAMBOAT COMPANY.

Supreme Judicial Court of Massachusetts.

[Courtesy of Henry N. Sheldon, Esq., of Boston.]

The defendant corporation ran a line of passenger and freight boats as common carriers between Boston and Hingham. While one of their boats was loading at the wharf in Boston, the plaintiff, in passing over the gangway plank from the wharf to the boat, for the purpose of going to Hingham as a passenger, was thrown into the water and injured by the end of the plank slipping from the boat. This action was brought to recover for the alleged negligence in not having this plank properly secured and tended.

The plaintiff introduced evidence of the injuries which she claims to have suffered, and of their effect upon her nervous system. Susie Parker testified, against defendant's objection, that the plaintiff's health was decidedly worse at the time of the trial than it had been two months after the accident.

One Bradshaw testified for plaintiff that he went on board the boat over the same plank just before the plaintiff; that it was not resting as it should be; and that hands were taking in freight close to this plank. He was then allowed to state, against defendant's objection, that he called the attention of these hands to the plank.

One Hildreth testified that he went over the same plank before the plaintiff; that it was then from six to eight inches from falling off; that he went back and spoke to a man who was taking in baggage over the same plank; and he was then allowed, against defendant's objection, to state that he told this man there should be some one to see to this gangway plank, or some one would fall in.

There was no other evidence to show who these men or "hands" were, or whether they were in the employ of defendants; but defendants called the captain of the vessel, and there was no express denial at the trial tha the men who took on board freight and baggage were employed by defendants. The jury found for the plaintiff, and the defendants alleged exceptions.

L. M. Child, for defendants.

The opinion of Susie Parker as to plaintiff's comparative health at different times was inadmissible. Ashland v. Marlborough, 99 Mass. 47. Testimony of what was said and done by or to men at work near the gangway should not have been received. It did not appear that the work was done for defendants or at their request. Fisk v. Chester, 8 Gray, 506; Everest v. Wood, 1 Car. & P. 75. These men may have been expressmen carrying on board their own freight. On the evidence they were mere volunteers. Nor can the plaintiff's failure to prove her case be supplied by the fact that defendants gave in evidence no denial that these men were their servants. A non-denial can be used only to support some direct evidence of an affirmative. Commonwealth v. Hardiman, 9 Gray, 136.

Tolman Willey, for plaintiff, argued that the statement of Susie Parker was not of an opinion, but of a fact within her own knowledge, and that notice of the dangerous condition of the plank to the "hands" was admissible.

The court held that there had been no error at the trial, and ordered judgment on the verdict for the plaintiff.

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United States Supreme Court—Recent Decisions.

Life Insurance—Willful Exposure—Death while Horse-racing.—Travelers' Insurance Company v. Seaver. Error to Circuit Court for Vermont. The main questions in this case were whether the court below erred in instructing the jury that the driving of a race, when regarded as an exposure of the life of the insured to unnecessary peril, was to be considered in the light in which fair-minded people of the community looked upon it, and if, under the ordinary regulations of such matches such fair minded people would not regard the driving of the match as within the provisions of a life policy against such exposure, then the representatives of the insured, who was killed while so driving, could recover; and whether it was error for the court to instruct the jury that, if the insured was killed by the reckless driving of his competitor, and not by the ordinary mischance of the race, then there should be a recovery. It is held that the court erred in both instances; that the question of willful exposure was for the jury, after all the facts were before them, and that, if the intentions of the competitor of the insured were as bad as the charge of the court implied, and the reckless driving was for the purpose of winning the race at all hazards, still the fact did not take the case out of the clause of the policy against willful exposure. It was against just such danger the company had intended to protect itself. Reversed. Mr. Justice MILLER delivered the opinion.

Bills of Exceptions—Incorporating Rule of Court—Measure of Damages for Infringement of Patent.—No 265. Washington and Alexandria Steam Packet Company v. Sickels. Error to the Supreme Court of the District of Columbia. This was an action by Sickels to recover for the use of his cut-off for the saving of coal in operating steam engines. The judgment below was for the patentee, and the company, bringing the case here for review, obtained a reversal for errors, which will appear in the following statement of the substance of the opinion: The statute of limitations having been pleaded, the court say that while the right to plead it is no more within the discretion of the court than other pleas, when the refusal of the court to permit the plea to be filed is based on the allegation that it is not filed within the time prescribed by the rules of practice adopted in that court, it is necessary that the party excepting to the refusal shall incorporate the rule in his bill of exceptions, or this court will presume that the court below construed correctly its own rules. Such rules are indispensable to the dispatch of business and the orderly administration of justice, and it must be presumed that the court below is familiar with the construction and course of practice under them. On the merits it is said that the rule of damages in actions at law for infringement of the rights of patentees has long been established in this court to be the customary price at which the patentee has licensed the use of his invention, where a sufficient number of licenses or sales have been made to establish a market value. The reason for this rule is still stronger where the use of the patented invention has been, with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties. (In this case the compensation was to be the value of three-fourths of the amount of fuel saved.) Mr. Justice MILLER delivered the opinion.

Constitutional Law—Duty on Tonnage.—No. 248. Peete v. Morgan. Appeal from the Circuit Court for the Eastern District of Texas. In this case Morgan, a citizen of New York, running two lines of steamers between ports in Louisiana and ports in Texas, obtained a perpetual injunction to restrain the appellant, health officer of Galveston, from exacting of him certain tonnage duties laid upon his shipping to defray the expenses of quarantine regulations. The decree below is affirmed here, the court holding in substance that while the legislature may lay a tax in some proper form to maintain the quarantine system of the state, the present tax is outside the jurisdiction of the state to enforce, being a duty on tonnage. Mr. Justice DAVIS delivered the opinion.

Discharge in Bankruptcy—Debts Due the United States.—No. 252. United States v. Herron. Error to the Circuit Court for the District of Louisiana. In this case the government sued on the official bond of one Collins, Herron being a surety. The defence was a discharge under the bankrupt act. The court below sustained the plea, and the judgment was accordingly. The judgment is here reversed, the court holding that a discharge under the bankrupt act does not bar a debt due the United States. This conclusion is sustained by the uniform construction of similar legislation in this country and in England. Mr. Justice CLIFFORD delivered the opinion.

Land Law—Spanish Grant.—No. 247. United States v. Heirs of Junerarity. Appeal from the Circuit Court for Louisiana. This was a reversal of a decree adjudging parties represented by the appellees entitled to certain land in Louisiana, under a Spanish patent issued to one Ramos, the court holding that the claim attempted to be set up by the petitions in the case can not be sustained. Mr. Justice HUNT delivered the opinion.

Bill of Review by Creditor.—No. 257. First National Bank of Troy v. Cooper *et al.* Appeal from the Circuit Court for the Northern District of New York. The bill in this case was filed by the bank, a creditor of an insolvent corporation (the Troy Woolen Company), to review a decree of the district court confirming the report of a referee and allowing a claim of Cooper, Vail & Co. for $67,000. The circuit court decided that it could not review this decree at the instance of a creditor, and dismissed the bill. That decree is affirmed here, the court holding that the bank does not show any equity sufficient to justify the court in granting the relief sought. Mr. Justice STRONG delivered the opinion.

Power of Attorney by Husband and Wife.—Holladay v. Daily. Error to the Supreme Court of Colorado Territory. In this case Ben Holladay and wife joined in executing a power of attorney to sell their real estate in a section of the Territory. The attorney sold, making the deed in the name of Holladay alone. Thereupon the latter repudiated the transaction and sought to hold the property. The court below sustained the sale, and that judgment is here affirmed, the court holding that a power of attorney to sell and convey real property given by a husband and his wife authorizes a conveyance by the attorney of the interest of the husband by a deed executed in his name alone. If, it is said, the wife in fact has no interest in the property, such individual deed passes the entire estate. Mr. Justice FIELD delivered the opinion.

Memphis Paving Contracts.—In the case of The City of Memphis v. Brown *et al.*, from the Tennessee Circuit Court, an appeal by the city to reverse a decree recovered against it by the appellees, upon contracts for paving its streets, this court affirms the decree except as to the item for damages for not creating a sinking fund for the payment of the bonds issued in pursuance of the contracts, the item for the services of attorney, and that for services in collecting bills for paving. As to these the decree is reversed, and the court below is directed to enter a decree in accordance with these views. Mr. Justice HUNT delivered the opinion.

Decisions in Ninth Federal Circuit.

In the case of Lee v. Rogers, adm'r, &c., Circuit Judge SAWYER, of the Ninth Federal Circuit (whose opinion is reported in full in the Pacific Law Reporter, March 3, 1874), ruled the following points:

1. **Paid Judgment—Sale.**—A sale of lands under an execution issued upon a judgment which had been fully paid, is void.

2. **Assignee of Paid Judgment.**—W. had a judgment against C., which was the first lien on his property. T., also, had a judgment, which was the second lien on the property. C. paid W.'s judgment in full, but took an assignment of it in the name of his hired man, who paid nothing for it. Afterwards, to avoid an attachment, C. confessed a judgment in favor of L., for a debt previously due him, which became a lien upon the property, and, in order to give L. a preference over T., C. procured an assignment to him of W.'s judgment, for which no additional consideration was paid, but L. was not aware that it had been paid. C. afterwards confessed a judgment in favor of F., which also became a lien on the property. L. afterwards sold the lands on W.'s judgment and became the purchaser. Afterwards F. became the purchaser of the same lands under his own judgment. *Held:*

1. That as to F., L. was not a *bona fide* assignee of W.'s judgment for a valuable consideration, and that his sale was void.

2. That by his purchase F. acquired the title to the land.

3. **Power of Attorney- Incidental Powers.**—L. executed a power of attorney to H., authorizing him to collect his said judgments against C., by sales under execution, etc., to receive the money thereon, "arbitrate or compound" the same, and for that purpose to employ counsel. After the aforesaid sales F. brought an action against L. to annul the said sales and conveyances to L., as clouds on his, F.'s title. H. consulted counsel, who advised him that the said sales under W.'s judgment after payment, were void, and L.'s title invalid. *Held*, that as incident to the powers expressly given to collect said judgment, arbitrate and compound the same, in connection with subsequent instructions from L. by letter, H. had power to authorize counsel to appear in said action and consent to a judgment annulling said sales, upon terms that enabled him to realize the amount due to L. on his judgment.

4. **Actions against Belligerents.**—The existence of war does not prevent the citizens of one belligerent power from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process.

In Nicklin, complainant, v. Wythe *et al.*, defendants, before SAWYER and DEADY, JJ (Pacific Law Reporter, March 10, 1874), it appeared that G. conveyed lots 1 and 2, in the town of Salem, to W., and in consideration of such conveyance said W. and wife afterwards conveyed to said G. lands belonging

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to said wife, in exchange for said lots 1 and 2, and it was held that in the absence of evidence to show that the conveyance of lots 1 was 2 were made to W. with the assent of his wife, there was a resulting trust in her favor, and her subsequent vendees were entitled to a decree against the heirs of W. for a conveyance of the legal title.

Supreme Court of Missouri—Decisions at the March Term, 1874.

Continuance—Effect of the Answer as Evidence.—Thomas J. Bartholow *et al.* v. Thomas Campbell Eliza Hays and George W. Thurmond. This was an action on a promissory note made by the defendants, Campbell and Hays, in favor of the defendant Thurmond, and by him endorsed to the plaintiffs for value. The defendant Thurmond failed to answer. The other defendants filed separate answers, alleging that the note was procured from them through fraud for the accommodation of the defendant Thurmond. Mrs. Hays' answer differed from Campbell's in that it charged fraud against both Campbell and Thurmond. It was alleged that the plaintiffs had notice of this fraud before they discounted the note. Two questions arise, the first relating to the refusal of a continuance. The court—after stating the general rule that the continuance of causes by the trial court is generally very much in the sound discretion of the court; that every intendment in such cases should be in favor of the sound and proper exercise of this discretion; and that, unless it plainly appears from the record that this discretion has been unsoundly or oppressively exercised, the supreme court ought not to interfere—proceed to say: "The affidavit in this case shows that the absent witness resided in the city of St. Louis, where the trial was had; that she had been sick for ten days before the day of trial—confined to her room; that this fact was known to the defendant; that the defendant did not know until the last two or three days that the absent witness would not become able to attend the trial; that no witness in attendance, or whose presence could be procured *in time*, could prove the same facts expected to be proved by the absent witness. But it nowhere appears in the affidavit that there were not others who were not in attendance who could prove the same facts. On the contrary, it is plainly apparent from the affidavit that there were such other persons, and it does not appear that any effort had ever been made to procure any such evidence during the ten days after the witness named in the affidavit was known to be sick, or within the three days after which it was known to the defendant that the absent witness would not be able to appear at the trial. The defendant seems to have remained wholly inactive until the case was called for trial; and it is not negatived in the affidavit that the application was made for delay or vexation. The defendant is required to show some diligence in such cases. In the absence of diligence on the part of the defendant to avail herself of every means in her power to get ready for trial, this court will not be authorized to reverse the judgment on the ground that the court trying the cause has unsoundly exercised its discretion in the premises. (Cline v. Brainerd, 28 Mo. 341; Globe Mutual Ins. Co. v. Carson, 31 Mo. 218; State v. Murphy, 46 Mo. 430.)

"The second ground of error related to the ruling of the court below in excluding the answer of the defendant Campbell as evidence for the defendant Hays. It was claimed that as no replication had been filed by the plaintiff as to this answer, its truth was therefore admitted, and that the defendant, Mrs. Hays, who had filed a separate answer, might put Campbell's answer in evidence for herself. But the court held, expounding the statute which relates to the effect of the answer as evidence (2 Wagn. Stat. p. 1019, § 36), that although the answer, not being denied, was admitted by the plaintiff so as to make it evidence for Campbell, yet it was not therefore evidence for Mrs. Hays, and that there was no error in rejecting it when offered by her."

VORIES, J., delivered the opinion of the court. The other judges concurred, except SHERWOOD, J., who did not sit.

Supreme Court of Missouri—List of Cases Decided Monday.

The Supreme Court of Missouri, Monday morning, on convening, delivered a large batch of opinions, as follows, all the judges being present:

BY JUDGE ADAMS.

Wolf v. Walter; affirmed.
Bailey v. Rosenthal; affirmed.
Helmerichs v. Gehrke; affirmed.
Bennett v. Torlina; affirmed.
Chouteau *et al.* v. Rowse; affirmed.
O'Fallon v. Nicholson; affirmed.
O'Neill v. Capelle; affirmed.
Schasle's v. Woodburn Sarven Wheel Co.; affirmed.
Bloebgum v. Seatheny; affirmed.
Bobb v. Taylor; affirmed.
Woods, assignee, etc., v. Atlantic Insurance Co.; affirmed.
Norton v. Ittner *et al.*; affirmed.
Lackland v. Garesche, garnishee, etc.; affirmed.

BY JUDGE WAGNER.

Harney v. Sullens; affirmed.
Reid v. Piedmont and Arlington Insurance Co.; affirmed.
Tyler v. City of St. Louis; affirmed.
Haenschen v. O'Bannon; affirmed.
Ruff v. Doyle's administratrix; affirmed.
Kellogg v. Schnaake; reversed and remanded.
State *ex rel.* Cavender v. City of St. Louis; affirmed.
Carlin v. Cavender; judgment modified and affirmed.
Parker v. Scudder; affirmed.
Ricords v. Watkins; affirmed.
Estel & Co. v. St. Louis and S. E. R. R. Co.; affirmed.
Bishop v. O'Connell; affirmed.

BY JUDGE NAPTON.

Brink v. Collier; affirmed.
Claflin & Co. v. Hafkemeyer *et al.*; affirmed.
Price v. Roetzel, administratrix; reversed and remanded.
Williams v. Mellon; reversed and remanded.
Huth v. Carondelet Dock Co.; reversed and remanded.
LeBeau v. Armitage; reversed and remanded.
Market v. City of St. Louis; general term reversed and special term affirmed.
St. Vrain v. Columbia Bottom Levee Co.; reversed and remanded.
Thomas *et al.* v. Pullis *et al.*; affirmed.

BY JUDGE SHERWOOD.

Primm *et al.* v. Rabeteau; affirmed.
Seiners *et al.* v. Kleeburg *et al.*; reversed and remanded.
State use Clifford v. Beldsmeier; reversed and remanded.
Gillett v. Union National Bank; affirmed.
Kefferstein v. Knox; reversed.

BY JUDGE VORIES.

Wilson *et al.* v. Taylor; affirmed.
Cocker v. Cocker; affirmed.
Township Board of Education v. Heath; affirmed.
Doering v. Saun; affirmed.
Stagg v. Eureka Tanning Co.; reversed and remanded.
Daly v. Butchers and Drovers' Bank; reversed and remanded.
Gibson v. Coons; affirmed.
Edmondson v. Garnhart; affirmed.
Mutual Life Ins. Co. v. Board of Assessors; affirmed.

The Arkansas Homestead Law.

Our correspondent at Little Rock, Frank M. Parsons, Esq., sends us the following note of the exposition placed upon the homestead law of Arkansas by the Supreme Court of that state, in the case of Norris *et al.* v. Kidd. They decide that, under their constitution and homestead law, a homestead is a mere *possessory* right—a particular estate carved out of the fee by constitutional provision. It is a *personal* privilege conferred by the constitution of the state upon a resident, which he may insist upon or waive at his option. It must be selected by the owner in the manner provided by the act of March 28, 1871, and in no other way can a sale upon execution be prevented. Mere occupancy is not sufficient to constitute property a homestead; but after the selection has been properly made, occupancy is necessary to give it the character of a homestead. The homestead may be selected at any time before actual sale. Any house or town lot (or tract of land, not exceeding 160 acres, owned by a judgment debtor, may be selected by him as a homestead, whether he resided upon it at the time of the rendition of the judgment or not. The entire building need not be used as a residence. It is enough if the owner and his family actually occupy some part of the house as a residence. A failure to select in the manner provided by the act of March 28, 1871, before sale, is a waiver of the homestead right, and it can not after that be set up in defence in ejectment. The selection of a homestead does not prevent the lien of a judgment from at-

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taching; it merely suspends the sale of the property; the lien attaches to the reversion or remainder.

Our correspondent adds, by way of a note, that it would seem that the execution might be enforced by the *sale of this remainder*, subject to the debtor's "possessory right," and that this could be done by an assignee in bankruptcy, but that view is not considered in the opinion.

Judge BENNETT dissented as to the manner of reaching these conclusions.

Taking Private Property for Public Use—Damages, when Fixed.

Our Boston correspondent, Henry N. Sheldon, Esq., sends the following note of a recent decision of the Supreme Judicial Court of Massachusetts in the case of William L. Bent v. The Merchants' Ins. Co.:

This is a petition for the assessment of the value of the estate of the defendants, taken by the United States for the extension of the post-office under the provisions of that act. The receivers of the Merchants' Insurance Company are the general owners of the estate; Charles L Haley is the lessee, and Avery & Harris are sub-lessees under Haley. At the trial in the superior court with a jury, it was contended on behalf of the United States, that the time at which the value of the land should be estimated was the date of the petition. But the court ruled that it should be estimated as at the time of the verdict and trial. The petitioners excepted to this, among other rulings of the presiding judge. The supreme court has now sustained the exceptions, set aside the verdict and ordered a new trial. The rescript is as follows:

1. The value of the land should have been estimated as of the date of the petition. The jury having been instructed otherwise, the exception of the petitioner must be sustained on this point.

2. The sum of the damages of the owners of all the interests in the land taken, can not exceed the value of the whole land. And such is a fair construction of the instructions to the jury.

Obiter Dicta.

The Albany Law Journal has hit upon a happy name for its funny column. It calls it *obiter dicta*. The following are specimens:

The Law Journal (London), speaking of the close of the Tichborne case, says: If the learned counsel engaged in the case had thrown up their wigs and proffered each other a back at a game of leap-frog in Westminster Hall, no one who knows what they have suffered would have found fault with their somewhat undignified expressions of joy.

A Nevada judge, after the jury had been empannelled and counsel ready to proceed, pulled out a revolver and judiciously remarked: "If any man goes frollicking around the court-room during the trial of this case, I shall interrupt him in his career." The strictest decorum prevailed.

On the trial of a person charged with stealing ducks, the prisoner's counsel asked the farmer from whom they had been stolen, "how he knew" they were his ducks, and the farmer went on to describe their peculiarities. "Why," said the lawyer, "these ducks can't be such a rare breed; I have some very like them in my own yard." "Likely enough," replied the farmer, "they are not the only ducks I have had stolen lately."

One can hardly appreciate the "mixed emotions" with which the counsel in a certain important case listened to the following dialogue between the judge and the foreman of the jury, at the close of the judge's charge:

Judge—"Is there any point on which the jury would like further explanation?"

Foreman—"There are two terms of *law* that have been a good deal used during the trial, that I should like to know the meaning of—they are *plaintiff* and *defendant*."

The judge explained.

Notes and Queries.

The following letter was not written for publication, but we shall print it and take the consequences. We, however, omit our friend's name, notwithstanding there is nothing in his letter that need have made him feel so modest:

CAPE GIRARDEAU, Mo., April 12, 1874.

EDITORS CENTRAL LAW JOURNAL:—In answer to some correspondent in the CENTRAL LAW JOURNAL of the 12th ult., you say that "professional opinion in St. Louis is somewhat divided as to the construction of the 5th section of the homestead act," and although you express no opinion as to the proper construction, I infer, from the authorities cited, that you are inclined to hold that it passes *the fee*. I have always so understood the law. The language, it seems, will admit of but one construction, although somewhat ambiguous. As to what the law *was*, your correspondent does not ask, and it is unnecessary to enquire.

It is granted that the legislature is not the recognized tribunal for the interpretation of acts passed by prior legislatures, but as they have the power to repeal, alter or amend, it is submitted that any amendment adopted by them subrogates—if I may use the term—the old to the new law, and fixes, upon the whole, the *intention* of the last legislature.

If this be true, it seems to me that there ought to be no further doubt as to whom the *fee* passes, for the general assembly of 1873, Gen'l Acts, p. 16, so amended the old law as to allow *femes covert* to file a claim to a homestead, even against the will of the baron, and any conveyance made by him of said estate, without being joined by her, is *absolutely void*—in contradistinction to the old rule that a husband may convey in fee, even if his wife does not join, subject, of course, to her dower.

If the general assembly intended by this act to give a mere life-estate, it seems to me that a very different wording would have been used.

I do not write this for publication, but simply to suggest what seems to me to be an additional reason in support of the theory that the widow ultimately takes the fee.

*** We have received several queries from correspondents, which we shall attend to as soon as we get time.

Book Notices.

REPORTS OF CASES AT LAW AND IN EQUITY IN THE SUPREME COURT OF THE STATE OF IOWA. Edited by C. C. COLE, LL.D., Judge of the Supreme Court of Iowa, Professor in the Law Department of the Iowa University, Editor of Western Jurist, etc. Vol. 1. Des Moines, Iowa: Mills & Co. 1874. NEW EDITION.

The first 12 volumes of Iowa Reports were not stereotyped, and the plates of the remainder of the first 21 volumes were mostly destroyed by the great Chicago fire. In consequence of this, and of the very considerable general demand of late years for the Reports of the Iowa Supreme Court, it has lately been quite impossible to procure a full set of them at a moderate price. Hence the necessity for a new edition, and the publishers very wisely resolved to secure success to their enterprise by deserving it.

The Iowa Reports justly stand high in professional estimation. This has, we think, very largely resulted from the painstaking and thorough manner in which the judges discharge their duties. For the past 12 years the judges, imitating the example of the Supreme Court of the United States, have strictly followed the plan of examining and deciding every case *in conference* before it is assigned to a judge to prepare the opinion. It is known to us that many of the appellate courts in the country pursue the opposite course and assign the cases before they are settled by the judges. The bar of every state where this is done should protest against it. It is a prolific source of error and of ill-considered law.

The Iowa court has had the good fortune, also, to have three most excellent and capable reporters—Clarke, Withrow and Stiles.

The present series is *unabridged*, and the head-notes are entirely new, and have been prepared by Mr. Justice COLE himself. His name is a sufficient guaranty that his work has been well done. The present editor is part of the judicial history of the state. For the past eleven years he has been one of the judges of the court, and before that he was an extensive practitioner at the bar. This experience has peculiarly fitted him to undertake the editorial management of the new edition of the Reports, and gives to the head-notes and the copious foot-notes an especial value. To each case has been added a note referring to every subsequent Iowa case in which *the case* to which the note is appended has been cited. This is a new and valuable feature in this republication, and of itself will finally induce many persons to dispose of the first edition in order to procure the second.

We congratulate the distinguished editor upon the excellent and thorough manner in which his work upon this volume has been done, and we doubt not that the future volumes will keep up to the standard of the present one.

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SOUTHERN LAW REVIEW for April. Nashville: Frank T. Reid & Co.

This number is fully up to its usual standard in point of variety and ability. Chancellor Cooper continues his paper on Modern Theories of Government. John C. Reed, Esq., of Lexington, Georgia, has a paper on Codification, which, however impracticable some of his views may seem, contains a great many excellent suggestions well made, and will amply repay a perusal. The Parkman Murder is graphically described by Chas. J. Swift, Esq., of Columbus, Georgia. Mr. Phelan of Memphis entertains us with a number of quaint extracts on Legal Presumptions. Mr. Hutchinson of Memphis furnishes a thoughtful article on Executions by Separate Creditors against the Joint Effects of the Partnership. The Privilege Tax is discussed by J. S. Wiltse, Esq., of Chattanooga. Mr. Daniel of Lynchburgh, Virginia, furnishes an article upon Exchange and Re-exchange and Damages upon Dishonored Negotiable Paper, which we presume is a chapter from his forthcoming work on Negotiable Paper. Not the least interesting part of the Review are its "Notes," among which we find the following foot-note, by Judge Cooley, taken from the last edition of Story on the Constitution.

We have now received three numbers of the WESTERN INSURANCE REVIEW, edited and published at St. Louis by H. L. Aldrich, Esq., and have perused each number with much pleasure and profit. To an insurance lawyer we should judge that it would be a great favorite. Its legal department, edited by H. E. Mills, Esq., of the St. Louis bar, gives in a condensed form a great many insurance decisions, fire and life, of various courts throughout the country, while important opinions are frequently published in full. From the typographical beauty of the Review, the richly tinted paper on which it is printed, and the great amount of advertising which it carries, we judge that the insurance business, by which we presume it is chiefly supported, must be in a highly prosperous condition.

Legal News and Notes.

—BENDER, the notorious Kansas murderer, has been caught for the fifth or sixth time. It is pretty certain now that they have got the right man. He emerged from the mountains near Salt Lake City.

—THE Brazilian Bishop of Olinda has been tried, convicted and sentenced by a civil court, the Supreme Tribunal of Justice, at Rio, upon a charge of "attempting to destroy an article of the constitution."

—A DISPATCH from London states that John Karslake has resigned the attorney generalship, in consequence of illness.

—THE Erie Railway company has given a consolidated mortgage of its road to the Farmers' and Merchants' Land and Savings company of New York, to secure the payment of $30,000,000. It is recorded in every county along the line of the road.

—Of the $75,000 appropriated by the legislature of New York to pay the counsel who prosecuted the Tammany Ring thieves, Mr. Peckham, son of the late Judge PECKHAM, of the court of appeals, gets the principal share, and Charles O'Conor declares that he has earned all he gets.

—THE following colloquy occurred in an English divorce case: Mr. Sergeant Tindal—"He treated her very kindly, did he not?" Atkinson—"Oh, yes, very; he kissed her several times." Mr. Sergeant Tindal—"And how did she treat him?" Atkinson—"Well, she retaliated."

—THE legislature of Mississippi, at its recent session, passed an excellent temperance law. It embraces the principles of the so-called "local option" incorporated in the laws on this subject which have been enacted in the several states of the Northwest. These laws provide for the license or refusing to license retail traffic in intoxicating liquors in any township or incorporated city, accordingly as a majority of the legal voters may decide. The Mississippi statute requires the signature of a majority of men over twenty-one years of age, and of women over eighteen years of age, in any locality, to a petition asking for a license before it can issue.

—THE learned editor of the Bench and Bar Review writes us as follows: "I received your JOURNAL, and am very greatly obliged for your kind notice. The criticism, however, requires that I should set you right, being somewhat premature. When we were looking about for a name for the 'Review,' we struck upon 'Bench and Bar' as one likely to answer in all particulars. Afterwards, but before we issued it, we were made aware of the existence of the Chicago periodical. We then wrote to Callaghan & Co., and received the reply that they had *discontinued* its publication.

"Very truly, A. SCHAUMBERG."

—AN amusing incident is related of a woman in England, whose husband, a wealthy man, died suddenly without leaving any will. The widow, desirous of securing the whole property, concealed her husband's death and persuaded a poor shoemaker to take his place while a will could be made. Accordingly he was closely muffled in bed as if very sick, and a lawyer was called to write the will. The shoemaker in a feeble voice bequeathed half of all the property to the widow. "What shall be done with the remainder?" asked the lawyer. "The remainder," replied he, "I give and bequeath to the poor little shoemaker across the street, who has always been a good neighbor and a deserving man." The widow was thunder-struck with the man's audacious cunning, but did not dare expose the fraud, and so two rogues shared the estate.

—QUITE a stir was created in the court of claims the other day in consequence of the application of Mrs. Belva A. Lockwood for admittance as an attorney of that court. After considerable debate, in which the lady acquitted herself creditably, Chief Justice DRAKE took the matter under advisement, and was still advising upon it at last accounts. The difficulty in the way of her admission is two-fold. First, the rules of the court require that a person to be admitted must be a *man* of good moral character, etc. Secondly, Mrs. Lockwood has a husband, and consequently is "dead in law." It is stated, however, that she is in good standing and practice before the other courts of the district, and if denied admission by the court of claims it is said her friends will appeal to congress for the passage of a declaratory act to the effect that the law is not designed to authorize the exclusion, on account of sex, of any practicing attorney in good standing.

—OUR sanctum was honored on Tuesday with a call from Mrs. Myra Bradwell, editor of the Chicago Legal News. We had always regarded Mrs. Bradwell as one of the most remarkable of American women; but had hardly expected to meet a lady that converses with the same graceful ease and precision which characterize her written compositions. Her paper is probably as extensively read and with as much profit to the profession as any legal publication in the United States. We know this is saying much, when we consider the success which has attended the brilliant Albany Law Journal and the staid old Legal Intelligencer of Philadelphia; but from the reports of our agents and canvassers, we do not doubt that it is true. As an instance of Mrs. Bradwell's ability to overcome difficulties, we may note that her establishment was so completely burned out in the great Chicago fire, that nothing but a prayer-book was saved. Nevertheless, the News appeared on its next publication day as usual, and since then a new printing office has been purchased and its prosperity has been greater than ever. This is the more remarkable when we consider that although the Legal News establishment was well insured, only three per cent. of the insurance money was paid.

—THE judgment in the case of Fox v. Penn Mutual Life Insurance Company, recently rendered in a Philadelphia court, is causing no little comment, both in the insurance and secular press. Lee, the party whose life was insured for the benefit of Fox, represented himself as a man of temperate habits when the reverse was the case, as he died within a year after the policy was issued, of disease superinduced by excessive drinking. Soon after the policy was written the officers of the insurance company were apprised of the fraud practiced on them, cancelled the policy and offered to return the premium received, which offer was refused by the beneficiary, and the suit was brought soon after the death of Lee.

It seems to us that the true course for the company to have pursued as soon as the fraud was discovered, was to have brought a suit in equity to set aside the contract on the ground of fraud. As this would have been a purely legal question, a sympathetic jury could not have outraged the plainest principles of justice. Does not good policy require of the managers of life companies, as soon as an attempted fraud is discovered, to take immediate measures to annul the policy? Better by far fight the living swindlers than their legal representatives, who are often innocent parties.—*Western Insurance Review.*

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. }
S. D. THOMPSON, Ass't Editor. } ST. LOUIS, THURSDAY, APRIL 30, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance

We print elsewhere an interesting opinion of the Supreme Court of Colorado, determining that the mere fact that a special election called on petition of some of the citizens of a county has resulted in authorizing the county commissioners to issue the bonds of the county to a railroad, will not entitle the railroad company to a mandamus to compel the county commissioners to issue the bonds. It is to be inferred from the opinion that the rule might be otherwise if the election were ordered [in pursuance of a petition of the railroad company, but this question is, of course, not determined.

The Pueblo Chieftain in publishing this opinion pays a merited compliment to G. Q. Richmond, Esq., of that city, who at the request of the chairman of the board of county commissioners prepared some time previously a written opinion, with which the opinion we publish fully corresponds. Mr. Richmond is a young lawyer, but unless a brief acquaintance has greatly deceived us as to his qualities, the country will hear of him hereafter.

THE Supreme Court of South Carolina has recently decided, in the case of Whaley v. Bank of Charleston, that a bank doing business before and during the war (and which has resumed business since) is liable to a customer for the value of deposits in gold made before the war, notwithstanding the fact that the bank gave notice that all credits would be given and payable in currency (confederate) after September 6, 1861, and that plaintiff's testator continued to do business with the bank after that date and with knowledge of the notice. The opinion was delivered by Chief Justice MOSES, with whom WRIGHT, J., concurred. WILLIARD, J., dissented, on the ground, as we understand it, that whereas the first balance that was struck after the notice exhibited the same amount to the credit of the plaintiff's tesrator as the last balance which was struck before the notice, an acquiescence on his part was manifested in the resolution of the bank to treat it as a currency balance. This decision opens, so far as South Carolina is concerned, another vexatious question growing out of the war.

Our correspondent who sends us this opinion states that "it is a little singular that the chief justice who wrote the opinion of the court was during the war a prominent secessionist, though now a republican, and that the judge who wrote the dissenting opinion is a Northern man who was always a republican, and who came first to South Carolina in the union army. The judge who concurred with the chief justice is a colored man."

WE desire to call the attention of insurance lawyers and underwriters to the opinion of the Supreme Court of Tennessee, elsewhere published in this issue, in the case of The People's Insurance Company v. Kuhn. The judge who delivered the opinion has obtained considerable reputation as a jurist during the comparatively short time he has been upon the supreme bench of Tennessee. The syllabus and foot-note were prepared by Hon. JAMES O. PIERCE, formerly judge of the Law Court of Memphis, and now a practitioner at the bar of that city. Judge PIERCE's note is marked by that care and fine discrimination which characterizes everything its author writes. It may perhaps strike some readers as leaning somewhat towards the underwriters' side of the question which it discusses, but we do not think it fairly open to this criticism. In the matter of entering into contracts of insurance there is no species of "moral duress" such as characterizes many engagements made with common carriers, where the shipper is obliged to send his goods over a particular line. On the contrary, the insurance business is marked by a degree of competition which is excelled by no other business of the same magnitude. There appears, therefore, to be no reason, founded in public policy or in the principles of private right, why insurance contracts should be subjected to those severe rules of interpretation as against the obligor which the courts are obliged to apply to contracts made with common carriers. But, rather, it would seem true that common sense and the principles of an unbending morality require that contracts of insurance should be subjected to the same rules of interpretation, both as regards their written and printed conditions, which are applied to other private contracts; and this we understand to be the principle enforced and applied in the opinion and note which we elsewhere print.

Negligence of Municipal Corporation in Suffering Street to be out of Repair—Rule as to Notice.

In the case of Market v. The City of St. Louis, decided by the Supreme Court of Missouri on the 20th instant, the court held that where a street in the city of St. Louis had been out of repair for the space of two months, no express notice to the city authorities was necessary in order to charge the city with liability for an injury happening in consequence of such defect. The court (NAPTON, J.) say: "Of course, where a street is out of repair from a casual rain-storm, or any other sudden or unforeseen violence, the city can not be held responsible for accidents occasioned by such sudden occurrences until the authorities have had a reasonable time to make the necessary repairs. But if a reasonable time has elapsed, as was the case here, where the defect continued for two months, no express notice is necessary." Further on the court say: "We do not think any notice is necessary where there has been a standing nuisance in a public street for two months." The rule thus laid down follows that in Requa v. City of Rochester, 45 N. Y. 129, 136, and Reid v. Northfield, 13 Pick. 94. In the former case it is said that the city is liable "if, after the wilful act of one not in its employment has made a place of danger in its highway, a lapse of time had run long enough, *in the sound judgment of a tribunal*, for it to have learned of the danger and to have removed it." In Reed v. Northfield, 13 Pick. 94, 98, it is said that "notice to the town of a defect in the highway may be inferred from its *notoriety*, and from its continuance for such a length of time as to lead to the presumption that the proper officers of the town did in fact know, or, with proper vigilance and care might have known, the fact." In Mayor v. Sheffield, 4 Wall. 189, the authorities of New York city, in converting a portion

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of a park into a street, had cut down a tree and left the stump standing from six to eight inches above the surface, and from fourteen to eighteen inches inside the curbstone on the sidewalk. This was done in 1847, and the stump thus left by the city authorities, who had cut down the tree, remained in this condition until the plaintiff was injured upon it in 1857. These facts were uncontradicted, and the court (Mr. Justice MILLER) said that "stronger proof of notice could not be given."

In the Missouri case, *supra*, the circuit judge instructed the jury that the plaintiff was not entitled to recover unless the defendant had notice of the unsafe condition of the gutter and neglected to repair it within a reasonable time thereafter. The jury found for the plaintiff, but the verdict was set aside at general term, on the ground that it was against this instruction. The supreme court, however, reversed the general term and sustained the verdict on the ground that the instructions were more favorable to the defendant than the law justified.

Negligence—Proximate and Remote Damage.

One of the most interesting cases on the law of negligence which has been determined for some time is the Metallic Compression Casting Company v. Fitchburg Railroad Company, decided by the Supreme Judicial Court of Massachusetts, and to appear in volume 109 of the Massachusetts Reports. It will be found in the American Law Times Reports (N. S.) vol. 1, p. 135.

On the 24th of January, 1870, a little before midnight, the plaintiff's manufacturing establishment was discovered to be on fire. The buildings were situated in Somerville, about fifty feet south of the track of the Fitchburg railroad. Two fire engines were brought upon the ground, belonging to the Somerville fire department, and one from Cambridge. Not being able to procure a supply of water otherwise, they laid the hose across the railroad track, under the direction of the chief engineer of the Cambridge fire department, and obtained a supply from a hydrant on the north side of the track. The water was, by means of the hose, applied to the fire and diminished it, and would probably have extinguished it in a short time but for the acts of the defendants. At that time a freight train came along from the west, and though its managers had sufficient notice and warning, and might have stopped and had no occasion for haste, they paid no attention to the hose, but carelessly passed over it with their train and thereby severed it and stopped the water. They injured the hose so much that it could not be seasonably repaired, and thereby the plaintiff's buildings were consumed. They did not delay to give time for uncoupling the hose, which would have delayed them but a few minutes. The railroad was crossed by another at a grade a few hundred feet before the place where the hose was severed, and the train was not stopped before the crossing, as required by the Gen. Stats. c. 63, § 93.

The owners of the buildings bring this action to recover damages against the railroad corporation; and upon the foregoing facts the court hold: (1) that the violation of the statute did not affect the defendants' liability; (2) that the firemen had a right at common law to lay the hose across the railroad; (3) that it was immaterial that they were volunteers from another town; (4) that it was immaterial that the plaintiff did not own the hose; (5) that the severing of the hose was the proximate cause of the destruction of the building; and (6) that the defendants were liable for the negligence of their servants in severing the hose.

Upon the question that the injury was too remote to entitle the plaintiff to recover Mr. Chief Justice CHAPMAN, in pronouncing the judgment of the court, said: "The question of proximate cause is often involved in difficulty, by reason of the endless variety of circumstances in which injuries may occur; and the cases on the subject are very numerous. A case which much resembles the present is Atkinson v. Newcastle & Gateshead Waterworks Co., Law Reports, 6 Exch. 404. The plaintiffs' saw-mill and lumber-yard took fire; and in consequence of the defendants' neglect in respect to the head of water, the plaintiffs could not obtain a supply, and their property was burned. It was held that the defendant's were liable on the common-law principle stated in Comyn's Digest, Action on the Case, A: 'wherever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages.' The defendants contended that the damages were too remote, but the court held otherwise. KELLY, Ch. B., significantly asked, 'what kind of damage can be more a proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved?' Baron BROMWELL remarked that it was the immediate consequence of the proximate cause. Couch v. Steel, 3 El. & Bl. 402, was cited as decisive of this principle." Among other cases illustrating the subject of direct consequences are Scott v. Shepherd, 2 W. Bl. 892; Gilbertson v. Richardson, 5 C. B. 502; Lee v. Riley, 18 C. B. (N. S.) 722; Dickinson v. Boyle, 17 Pick. 78; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64. Other cases are cited where the damages are held to be too remote, but they are unlike the present case. The law regards practical distinctions rather than those which are merely theoretical; and practically, when a man cuts off the hose through which the firemen are throwing a stream upon a burning building, and thereupon the building is consumed for want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury."

The Right to Use or Destroy Private Property in Preventing the Spread of Fires.

It is difficult to conceive how an advocate could face a court of justice — especially such a court as the Supreme Judicial Court of Massachusetts — and assert that, because a railroad company had obtained a legal title to the land occupied by its track, a fire company could not lawfully lay a hose across it for the purpose of extinguishing a fire. Yet this proposition was asserted in The Metallic Compression Casting Company v. Fitchburg Railroad Company, 1 Am. Law Times Reports (N. S.) 135; and the court was obliged to reiterate a principle which has been familiar to lawyers, at least, since the time of Lord COKE. In 12 Coke, 13, it was said, in illustrating a principle which was resolved by all the judges, that "for the commonwealth a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city, in time of war, for the common safety, shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action." In British Cast Plate Manufacturers v. Meredith, 4 Term, 796, it is said, by BULLER, J., "there are many

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cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil-law writers indeed say that the individuals who suffer have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, etc. This is one of those cases to which the maxim applies, *salus populi suprema lex*." In The Mayor, etc., v. Lord, 18 Wend. 129, it is said by Chancellor WALWORTH that "the rule appears to be well settled that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other public calamity, the private property of an individual may be lawfully taken or destroyed for the relief, protection or safety of the many, without subjecting those whose duty it is to protect the public interests, by whom or under whose direction such private property was taken or destroyed, to personal liability for the damage which the owner has thereby sustained." See, also, to the same general effect, Russell v. Mayor, etc., 2 Denio, 461; Hale v. Lawrence, 1 Zab. 714; American Print Works v. Lawrence, 1 Zab. 248; Lorocco v. Geary, 3 Cal. 69; Meeker v. Van Rensselaer, 15 Wend. 397; McDonald v. Redwing, 13 Minn. 38. The Supreme Judicial Court of Massachusetts had also said, in Taylor v. Inhabitants of Plymouth, 8 Metc. 465, that, "independently of the statute, the pulling down of a building in a city or compact town in time of fire, is justified upon the great doctrine of public safety, when it is necessary."

So much for the general principle. It remained, however, for a railroad company to assert that it was unlawful to lay a fireman's hose across its track to reach the only water which was accessible in order to save a large manufacturing establishment which was on fire. While in such emergencies the houses of private citizens may be torn down and blown up, and their property taken or destroyed as far as necessary, the *convenience* of a corporation must not be temporarily interrupted! The court, however, thought otherwise. Mr. Chief Justice CHAPMAN, after reiterating the general principle laid down in the foregoing cases, said:

"The elaborate provisions which our statutes have made for the extinguishment of fires, indicate the magnitude of the interest which the community has in preventing the spread of conflagrations, but these statutes do not supersede the common law. Their purpose is merely to enable the community to protect themselves more effectually than they could do otherwise. Thus the organization of a fire department with officers and implements does not deprive the people of a neighborhood from obtaining an engine and hose and crossing the neighboring lands to obtain water for stopping a conflagration, without waiting for an organization, and individuals may climb upon neighboring roofs to carry buckets of water. It is a sufficient justification that the circumstances made such an invasion of private property reasonable and proper in helping to extinguish the fire. The objection of the defendants that the officers of the fire department in Cambridge had no jurisdiction in Somerville, and could not act officially in that town, has no validity. They had a fire company organized, and an engine and hose, and were in the vicinity of the building, and they could not with propriety stand idly by and witness the spread of a fire which they might extinguish, merely because it was beyond the town line. They had a right, *as citizens*, to do what they reasonably could to prevent this public calamity, whether in their own city or a neighboring town."

The court, however, intimate that there may be a limit to this principle, but where that limit is to be drawn is a question for the jury. Thus, the chief justice said: "It is urged that upon this principle one person may enter upon the property of another for the purpose of extinguishing a fire in a small building of no importance, and where there is no danger to other buildings. Undoubtedly the principle is to have a reasonable limitation. He who enters upon the property of another takes upon himself the burden of establishing the fact that there was a just occasion for it, and in this case the plaintiffs must submit to the jury, with proper instructions, the question whether there was good cause for laying the hose across the defendant's track. All that the court can say is that there is sufficient evidence to submit to the jury."

Seizure of Books and Papers by Revenue Officers Decision by Judge Blatchford.

Judge BLATCHFORD, of the Federal District Court at New York city, has just rendered an important decision upon the constitutionality of laws authorizing the seizure of the books and papers of persons who are suspected of having committed frauds upon the revenue. The case is stated by the New York Herald as follows: "Three warrants issued by Judge BLATCHFORD in the United States District Court on the 14th of June, 1873, the 16th of June, 1873, and July 30, 1873, respectively. The books and papers of Platt & Boyd, glass importers of this city, were seized by custom-house officers on the allegation that Messrs. Platt & Boyd had committed fraud on the revenue by the undervaluation of goods. The defendants filed a petition praying for the restoration of their books and papers, and claimed through their counsel that the seizure in question was wholly illegal and not warranted by the law or the constitution. Full argument having been heard upon this point, the court took time to consider, and yesterday Judge BLATCHFORD redered a long but able opinion sustaining the constitutionality of the law under which the seizure in question was made, but holding that the books and papers must be immediately restored to the petitioners, as the government have had them long enough to examine and make such extracts from them as they desired."

In the course of the opinion, after showing that the constitutionality of laws authorizing the seizure of *goods* by custom-house officials has never been questioned, Judge BLATCHFORD goes on to say: "If imported goods may be searched for and seized because alleged to have been imported or entered in fraud of the revenue, it is difficult to see why books and papers, which relate to the goods in respect to which such fraud is alleged to have been committed, may not be searched for and seized and examined. Of course, what is to be searched for and seized is books and papers, which not only relate to the goods, but will show the fraud. The fourth amendment to the constitution is directed against a search for and seizure of 'effects' as fully as it is against a search for and seizure of 'papers,' and is no more fully directed against a search for and seizure of 'papers' than it is against a search for and seizure of 'effects.' Under the fifth amendment merchandise is as fully 'property' as books and pa-

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pers are, and books and papers are no more fully 'property' than merchandise is. Books and papers appertaining to and evidencing frauds on the revenue, in respect to imported goods, can not be said to be unreasonably searched for and seized, in the abstract, if a search for and a seizure of the goods themselves be not, in the abstract, unreasonable; and if a seizure of goods imported in fraud of the revenue does not, in the abstract, deprive a person of the property without due process of law, a seizure of books and papers appertaining to and evidencing such fraud can not be said, in the abstract, to deprive a person without due process of law of his property in the books and papers."

But while he affirms the validity of the laws themselves, he indicates distinctly that the power conferred by them may be exercised oppressively, in a manner not warranted by the statutes themselves and in derogation of the immunities secured by the constitution. He says:

"A search and seizure may be unreasonably conducted in execution under the statute authorizing it, and thus the right of security sought to be protected by the fourth amendment may be violated, and, under what is due process of law as authorized by the statute, a person may be deprived of his property when the statute did not contemplate or authorize such deprivation, and thus the fifth amendment may be violated. But these things are not the fault of the statute as it stands. They grow out of the fact that the statute is administered in the particular case in a manner not authorized by the statute. They are violative alike of the statute and of the constitution, but they have no effect to make the statute unconstitutional."

The Herald summarizes the concluding portions of the opinion as follows:

"After adverting at considerable length to the statutes, the decision goes on to maintain that the various statutes referred to have been held to be constitutional; that no good objection has been raised against the warrants issued for the seizure of the books and papers of the petitioners, and the judge refuses to grant the motion to vacate the warrants. Then, turning to the question whether the books and papers have been retained long enough, the judge decides that it must be assumed that the books and papers have been adequately examined, or if they had not, abundant time has elapsed for examining them for the taking of such copies and extracts as relate to the fraud alleged in the warrants. The judge goes on to show that the law under which this seizure was made—the law of 1867—provides for sending the warrant to the marshal, who was responsible to the court which took the responsibility of issuing the warrant on affidavit properly sworn to, while a previous law on the same subject—the law of 1863—sent the warrant for execution to the collector, who seized the books and held them subject to the order of the solicitor of the treasury. Nothing (adds the judge) is shown on which I can base a satisfactory opinion that any further detention of the books and papers is either proper or necessary. The decision closes by stating that an order directed to the marshal shall be issued, directing him to return the books and papers, and that the petitioners are entitled to receive them immediately."

—ONE of Judge FORD'S instructions in the Humbolt (Iowa) county court was like this: "Sheriff, extinguish the lighted cigars, put out the pipes, hoist the windows and let the wind blow this fog of smoke away, that we may see what we are doing."

Fire Insurance Policies — Waiver of Printed Conditions—Insurance on Family Grocery Store, with Printed Condition against Vending Spirituous Liquors, etc.

THE PEOPLE'S INSURANCE CO. v. WILLIAM KUHN.

Supreme Court of Tennessee, Special November Term, 1873.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK,
" JOHN L. T. SNEED,
" THOMAS J. FREEMAN, } Judges.

1. **Fire Insurance—Contract.**—Both parties to an insurance contract are bound by it, according to its fair, just and reasonable meaning.

2. ——. ——. **Condition of Policy—Waiver.**—Condition sustained, providing that "the use of general terms, or anything less than a distinct, specific agreement, clearly expressed, and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction thereon."

3. ——. ——. ——. ——. In a policy with such a condition, the use of the written words "family groceries," or "meat and family grocery store," is not a waiver of a printed condition prohibiting the use of the premises for "storing, using or vending" spiritous liquors or kerosene oil.

4. ——. ——. ——. **Retailing Liquors.**—A printed condition prohibiting the use of the premises as above stated is violated by retailing liquors and oil on the premises as a business.

5. ——. ——. ——. If in such case it be proved that the insured retailed liquors and oil as a part of the business of keeping a "meat and family grocery store" (though not the principal part of such business), this will avoid the policy unless it contains an especial agreement in writing that such articles may be kept and sold. *Aliter*, if such retailing were only accidental or immaterial.

6. ——. ——. **Proof of Custom.**—Proof in such a case that the retailing of liquors and oil is a usual and customary part of the grocery business, can not avail to change the contract and bind the underwriter.

MCFARLAND, J., delivered the opinion of the court.

This was an action upon an insurance policy against loss by fire, "upon a stock of family groceries and meat store." The plaintiff having recovered, the company appealed in error. This contract contains a large number of conditions and restrictions; as usual, these were contained in a printed form of great length. It has been sometimes remarked by courts that these printed conditions escape the notice of the insured, and sometimes "define away" all or nearly all of the substantial part of the contract itself; and for this reason, in cases where there appears to be a conflict between the printed form and the written parts of the policy, the latter have been held a waiver of the former. But the parties may certainly make their contracts, and by the contract, according to its fair and reasonable meaning, they must be bound. One of the conditions of the policy, being part of the printed form, is as follows: "If during this insurance the above mentioned premises (the premises containing the stock of groceries) shall be used for any trade, business or vocation, or for storing, using or vending therein any of the articles, goods or merchandise denominated hazardous or extra hazardous or specially hazardous in the second class of hazards on the back of this policy * * * except as herein specially agreed to in writing upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, this policy shall cease and be of no effect."

Among the articles so classed on the back of the policy are kerosene or petroleum, liquors, matches, &c., and the business of retailing liquors. These articles were kept by the plaintiff, as the proof shows, and the proof shows that he retailed liquors without a license. By the express provisions of the policy above quoted, to keep these articles avoided the policy, unless the policy contained an especial agreement *in writing* that these articles might be kept. The question is, does the policy contain such agreement in writing? The circuit judge held, in substance, that that part of

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the policy as follows, "On his stock of family groceries contained in the two-story framed building occupied below by assured as a meat and family grocery store," &c., being in writing, would amount to an express consent that these articles might be kept, provided these articles are usually kept in a family grocery store; that the use of these general words, "meat and family grocery store," would be an express consent that the insured might keep all articles usually kept in such a store.

Upon this question there is a conflict in the authorities. The Massachusetts cases are by the counsel admitted to be against this proposition. Flanders, in his work on Fire Insurance, cites numerous cases sustaining the ruling of the circuit judge. See p. 309. The question of doubt is whether the general terms used, "family grocery store or meat store," &c., shall be held to amount to the express written consent required.

But this policy contains a provision evidently intended to meet this question, and one that does not seem to have been contained in the cases upon which the text in Flanders is founded. That provision is as follows: "The use of *general terms*, or anything less than a distinct, specific agreement clearly expressed and endorsed on this policy shall not be construed as a waiver of any printed or written condition or restriction thereon." This, we think, leaves but little room for argument, and we are constrained to hold under this that the general terms in the beginning of the policy, "family groceries," or "meat and family grocery store," are not a waiver of the restrictions against keeping kerosene, liquors, &c., marked "extra hazardous."

The cases referred to in 22 New York, 441; 17 New York, 194, and 6 Wendell, 623, have been examined, but do not meet this objection. The cases where the written portions of the contract have been held to overrule the printed portions are only where they are in conflict and can not be reconciled. Flanders on Insurance, pp. 72, 212, 216.

The circuit judge held that the company should have known what is usually kept in a family grocery store, and if they did not intend the general terms above quoted to be a permission to keep all such articles, then they should have so stated in unmistakable terms, and this they had not done. As we have said, we think this an erroneous construction of the contract. The charge also uses language which was calculated to mislead the jury, by assuming that the prohibited articles mentioned were usually kept in a family grocery store. This, in any event, was a matter of proof before the jury.

Again, in the manner before stated, the policy contains a restriction against the building being used as a retail liquor store. The judge instructed the jury that if the insured converted his store into a tippling shop as his *principal business*, this would avoid the policy; but if he occupied the house as a meat and grocery store as his principal branches of business, and that as incidental to these he occasionally or frequently sold whisky by the glass or otherwise, but not as his principal business, this would not avoid the policy. We think this rather a latitudinous construction of the contract. We would not hold the policy avoided by some immaterial or accidental violation of this restriction. The law has regard for a substantial compliance with contracts.

But as we have construed this contract, it is a prohibition against the use of the building as a retail liquor store. According to the construction given, the house might have been used for retailing liquors, as the proof indicates that it was, provided Kuhn made his other business in the meat and family grocery line so far excel in amount as to make the latter his principal business. We think this language too strong, and that it is erroneous. The charge should have been that the house could not be used for the trade, business or vocation of retailing liquors.

We suppose insurance companies are compelled, in order to guard against frauds, to resort to these carefully-prepared conditions and restrictions. At all events, they are entitled to stand upon their contract, according to its fair and just interpretation.

For the errors indicated, the judgment is reversed and a new trial awarded.

REVERSED.

NOTE.—This case bids fair to become a leading one upon the branch of insurance law therein treated, in view of the new features of the policy therein exhibited.

I. The policy in this case is different from those construed in previous cases, not only by the condition relating to "the use of general terms," &c., but also by the provision against using the premises "for *storing, using or vending*" any of the prohibited articles. This distinction appears to have escaped the attention of the able and careful judge who prepared the opinion. In all of the cases cited by him, viz: 6 Wend. 17 N. Y., and 22 N. Y., the condition was against "storing" or "keeping" only, and this feature distinguished all that large number of cases based on 6 Wend. as a leading case, which hold that such a condition does not by implication prohibit vending. All this line of adjudication may now become obsolete should underwriters generally amend their policies by inserting this revised condition expressly prohibiting "vending." Many insurers are already doing this. It does not appear, however, that a policy thus worded has ever before received judicial construction. In the late cases in 12 Wall. 404 (1870), 34 Mo. 227 (1870), and 47 N. Y. 597 (1872), the condition, like that in older cases, applied to "storing" alone. Probably the principal case is the first one reported in which the policy contained this express prohibition against "vending." This fact alone plainly distinguishes the case from preceding ones, and, when considered in connection with the proof in the case as to the habitual sale of liquors, furnishes additional and sufficient reasons for sustaining the condition under the same principles of law that govern the older cases.

II. A provision against "storing" liquors is not violated by keeping them for retail and retailing them in a family grocery (Equitable Ins. Co. v. Langdon, 6 Wend. 623), nor by keeping them for the use of a family and boarders in a boarding-house (Rafferty v. Ins. Co. 3 Harr. N. J. 80); even when such retailing be unlawful, provided the fire be not occasioned by such unlawful act. Ib. To the same effect as to other articles are Phenix Ins. Co. v. Taylor, 5 Minn. 492; Mayor v. Hamilton Ins. Co., 10 Bosworth, 537; Moore v. Protection Ins. Co., 29 Me. 97, and many cases cited in May on Insurance, 261, 262; and 1 Benn. Ins. Cases, 353.

This ruling is in view of the fact that the storage in these cases is not a principal business, in truth not strictly a business at all, but is a mere incident to the usual and ordinary business of selling or retailing, which is not prohibited by the terms of the policy in any of the said cases. But when, as in the present case, "vending" as well as "storing" is under an express prohibition, it is correctly characterized as erroneous to assume at *nisi prius* that consent to keep a meat and family grocery store could sanction the habitual sale of liquors, even if that were shown by proof to be common in such a store. Such an assumption would amount to a denial to underwriters of the right to make their own contracts.

It is said, on the authority of Mr. Flanders, that there are "numerous cases sustaining the ruling of the circuit judge" on this point, and that there is conflict in the authorities, the Massachusetts cases (inferentially) being alone and in the minority. On examination of the cases cited by the usually careful Mr. Flanders on the point of the repugnancy between the written and printed portions of the contract (p. 311), shows that the conflict is not so extensive as might be supposed, and that many of the cases cited by him as sustaining written endorsements as against printed conditions, do not go to that length. The cases in 6 Wend., 3 Harr., 19 N. Y., 22 N. Y. and 29 Me., expressly pretermit the question of repugnancy, and hold that storing of the articles named, which was merely incidental to the recognized business, was not prohibited. We repeat that the express prohibition of "vending" in the present case practically isolates it from all prior cases. It is, as to its facts, and the application to them of the law, a case *sui generis*.

III. The instruction to the jury that "if the insured converted his store into a tippling-shop as his principal business, this would avoid the policy," but if this were only incidental to his main business of selling meats and groceries, it would be otherwise, furnishes not only a "latitudinous construction of the contract," but also a confused and unstable standard of construction. Where several different principles of law may enter into and affect the determination of the same case, if they be not distinguished in their application, confusion results. It will be seen that the circuit judge assumed in this instruction that the policy contained a prohibition, to some degree at least, of the vending of liquors. It is true that an occasional or incidental storage or use of prohibited articles does not avoid the policy when its conditions are those before referred to; (May on Ins. § 241; Dobson v. Sotheby, 1 Mood. & M. 90; Hynds v. Schenectady Ins. Co., 11 N. Y. 554; Gates v. Madison Co. Ins. Co., 5 N. Y. 479, Leggett v. Ætna Ins. Co., 10 Rich. Law (S. C.), 202; Vogel v. People's

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Ins. Co., 9 Gray, 23; Phenix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9); because the law has regard for a substantial, not a merely technical compliance with insurance contracts. Phœnix Ins. Co. v. Slaughter, 12 Wall. 404; Turley v. N. A. Ins. Co., 25 Wend. 374; May on Ins. § 173, 174; 11 N. Y. 554; 10 Rich. Law, 202; 3 Harr. (N. J.) 480; 53 Penn. 485; So. Life Ins. Co. v. Booker, Tennessee, April, 1872.

But it is also true, as a distinct principle, that where the policy *recognizes* the conducting on the premises of any certain business, this carries with it, by necessary implication which the law so often indulges, the right to sell, keep or use any article which is a *necessary* appurtenant to the conduct of that business; (May on Ins. § 239; Harper v. Albany Ins. Co., 17 N. Y. 194; Bryant v. Poughkeepsie Ins. Co., 17 N. Y. 200; Harper v. N. Y. Ins. Co., 22 N. Y. 441; Stanley v Western Ins. Co., 3 Law (Exchq.) R. 71; Delonguemare v. Tradesmen's Ins. Co., 2 Hall (N. J.) 588); and also to some extent all such articles as are usually and customarily an incident of such business. Eq. Ins. Co. v. Langdon, 6 Wend. 623; Brown v. Kings County Ins. Co., 31 How. (N. Y.) 508; Citizens' Ins. Co. v. McLaughlin, 53 Penn. 485; People's Ins. Co. v. Spencer, 53 Penn. 353; Pindar v. Kings County Ins. Co., 36 N. Y. 648. These points often present questions for the jury. Franklin Ins. Co. v. Updegraff, 7 Wright (Pa.) 350; 17 N. Y. 194; 22 N. Y. 442; 36 N. Y. 648.

In the present case the policy contains a clear restriction upon the vending of liquors, and its several clauses, taken together, give authority to the insured to carry on the business of a meat and grocery store, *except* the retailing of liquors. When the court has construed this contract, as is its duty, there can be no question to submit to the jury concerning the custom of grocers to retail liquors. The only proper question for the jury would be the fact of retailing liquors in the case at bar. The only question for the court would seem to be the right and capacity of the parties to contract.

IV. The case recognizes the right of parties to make their own contracts of insurance, by sustaining the new condition here brought into practice concerning "the use of general terms," etc. Possibly such a condition has never before been considered by the courts, as there are no reported cases in which it figures. But it is probable that other courts will in like manner sustain it. Parties have, as a rule, been held bound by the conditions of their insurance contracts, except in cases of fraud, deceit, mistake or accident. The courts have often criticised these conditions unsparingly. In Pennsylvania, WOODWARD, Ch. J., described them as "four times as voluminous as the policy itself, and which, if strictly construed, take back nearly all the policy grants, and leave the insured about as empty-handed as he began." Columbia Ins. Co. v. Cooper, 14 Wright, 340. And in Massachusetts, where underwriters have, as a rule, had the most success in the courts, it was said that "many of these companies have encumbered their policies with so many conditions that they can be seldom held responsible for losses except at their own option." Abbott v. Shawmut Ins. Co., 3 Allen, 214. Such language seems extra-judicial, savoring more of passion than of reason. In contrast with it is the calm dignity with which the Supreme Court of the United States, in 12 Wall. 404, criticised the employment of small type in printing conditions, and disregarded the construction contended for by the insurer, as resting in unfairness and bad faith. The Tennessee court has looked at the subject with the eyes of Lord KENYON, who said in 1796: "Insurance companies are liable to great frauds and impositions; common prudence, therefore, suggests to them the propriety of taking all possible care to protect themselves from frauds when they make these contracts." Worsley v. Wood, 6 Term R. 710. The true rule is the Tennssee rule, to let the parties "stand upon their contract, according to its fair and just interpretation." "Every man's inclination to the side of the plaintiff must be governed by the rules of law and justice," said Lord MANSFIELD, in 1780. Langdale v. Mason, 1 Benn. Cas. 17. If these salutary principles be preserved, the honor and impartiality of the law will remain unsullied. As a general rule, it will doubtless be found that those underwriters, if any, who practice fraud and oppression in their contracts, will be shunned by applicants for insurance, particularly if the latter are by the courts held to a strict compliance with their contracts It is the safer plan to let all such evils correct themselves, as is done by the courts in so many other instances.

V. It is a matter for regret that so many courts have decided questions arising in insurance cases in haste, without the application of the principles of law most properly applicable, and without the deliberation manifest in the opinion of the Tennessee court. The same tribunal has heretofore said, in an opinion prepared by the same learned judge: "It is important that these questions be determined upon principles alike fair and just to the parties upon both sides." Southern Life Ins. Co. v. Booker, April, 1872. This is an echo of the warning given at an early day by Lord ELDON, "It is dangerous to decide these questions of insurance without being sure what may be the effect of the decision, and the nature of the doctrine which may result from it." Newcastle Ins. Co., v. Macmorran, 3 Dow, 255. It would seem that more care on the part of the courts might have resulted in less diversity of decisions, and saved the student of insurance law from much wandering through the mazes of the contradictory authorities that now embarrass his researches among our thousands of insurance cases.

J. O. P.

Railway-Aid Bonds—Charter Privilege of Receiving Subscriptions—Effect of Railway Consolidation and Change of Name.

JOHN T. THOMAS v. COUNTY OF SCOTLAND, AND JOHN T. THOMAS v. COUNTY OF SCHUYLER.

United States Circuit Court, Eastern District of Mo., March Term, 1874.

Hon. JOHN F. DILLON, *Circuit Judge.*
Hon. SAMUEL TREAT, *District Judge.*

1. **Municipal Bonds—State Decisions, how far Binding on the Federal Courts.**—Although the decisions of the supreme court of a State expounding the effect of the State constitution and laws upon securities issued by a municipal corporation are not necessarily conclusive upon the federal courts, yet they will be followed, unless cogent reasons appear to the contrary.

2. **Railway-Aid Bonds—Charter Privilege of Receiving Subscriptions, a Contract**—The decisions of the Supreme Court of Missouri in State *ex rel.*, etc., v. Sullivan County, 51 Mo. 522; Smith v. Clark County, 54 Mo. 58; 1 CENT. LAW JOUR. p. 5, and State v. Green County, January Term, 1874, which hold that a provision in the charter of a railway company granted by act of the legislature, authorizing and empowering counties through which the road shall pass to subscribe for its stock and issue its bonds in payment of the same, is a "privilege" of the railway company, which is not taken away by a subsequent constitutional ordinance, are approved and followed.

2. ——. **Effect of Railway Consolidation—Case in Judgment.**—The charter of the Alexandria and Bloomfield Railroad Company gave the county courts of the counties through which the road should pass power to subscribe to its stock and issue their bonds in payment of the same, *without a vote of the people*. Subsequently the company was empowered to change its name and extend its line, and its name was accordingly changed. Subsequently authority was given to this company to consolidate with an Iowa company whose road intersected it on the boundary line between the two States, and the consolidation was accordingly effected, and the consolidated company took a new name. After this consolidation the defendant counties issued their bonds to the consolidated company by name, reciting on the face of the bonds the provision in the charter of the original Alexandria and Bloomfield Railroad Company as their authority to do so, and also reciting on the face of the bonds the subsequent change of name of that company, and the final consolidation and change of name. In a suit upon coupons detached from these bonds, *it is held*, on the authority of Nugent v. Putnam County (1 CENT. LAW JOUR. 153), that the authority to issue the bonds was complete, and that the defendants are liable.

Case Criticised.—The case of —— v. Bates County, U. S. Circuit Court, Western District of Missouri, November Term, 1873, distinguished from the present case.

TREAT, J.—These are suits on coupons attached to bonds issued by the respective counties to pay for subscriptions to stock in a consolidated railroad company, and are in all essential particulars dependent on the same legal questions.

The bond in the Scotland county case reads as follows: "United States of America. $1,000. Eight per cent. Railroad Bond, County of Scotland. Twenty-five years.

"Know all men by these presents: That the County of Scotland, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by consolidation of the Alexandria and Nebraska City Railroad Company, formerly Alexandria and Bloomfield Railroad Company, of the State of Missouri, and the Iowa Southern Railway Company of the State of Iowa, in the sum of one thousand dollars, which sum the said county hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company, New York, on the 31st day of December, A. D. 1895, together with interest thereon from the 31st day of December, 1870, at the rate of eight per cent. per annum, which interest shall be payable annually in the city of New York, on the 31st day of December in each year as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the county court of said Scotland County for subscription to the stock of the Missouri, Iowa

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and Nebraska Railway Company, as authorized by an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company,' approved February 9, 1857.

"In testimony whereof," &c.

Under the various decisions of the Supreme Court of Missouri and of the United States, a *bona fide* holder of such a bond, or of its coupons annexed, has a right to recover thereon at maturity, unless there was an absence of authority on the part of the county court to issue them, and said county is estopped by the recitals from disputing that all measures antecedent to the issue were properly and lawfully adopted and pursued when the recitals so state.

When these cases were argued at the last term of this court, several grave questions as to the authority of the respective counties to subscribe to the stock of the consolidated company, and issue bonds in payment of such subscriptions were fully discussed, leaving the court in serious doubt as to the liability of said counties. Since that term, several decisions have been made by the Missouri and United States Supreme Courts upon the disputed points, and a new argument has been had in the light of those new decisions.

What our views might have been on the many propositions arising under the state constitution of Missouri and the state statutes, were they before us *de novo*, is unimportant; for while in cases like the present the decisions of the State Supreme Court would not be conclusive in United States courts; yet they will be, and ought to be, followed, unless very cogent reasons to the contrary appear. The more especially should the United States courts so act, when under such state decisions negotiable instruments of the kind sued on have, on the faith thereof, been received in the money markets of the world and passed freely from hand to hand. In the several cases of Iowa municipal and county bonds the United States Supreme Court has not only laid down that rule, even disregarding adverse state decisions subsequently made, but has also caused it to be rigorously enforced.

The Alexandria and Bloomfield Railroad Company was chartered in 1857, and in its charter the privilege was given to the county court of the counties defendant to subscribe to its stock and issue bonds in payment thereof. Subsequently, that railroad company was authorized to change its corporate name and extend its line. The name was duly changed accordingly, as recited in the bonds.

The Missouri Supreme Court has settled the question that the power given to the county courts by the charter of 1857 for the Alexandria and Bloomfield Railroad Company remained unaffected by the new state constitution; for that power was a "privilege" of the corporation, not impaired or taken from it. Hence, under the several state decisions, especially in the cases against Sullivan, Clark and Green counties, [State *ex rel.*, etc., v. Sullivan County, 51 Mo. 522; Smith & Hall *v.* Clark County, 1 CENT. LAW JOUR., 5; S. C., 54 Mo., 58; State *v.* Green County, Supreme Court of Missouri, January Term, 1874], it must be considered settled that the county courts of Scotland and Schuyler counties respectively had the power to subscribe, without a previous vote of the people, to the stock of the Alexandria and Bloomfield Railroad Company under its changed name of Alexandria and Nebraska City Railroad Company. Indeed, the case against Clark county was under said charter, and is express on that point.

This case is clearly distinguishable from that against Bates county in the United States Circuit Court for the Western District of Missouri. In that case the previous vote of the people was essential to the authority to subscribe, and that vote was for a subscription to a specified company. The reasons on which that decision is based are fully stated in the published opinion rendered, and it is unnecessary to repeat them. But in the cases now before this court no such proposition is involved, for the power was granted to these county courts to subscribe and issue bonds of their own motion. These courts could of their own motion subscribe to the stock of the Alexandria and Bloomfield Railroad Company, or of the same company under its new name of the Alexandria and Nebraska City Railroad Company, without a previous vote by the people. But the subscription was not made in terms to that company.

Under the act of March 2, 1869, authority was given for the *consolidation* of that company with any other railroad company in Iowa whose track met at the same point on the boundary line of the respective states. Pursuant thereto the consolidation was had, and the consolidated companies were known as the Missouri, Iowa and Nebraska Railway Company—the company named in the bonds issued. As reference was fully made to the changed name of the Alexandria and Bloomfield Railroad Company, and to said consolidation, the bondholder was bound, in the light of the law as expounded by the United States Supreme Court, to look only to the authority of these county courts to make subscriptions to said constituent and consolidated company. The decision in the case against Green county seems to have decided that point; but whether that be so or not, the case of Nugent against Putnam County, 1 CENT. LAW JOUR. 153, appears conclusive. The previous cases of Clearwater v. Meredith, and of Marsh v. Fulton County, were supposed to hold the opposite doctrine. True, in the case of Nugent v. Putnam County the subscription was made to one of the constituent companies and accepted before consolidation, and the bonds were delivered subsequently to the consolidated company. But when a subscription is made to a specified company which has at the time power to consolidate with another company, that subscription is made in full view of the fact that the consolidation may occur without invalidating the subscription. In the Bates county case the subscription was not made as the vote of the people required. The stockholders of a constituent company may by vote decide whether the consolidation shall be made, and even if a non-assenting stockholder could not be bound by the acts of the majority, he who subscribed to the stock of the consolidated company, after consolidation, could set up no such defense. In Tomlinson v. Branch, and other cases cited, it is clearly established that the new or consolidated company has for its respective constituent parts all the powers and privileges and exemptions pertaining to the constituents previously. Therefore, if Scotland and Schuyler counties had subscribed to the Alexandria and Nebraska City Railroad Company, and, as stockholders in said company, had voted for the consolidation, they would be in exactly the same position as they are now, viz: stockholders in the consolidated company by their own consent.

It follows, therefore, that if, when the subscription was to a constituent road, and the delivery of bonds to the road consolidated afterwards, the bonds are obligatory, the subscription and delivery of bonds, therefore, to the consolidated road are equally obligatory. The main consideration is the authority to issue said bonds to the consolidated company. That authority does not depend on the fact of previous subscription to a constituent road subsequently consolidated as authorized by law at the time the subscription was made, which subscription is by operation of law carried over to the consolidated road, but on the fact that the court's authority to issue the bonds was complete, as it had the authority to make the counties stockholders in the consolidated road and issue its bonds in payment of its subscriptions.

Such we understand to be the doctrine established by the United States Supreme Court in the recent case of Nugent v. Putnam County, in accordance with which the demurrers in these cases must be overruled.

DILLON, J., concurs.

DEMURRER OVERRULED.

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Municipal Subscriptions to Railroads—Mandamus to Compel the Issuance of the Bonds.

DENVER & RIO GRANDE RAILROAD COMPANY v. COMMISSIONERS OF PUEBLO COUNTY.

Supreme Court of Colorado, Pueblo, April 2, 1874.

Hon. MOSES HALLETT, Chief Justice.
" JAMES B. BELFORD, } Justices.
" EBENEZER T. WELLS, }

1. **Railway-aid Bonds—Mandamus to County Officers to Compel Issuance after Election.**—Although an election may have been lawfully held pursuant to a petition of some of the citizens of a county, upon the question of a county subscription in aid of a projected railway, and although such election may have resulted in favor of such subscription, yet this does not create a contract between the county and the railway company such as will entitle them to a mandamus to compel the county commissioners to issue the bonds in exchange for the certificates of stock. The proposition not having been submitted to vote on petition of the company, the transaction was one purely between the people and their agents, the company being in no sense a party or privy thereto.

BELFORD, J.—From a careful examination of the act authorizing subscriptions to be made to aid in the construction of railroads, it is apparent that the body clothed with the power of contracting is the board of commissioners, and it is equally clear that the exercise of this power is made dependent on the approval of the people, expressed at an election called for that purpose.

In this case it is evident, from the form of the proposition submitted to the voters, as from other things in the record, that no stock had been subscribed prior to the election, but that the purpose of the election was to ascertain whether the popular will would authorize and sanction such a subscription. The people can make no contract binding on the county. They can approve or disapprove a contract made by the board; beyond this they can not go. It is clear, also, that to maintain this action the complainants must have a valid, legal right against the county, springing out of a contract made in a way known to and approved by the law.

To constitute a contract there must not only be parties competent to agree, but also mutuality of consideration and obligation. Both must be bound or neither can be held. The election proceeds upon the petition of the citizens. The railroad company is not a party in this preliminary step. The election is not and can not be ordered at their request. They may submit their proposals to the board, and through it to the people; but the statute neither empowers the company to contract with the people, nor does it authorize the people, in their preliminary capacity, to contract with the corporation. This power is vested solely in their representatives, the commissioners, and to make it effectual they must pursue the strict letter of the law granting it.

The most that can be said to the action of the board in this case is, that at an election they submitted certain proposals—by whom made does not clearly appear—to the consideration of the voters, and that they approved them. This is not enough, for as we have seen, the people in their primary capacity are not empowered to contract. Nor can the commissioners make a contract that will bind the county until the people, through the ballot-box, tell them to do so. The action of both in their appropriate ways must be had before the negotiations can be consummated. "Until the county has subscribed," says the Supreme Court of Illinois, "there is no privity between the road and the county." It is the contract of subscription which compels the subscriber for stock to pay his money, and the company to issue to him shares of their stock. When the vote was taken and resulted in favor of subscription, it only amounted to a delegation of power to the commissioners to make the contract of subscription.

The company was no party in this vote, and has no more right to insist upon the execution of this power thus delegated, than it would have in case an individual were to authorize an agent to subscribe for stock in the road, and who should refuse to exercise the power of his principal. P. & O. R. R. Co. v. Tazewell County, 22 Ills. 156.

If we were to concede the power of the people to make a contract by a vote to take stock, still their vote could not amount to a contract till the company, through its proper officers, also agreed to issue the stock. The record fails to disclose any such contract in behalf of the corporation.

The recitals in this writ are simply to the effect that the Denver and Rio Grande Railroad Company had constructed its railway to Colorado Springs, and contemplate extending it thence to the coal fields of Fremont county by the most advantageous route, and that the citizens of Pueblo county, desiring such extension via the town of Pueblo, made their petition, signed according to law, praying the board of county commissioners of Pueblo county to order an election for voting to subscribe $50,000 in this behalf, and to pay the same in bonds of the county.

That pursuant to this petition a special election was ordered, the notice reciting the proposition upon which said subscription was to be made. There is nothing in the record to show that the propositions voted on were submitted by the company, or that they had any knowledge of the same. The connection of the corporation with the transactions only became apparent when through their attorneys they appear before the board and demand the bonds of the county. Clearly, then, according to the recitals of the writ, there is nothing that would indicate the existence of an obligation on the part of the company.

Had the commissioners, on behalf of the county, brought suit to compel the issue and delivery of stock, the company could well have replied, under the facts set forth in this record, "We never contracted to deliver any. The election was a movement between the people and the commissioners; we made no propositions. The record fails to disclose any agreement, and hence there is nothing on which to predicate a claim against us." And taking the facts set forth, no sufficient rejoinder could have been made by the board. It is insisted, however, that when the proposals were approved by the people it then became the duty of the board to subscribe. As stated above, it does not appear that these propositions were submitted by the company. If they were not, then the transaction was purely one between the people and their agents, the company being in no sense a party or privy thereto. Under a statute whose language is identical with that of our own, it was held that the vote of the people could create no obligation on the part of the county or railroad company. Mr. Justice Nelson, in answering the argument "that the duty of the board to issue stock after the election was imperative," said "that a subscription was necessary to create a contract binding upon the county, on one side to take the stock and pay in the bonds, and upon the other to transfer the stock and receive the bonds for the same. Until the subscription is made the contract is unexecuted and obligatory upon neither." Aspinwall *et als.* v. Davies County, 22 How. 364; Commissioners of Crawford County v. The L. N. A., etc., R R. Co., 39 Ind. 192; Union Pacific R. R, etc., v. Davies County, 6 Kansas, 256. In the absence of a contract, we see no obligation resting on the county which the complainants can enforce. It is very questionable whether the proceedings were valid in any sense. The order for the election was made at a special meeting, and there is nothing in the record to show that the meeting was appointed at a regular session of the board.

We are of the opinion that the court committed no error in sustaining the demurrer and refusing the writ.

JUDGMENT AFFIRMED.

Notes and Queries.

A correspondent asks whether the new rule (with regard to the taking of depositions) established in the federal court at St. Louis, and published in this journal, *ante*, p. 158, is a rule of United States circuit as well as of the district court. We are informed by Judge Treat that it applies to both the circuit and the district courts.

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The Reed Murder Trial—Circumstantial Evidence—Admirable Charge of Chief Justice Appleton, of Maine.

Recently Elridge W. Reed was tried before Chief Justice APPLETON for the murder of John Ray. The evidence showed that on the afternoon of the 20th September, 1870, Ray, a quiet and peaceable man, in full health, returned home from hunting, with his gun; that about six o'clock in the afternoon, after eating his supper and being informed by his wife that his cow was missing, he left to go in search of his cow, taking, as his daughter says, the road toward Reed's. From that search he never returned alive.

On Wednesday, the 28th September following, his body was found in a hole on the island, covered with rotten wood and brush. Upon removing the wood and brush, it was found that he had been cruelly and brutally beaten to death; a wound on the left temple so severe that the left eye protruded from its socket, two-thirds of the ball out of the head; the neck dislocated; evidence of blows on the top of the head; a bunch as big as a hen's egg; one behind the ear an inch and a half long; blows on the back between the shoulders as big as a saucer; black and blue spots on the left side and on the hip—evidence of terrible and fearful violence inflicted by some one upon the body of the deceased.

The evidence to implicate the defendant was largely circumstantial. In the course of his admirable charge to the jury, the learned chief justice, who has given much attention to criminal evidence, made the following observations upon the necessity, nature, and evidential force of circumstantial testimony, which, though not new in principle, are still interesting from the clear, forcible, and even eloquent manner in which they were presented to the jury. He said:

"Evidence is ordinarily divided into two kinds, direct and circumstantial—direct when the witness testifies to the principal fact in issue—as when a murder is committed and the witness testifies that he saw the blow inflicted, which resulted in death, and the person by whom it was so inflicted. In such a case the truth of the witness testifying is the main subject of enquiry.

In circumstantial testimony there is the fact proving and the fact proved inferentially from the fact given in testimony. The circumstance must be proved to the satisfaction of the jury, and it is for them to draw the inference from the fact proved. To illustrate: A snow storm; the new-fallen snow covers the earth; a witness testifies to human footprints; you infer some one has passed. He gives you the direction of the toe and the heel; you infer the direction which the person was moving. As his steps are watched, it is proved that there is a dot or hole in the snow; you infer he had a stick or cane in his hands. It is summer; the rain has fallen; the ground is muddy; a witness testifies to seeing the impression of the heel and the toes in the mud. If you believe the witness, do you doubt that the person whose feet made the impression was bare-footed? Yet this is circumstantial evidence.

"A man testifies to seeing a violent blow given by a club and the falling dead of the person struck. You infer the man was killed by the blow, from the fact that a witness so testified, for you did not see him; that is, you infer one fact from another; the killing from the sworn testimony—an inference properly drawn if the testimony be true, but it is still an inference. It is of the same kind as any other inference of one fact from another—the fact of testimony, the assumption of the truth of testimony, and the inference from the fact testified to its truth. In short, strictly speaking, all testimony is circumstantial or indirect, except what one sees or hears.

"You see a man discharge a loaded gun; you see the flash; you see a man fall dead; you find the bullet in the body; you saw not the ball in its passage through the air from the pistol to the body; you did not see it leave the pistol or enter the body, but from the facts seen you infer that it did. What is this but circumstantial evidence?

"The probative force of circumstantial evidence depends upon the closeness of connection between the fact inferred and the fact from which the inference is drawn. The more numerous the circumstances—the facts tending to establish a given fact—the greater this probative force. One circumstance may be of slight weight; another, tending to the same result, increases, by its consistency with the first, the probability of the inference to be drawn from their existence and co-existence. Another is added, and another, all pointing in the same direction, giving added and increased strength to the inference, as each strand gives strength to the cable of which it forms a component part. Men talk of a chain of facts. The comparison is inapt. The chain is weakened by the increasing number of its links, until it breaks by its own weight. Not so with circumstantial evidence. The rope or cable gains increased strength by each added strand. The failure of proof as to one circumstance is but one strand from the cable. The cable may still be firm and strong, holding the ship securely at anchor, though tossed upon the waves by the fierce and stormy winds.

"The strength of the conclusion is not to be ascertained by the addition of the several probabilities created by the several circumstances. Their existence proved, and their concurrence increases in a much higher degree the truth of the conclusion, till that may become irresistible from the concurrence of numerous, distinct, co-existent and corroborating facts, all tending in the same direction to one and the same result.

"Nor is it necessary that each and every circumstance should be proved beyond a reasonable doubt. Some facts may be proved with more, some with less assurance of certainty. Such is the invariable result. Some facts are proved more satisfactorily than others. It is enough that you give to each fact its just and true weight. Then, after weighing and examining each and all the facts, exculpative and inculpative, if you are satisfied beyond a reasonable doubt of the guilt of the prisoner, it will be your bounden duty to say so, though some of the alleged facts may be proved with a less degree of certainty than others.

"It is in vain that we attempt to detect or punish crime unless we resort to circumstantial evidence. Crime shuns the light of day. It seeks darkness. It courts secrecy. It endeavors to escape detection. The assassin moves stealthily upon his unsuspicious or sleeping victim. He calls no witness to see him strike the fatal blow. He attempts to obliterate all traces of crime. He seeks to cover up his tracks. Does the thief take a witness to see him steal—the incendiary to see him apply the torch? You must resort to circumstantial evidence or crime must remain unpunished. If you wait for an eye-witness, if you expect a felon to call one to witness his criminality, you at once grant impunity to crime.

"There may have been cases in which the innocent have been convicted. If this be so, it is a reason for caution; for giving to each circumstance its just and appropriate weight, not for disregarding such proof, or neglecting to give it proper consideration. But if men have been convicted erroneously on circumstantial evidence, so have they on direct testimony; but is that a reason for refusing to act on such testimony? Is it any more or better reason for refusing to act on circumstantial evidence? Assuredly not.

"The cases are few and far between in which erroneous verdicts were found, and they occurred under entirely different conditions from those of our own time. Formerly the prisoner was not permitted to call witnesses. He was not allowed to employ counsel. He could not be a witness in his own case. Now the government summons his witnesses, pays his counsel, and permits him to be a witness to explain, if he can, every adverse fact. But the cases of erroneous verdicts are of rare occurrence. The wonder is that they were so few. Did you gentlemen ever know or hear of one in this state? The stories told of such instances may or may not be true, but of their truth you have no proof. They are

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resorted to for the purpose of imposing upon timid jurymen the belief that there should be no safe conviction upon circumstantial evidence; that there is infinite danger to innocence if there is such conviction. They have nothing to do with the case under consideration. This you are to decide upon the evidence before you, upon nothing else.

"Circumstantial evidence is legal evidence. When that satisfies you beyond reasonable doubt, you are equally bound to act upon it as if it were the most direct. The possibility of error exists alike, whether the evidence be direct or circumstantial. But because you possibly may err, do you refuse to act? Because your wheat may possibly be blighted, do you refuse to sow? Until it pleases Providence to give us means of knowledge beyond our present faculties we must act upon this kind of evidence, or grant almost universal impunity to crime.

"When death occurs, it may be accidental or it may be by suicide. How do you know that John Ray's death was not the result of accident, or was not self-inflicted? No witness testifies to having been present when that sad affair occurred. Is not the answer obvious? The protruded eye, the blows on the back, on the head, on the sides, the secret and unknown burial place, the various circumstances detailed, do they not satisfy beyond a shadow of doubt that the death was not accidental, was not suicidal? Yet what is this but circumstantial? Can not you with almost absolute certainty, a certainty which no reasoning however acute, no eloquence however thrilling, can disturb, infer from the facts disclosed that the death of John Ray was by the hand of violence and of crime—for if no crime, why conceal or attempt to conceal the dead body? Could the dead man bury himself?

"If you can so infer, then you will remember that circumstantial evidence is not merely legal evidence, but that species of evidence upon which you can rest with an assured confidence of the truth of your conclusions.

"All the acts of the prisoner—whatever explains or throws light upon those acts, all the acts of others relative to the crime charged, that came to his knowledge and which may influence him; his loves and hates, his threats, the truth of his statements, the falsehood of his explanations, his looks, his speech, his silence when called upon to speak; everything which tends in any degree to establish the connection between the prisoner and the crime with which he is charged; every circumstance preceding, accompanying or following the act, may become articles of circumstantial evidence, and of no slight importance as proving or disproving guilt."

The Death of a Bankrupt no Bar to the Continuance of Bankruptcy Proceedings--Important Decision by Judge Blatchford.

Yesterday in the United States District Court Judge Blatchford rendered his decision in the case of E. C. Litchfield, an involuntary bankrupt. On the 3d of November, 1873, the order of adjudication was made, and on the 27th of that month the bankrupt died. The warrant, based upon this adjudication, was not physically issued until the 27th of December, 1873. To a further continuance of the proceedings objection was made by a creditor. This creditor, through counsel, insisted that the court had no further jurisdiction over the cause by reason of the death of the bankrupt.

The twelfth section of the bankruptcy law has the following language, bearing on a case of this kind:

"If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived."

The decision of Judge Blatchford upholds the point that the court has jurisdiction over a bankruptcy proceeding, even after the death of the bankrupt. The Judge says:

"This provision is found among those which relate to voluntary bankruptcy. Section 11, which relates to voluntary bankruptcy, provides that the filing of a voluntary petition shall be an act of bankruptcy, and the petitioner shall be adjudicated bankrupt, and a warrant shall be forthwith issued. Section 42, which relates to involuntary bankruptcy, provides that the court shall adjudge the debtor to be a bankrupt and shall forthwith issue a warrant, and that the proceedings for the taking possession, assignment and distribution of the property of the debtor shall be similar to those before provided for in the act in regard to voluntary petitions. It is contended that section 12 implies that if the debtor dies before the issuing of the warrant the proceedings can not be continued, and that the warrant is not issued in the meaning of the section or of the act until it is physically issued, or in other words, that when it is physically issued it can not be considered as having been issued before it was physically issued. Section 38 provides that the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf or by a creditor against a debtor, upon which an order shall be issued adjudicating the debtor a bankrupt, shall be deemed and taken to be the commencement of proceedings in bankruptcy under the act. (*In re* Patterson, 1 Benedict, 508.) By section 14 the assignment to the assignee and his title thereunder relate back to the commencement of the proceedings in bankruptcy. In the present case, there having been an adjudication entered before the death of the bankrupt, the title of the assignee relates back to the time the petition was filed, and the title the bankrupt then had to his property is absolutely vested in the assignee, unless the death of the bankrupt has had the effect to prevent the vesting of such title in the assignee. I do not think that the bankrupt died before the issuing of the warrant in the sense of section 12. The warrant is required to be issued forthwith. It is, in judgment of law, issued simultaneously with the entry of the order of adjudication. Whenever it is physically issued it relates back, for the purpose of section 12, to the entry of the order of adjudication. The entry of that order causes the entire proceedings and the title of the assignee to relate back to the filing of the petition, and there is no indication in the act of any intention that the death of the bankrupt, after the entry of that order, shall dissolve all the proceedings if the physical preparation and issuing of the warrant shall happen to be delayed until after such death. Where section 12 speaks of the issuing of the warrant it contemplates its issue in a voluntray case, simultaneously with the entry of an order of adjudication, and the same intent exists in regard to an involuntary case. Section 12 must be read as if the words "issuing of the warrant" were "entering the order of adjudication." There is no difference in the two forms of expression.—*New York Herald.*

A Legal Opinion in Rhyme.

It is said that one of our largest corporations, "in view of the approaching Centennial," has requested his solicitor hereafter to render his opinions on mortgage investments *in verse.* The legal gentleman being of known *poetic temperament* has promptly complied. His first effort was the following:

I have examined with great care
(A sound opinion to prepare)
This mortgage, brief of title and the deeds therewith produced;
And I think beyond all question
Or contrary suggestion,
Good title to the mortgagor, in fee, is well deduced.

I've read the search certificates
With watchful reference to dates,
And find therein no prior lien or charge is interposed.
I'm ready, therefore, to advise
That no good reason doth arise
(With one exception) to prevent the matter being closed.

The single point I would reserve
Most grave attention does deserve,
As clearly coming to the notice of the mortgagee:
There does a valid claim exist,
Tho' not included in the list
Of cases in "the act of eighteenth April, '53."

Tho' "not of record" 'tis, nor large,
'Tis in the nature of a *charge;*
And to its liquidation there is SOME ONE "bound to see"—
In short, without addition more
To what I have remarked before—
The point that I refer to is *the matter of my fee.*

—*Legal Intelligencer.*

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Supreme Court of Missouri—Decisions last Monday.

BY JUDGE ADAMS.

Ackley *et al.* v. Staehlin; reversed and remanded.

State *ex rel.* Aull *et al.* v. Macon County Court; affirmed.

Barker v. Patchin; affirmed.

Ackley *et al.* v. Winkelmeyer; affirmed.

Renicke v. Jod; affirmed.

Jones and wife v. Carter; affirmed.

BY JUDGE WAGNER.

St. Louis and Iron Mountain Railroad v. Silver; general term reversed and special term affirmed.

Howard *et al.* v. Smith; affirmed.

City to use Lancaster v. Armstrong; reversed and remanded.

DeJarnett v. DeGiverville; reversed, Judges ADAMS and NAPTON dissenting.

BY JUDGE NAPTON.

State *ex rel.* Winship v. State Auditor; mandamus refused.

Cranshaw v. Sumner; affirmed.

BY JUDGE VORIES.

O'Connor v. Koch; reversed and remanded.

Douglass v. St. Louis Zinc Company; general term affirmed.

Supreme Court of Missouri—Decisions at the March Term, 1874.

Question of Fact.—Estell v. The St. Louis & Southeastern Railway Co. This was an action on a contract to deliver cross-ties. The question was one of fact merely, namely: whether the defendant had waived the stipulation as to the time within which the cross-ties should be delivered, and whether there was a second contract for the delivery of more ties. Upon both of these questions the jury found for the plaintiff, and the court here affirm the judgment rendered on the verdict, saying that the jury are the proper judges of the credit to be given to the evidence. WAGNER, J., delivered the opinion, the other judges concurring.

Administration of Estates—Mistake in the Classification of Claims—The Remedy by Entry nunc pro tunc—Fraudulent Concealment.—E. L. Gillett *et al.* v. Union National Bank *et al.* The plaintiffs had certain claims allowed in the probate court against the estate of Turner Maddox, and placed in the sixth class. At the same term of court the Union National Bank had two claims allowed, which should have been placed in the same class. By a clerical error of the probate judge in endorsing on the claims of the bank a memorandum to the effect that they belonged to the fifth class, the clerk of the court conformed to that memorandum and made his entry accordingly. The plaintiffs were unaware that this mistake had been made, until the time for taking an appeal had elapsed. The Union Bank discovered the error in its favor during the term at which it occurred, but kept the fact to themselves, and when applied to by the plaintiff at the close of the term, declined to have any correction made. The first, second, third and fourth class claims against the estate were paid, and a sufficiency of assets was left to pay the fifth class, and over twenty-five per cent. to pay the sixth class, unless the claims of the bank were permitted to remain as originally and erroneously classed. The petition alleges these facts, and further, that the failure of the bank to disclose the mistake which had occurred in the classification of claims in its favor was a fraudulent concealment of facts of which it now sought to unfairly avail itself, and the prayer was that the bank be restrained from enforcing its claims as of the fifth class, and that the administrator be prohibited from paying them as such, and that they be adjudged as sixth-class claims and ordered to be paid only as such. This petition was held insufficient on demurrer, and the propriety of this ruling is now before the court. The court sustain the judgment below for two reasons: 1. A proper remedy existed at law by a *nunc pro tunc* entry in the probate court. 2. There being no relation of trust or confidence between the bank and the plaintiffs, and the bank having nothing to do in producing the mistake, it was under no obligation to communicate it to the plaintiffs, and its failure to do so does not make a case which would warrant the interposition of a court of equity, even if there was no remedy at law. SHERWOOD, J., delivered the opinion, all the judges concurring.

Garnishment of Express Trustee.—Henry Lackland v. Alexander J. P. Garesche, Garnishee of Thomas P. Smith. This case simply holds that the trustee of an express trust can not, under the Missouri system of procedure, be made to account as a garnishee in a suit by attachment. The remedy is by a bill in equity for an account. The proceeding by attachment is a *legal* proceeding purely, and it never was contemplated to allow a jury, or a court sitting as a jury, in a suit by attachment and garnishment, to exercise the complicated functions of a chancellor by compelling an express trustee to account. These views are enforced and illustrated at considerable length. ADAMS, J., delivered the opinion, the other judges concurring.

Book Notices.

THE AMERICAN LAW REVIEW. April, 1874. Boston: Little, Brown & Company.

The April number of the Law Review contains the usual amount of interesting reading matter. It contains a very complete and interesting review of the Tichborne trial, the only one, we believe, which has been published (except in book form by the same house) in this country. The next leading article is on the Virginius case. The history of that vessel, and of her operations previously to her capture, and a summary of the diplomatic correspondence, are first given, and then the legal principles attending the case are discussed with much clearness and force of reasoning. The article upon Torts under the French Law, the text of which is the recent work of M. SOUDAT, entitled "*Traite General de la Responsabilite ou de l'Action en Dommages-interets en dehors de Contracts*," will be read with great interest by every lover of the study of comparative jurisprudence. The Review also contains an excellent article on the Delivery of Telegraphic Messages, and this, together with its other matter, appears fully up to the standard it has hitherto maintained.

CONSTITUTION AND BY-LAWS OF THE CHICAGO BAR ASSOCIATION AND ADDRESS OF THE EXECUTIVE COMMITTEE.

We are glad to notice that a bar association has been formed in Chicago, the object of which is "to maintain the honor and dignity of the profession of the law; to cultivate social intercourse among its members, and to increase its usefulness in promoting the due administration of justice." We had occasion to notice in a previous number (*ante*, p. 156) the formation of a similar association in this city. The good which such associations, if properly conducted, are capable of accomplishing can scarcely be overestimated. They should not only become a means of purifying and elevating the standard of the profession, but they should afford a channel through which the united sentiment of the better class of the profession may find expression. To that sentiment, so expressed, not only the practicing members of the profession, but the judges themselves must in some measure become amenable. We join heartily in what the Albany Law Journal says with reference to this subject:

"We hope to see the time when all the principal cities in the country will have organizations similar to those of New York and Chicago, and when an annual congress of delegates from each will be an accomplished fact. Such a congress could and would exert a powerful influence in many directions, but especially in the direction of a unification of the laws and jurisprudence of the several states. Although all the states but one derive their fundamental law from the same source, we doubt if among the several nations of Europe can be found more diverse legislation, even on questions of general jurisprudence. There is no prospect for assimilation until the legal profession shall bring its united influence to bear to that end. The lawyers in Germany have for years held annual congresses, and their action, quite as much as anything else, made the German empire possible."

DIGEST OF DECISIONS RENDERED BY THE SUPREME COURT OF MICHIGAN at the January Term, 1874. By HENRY A. CHANEY, Attorney at Law. Lansing: W. S. George & Co. 1874.

ABSTRACT OF DECISIONS RENDERED BY THE SUPREME COURT OF MICHIGAN, at the January Term, 1874, at Lansing, Michigan; also a Complete Digest, with Marginal Notes, Indexed as to Subject; also, to have an Index as to Title of Cases. Arranged by CHIPMAN, DEWEY & HAWES, Attorneys, Detroit. Detroit: Richmond & Backus. 1874.

We have had occasion to notice and commend Mr. Chaney's Quarterly Digest heretofore. That of Messrs. Chipman, Dewey & Hawes is similar in its plan; but we have been so well satisfied with Mr. Chaney's that we have not examined the latter publication with that care which would warrant us in instituting a comparison between them. In this connection we would state that we have been favored by G. B. MOBLEY, Jr., Esq., of Eutaw, Alabama, with a Digest in scrap-book form of the Decisions of the

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last term of the Supreme Court of that State. If enterprises of this character could be instituted in every state, and then if there could be a general exchange of these publications, it would be a benefit to the profession.

THE CASE OF THE VIRGINIUS, CONSIDERED WITH REFERENCE TO THE LAW OF SELF-DEFENCE. By GEORGE TICKNOR CURTIS. New York: Baker, Voorhis & Co. London: Trubner & Co. 1874.

We shall notice this pamphlet at some length hereafter.

LEGAL BIBLIOGRAPHY—The Catalogue of the Library of the New York Law Institute. By R. S. GUERNSEY. Reprinted from the New York Daily Register of March 27, 1874.

Among the excellent suggestions contained in this little pamphlet we find the following: "It would seem that in a catalogue of all law books in the English language, chronologically arranged by editions and full titles under subjects, with an index by authors' names, after the manner of continental treatises on legal bibliography, where the latter science has been carried to perfection, should be eagerly sought for both in this country and in England. Such a work would now contain nearly twice the number of titles in Marvin's book, before mentioned, and would occupy about fifteen hundred pages. No publisher in Europe or America will undertake to publish so extensive a work and rely upon the sales for their reimbursement, although the compiler would ask nothing for his manuscript. Therefore, lawyers must still be content to resort to library catalogues only, for their knowledge of what books have been published on a special subject."

When the dream of the Albany Law Journal shall be realized, and we shall have a national bar association, it will be its duty to take upon itself the expense of publishing works of this character, the same as other learned societies are in the habit of publishing works which are beyond the limits of private enterprise.

Legal News and Notes.

—HON. SAMUEL D. LOCKWOOD, who formerly occupied a position upon the supreme bench of Illinois, but who for many years has been in private life, died on the 23d instant at his residence in Batavia, Illinois, at an advanced age. Judge LOCKWOOD enjoyed considerable distinction as a jurist, but the conspicuous feature of his character was his integrity, which was of so high an order as to command the admiration of all who knew him.

—AN action has been commenced in the New York City Supreme Court by Daniel McFarland to recover $50,000 damages against the United States Publishing Company for an atrocious libel upon the plaintiff in a book known as the "History of the New York Tombs," published by the defendant corporation. McFarland, it will be remembered, is the man who figured some time since as the slayer of Richardson, one of the writers on the *Tribune*. Ex-Judge CURTIS is counsel for McFarland, and eminent legal talent is retained for the defendant.

—A NUMBER of the employees of a street railroad company in New York have been prosecuted for salting a railroad track for the purpose of clearing it of snow. The indictment was for nuisance detrimental to public health, and the society for the prevention of cruelty to animals had also a finger in the pie. It was the first suit of the kind that has ever been before the courts. The counsel for the prosecution claimed that salt and snow produce a freezing mixture which unnaturally chills the atmosphere, injures men's bronchial tubes, produce coughs, colds and diphtheria in human beings, and freezes and contracts the horses' feet. The trial resulted in a drawn battle.

—SENATOR STEVENSON has introduced a bill authorizing Indians in their tribal capacity and as individuals to sue and to be sued. This senator has given considerable attention to the subject of our relations with the Indians, and understands the sad consequences which constantly flow from the inability of Indians to claim and defend their rights before the judicial tribunals of the country. A similar bill was introduced in the house some time since. It is hoped the proposed legislation may receive favorable consideration. That feature of the bill authorizing Indians to be sued should be carefully guarded.—*Washington Chronicle.*

—HON. SAMUEL MILLIGAN, associate justice of the court of claims, died recently at Washington. Judge MILLIGAN resided in Greenville, East Tennessee, the home of ex-president Johnson, by whom he was appointed to the bench of the court of claims. At the time of his appointment to the court of claims he occupied a position on the supreme bench of Tennessee. Though not a great jurist, he was sound and conscientious. His opinions delivered while on the supreme bench of Tennessee are, perhaps, quoted with as much respect as those of any judge who has occupied a seat on that bench since the war. Horace Maynard, of Tennessee, and Mr. Secretary Richardson are mentioned as his successors.

—SINCE the abandoned French steamer L'Amerique was picked up at sea, after having rolled for thirty-six hours in the troughs of the waves "manless and lifeless," and towed into an English port, the newspapers have been reviving a popular taste for the study of maritime law by publishing long disquisitions on the law of salvage, under such suggestive titles as "*Jetsam*," "*Flotsam*," and the like. Beyond question, the saving of the Amerique insures to her salvors the heaviest reward of any case which has occurred for many years. Whether we consider the remarkable circumstances attending her abandonment within one hundred miles of port, or the fact that she was the second steamship of the same line abandoned within two weeks under the same circumstances, or the fact that being a *French* ship, after being abandoned by her crew, she persisted in not sinking for thirty-six hours, and was finally saved by an *English* vessel;—we may well conclude that an English court of admiralty will not be so far uninfluenced by national pride but that it will allow liberal salvage. It is not matter of surprise, then, that the admiralty court fixed her bail at £125,000.

—THE "vexed question" of the attorney-general's landaulet has at last apparently been settled by the adoption by the house of representatives, in committee of the whole, of an amendment to the congressional appropriation bill providing that no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the treasury or property of the United States, beyond the salary or compensation allowed by law, or shall make any private use of such property, or of the services or labor of any person employed in the service of the United States, which service or labor is paid for by the United States; provided, this shall not be construed to deprive any officer of the United States of such fees as are or may be provided by law in addition to the salary of such officer, or of use of such property as may be expressly by law appropriated for the use of such officer.

—THE liberty of discussion which is the peculiar advantage of "committee of the whole" was conspicuously exemplified in the national house of representatives on Saturday. The house was in committee of the whole, considering the legislative appropriation bill.

Mr. Nesmith moved to strike out from the paragraph relating to the debts of the department of justice, the item of $140 for the care and subsistence of horses, and $600 for repairs to carriages and harness. He spoke of the attorney-general's $1,600 landaulet, and remarked that lawyers of the attorney-general's calibre in his city rode on the outside of a fifty-dollar mule. [Laughter.] There was a Spanish proverb to the effect that if you put a beggar on horseback he will ride to the devil.

Mr. Negley objected to a comparison of an officer of the government to a beggar on horseback.

Mr. Nesmith: I simply referred to the mule. [Laughter.]

The chairman: *The gentleman from Oregon will continue, being careful to keep in order.*

Mr. Nesmith: I was only quoting the Spanish proverb, which says: "Put a beggar on horseback and he will ride to the devil." I have no objection to the termination of a journey in that particular direction; but I don't want the people to pay for the transportation. [Laughter.]

Mr. G. F. Hoar believed that a reasonable and decent conveyance should be provided for the attorney-general, and he asked the gentleman from Oregon (Nesmith) whether he would like to have the attorney-general ride down Pennsylvania avenue on the back of a fifty-dollar mule.

In reply to Mr. Hoar, Mr. Nesmith said he had seen the attorney-general ride in Oregon on a mule; that Philip the Second, of Spain, rode an Andalusian mule through the streets of Madrid when he went to marry Mary of England, and that sacred history gave an account of a better man than either of them riding on one of those useful animals that had no pride of ancestry and no hope of posterity.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, MAY 7, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

WE publish in this number two important cases upon federal practice—one a decision of the Supreme Court of the United States in the case of The United States v. Boutwell, holding that in the absence of any statute warranting it, a mandamus against an officer of the government can not be revived against his successor; and the other a well-considered opinion of district Judge HOPKINS, of the Western District of Wisconsin, in the case of Main v. The Second National Bank of Chicago, holding that a national bank can not be sued in one of the federal courts in a district other than that where it is established and does business, by the device of getting service of process on its cashier. For the latter opinion we are indebted to the learned judge himself.

Municipal Bonds.

In the U. S. Circuit Court for the Western District of Missouri an interesting case of Huidekoper v. Vernon County—Stephenson and Shippen for plaintiff and Stone for defendant—has just been decided. The suit was for collection of interest coupons from bonds proved to have been executed by the presiding justice and clerk of the county court and substituted, with the knowledge of the county agent, for other bonds regularly issued about seven months previously, which were surrendered and destroyed at the time of substitution. The county held $300,000 of railroad stock, and the railroad was built through the county. The defendant claimed that the surrender and destruction of the old bonds by their holders released the county, and the issue and delivery of new bonds without any order of the county court were without authority and that the bonds were hence void. The court held that the said officials had the power to make such *bona fide* substitution, and further that by holding the stock, by levying and collecting taxes and paying interest, and by passing a resolution recognizing the new bonds and placing refusal to pay interest on other grounds, the substitution was abundantly ratified, and the county was estopped from making such defence.

Involuntary Bankruptcy—What Residence within the District is Necessary to Give Jurisdiction.

In the case of *Re* Johnson, in the United States Circuit Court for the Western District of Missouri, it appeared that the debtor had formerly resided and carried on business in the eastern district of Missouri for the longest period of the six months preceding the filing of the petition against him; and that for the remainder of the six months next preceding the filing of the petition, being a period of two months and a few days, and at the time of filing the same, he was *bona fide* residing and actually carrying on business in the western district of Missouri. Upon these facts a plea to the jurisdiction of the court to entertain a proceeding in involuntary bankruptcy was filed, and argued by Messrs. Lay and Belch for the debtor, and by Messrs. Johnson and Botsford, *contra*. It was held, affirming the judgment of the lower court, by DILLON, J.—

1. That the proceedings were properly commenced in the western district of Missouri, and that the district court of said district had jurisdiction to hear the same and to make an adjudication of bankruptcy.

2. That the provisions of section 11 of the bankrupt act, requiring voluntary petitions in bankruptcy to be filed in the district where the petitioner has resided for the six months preceding the filing of the petition, or for the longest period of such six months, does not apply to proceedings in involuntary bankruptcy, and that the district court of any district in which the debtor may actually reside and do business at the time of filing the petition against him, has jurisdiction under the bankrupt act (sec. 39) to hear the cause and make an adjudication of bankruptcy.

An Incident of the Chicago Fire—Remarkable Preservation of Legal Papers.

Among the cases decided last week by the Supreme Court of the United States is the case of Ephraim S. Sawyer v. Henry Prickett *et al.*

This case has had a very singular and remarkable history.

In 1868 Sawyer filed a bill in the United States Circuit Court for the Northern District of Illinois, to foreclose a mortgage executed by Prickett to the Fox River Valley R. R. Co. and assigned to the plaintiff. An answer was filed by Prickett, a great deal of testimony was taken, and the case was argued and decided, and a decree was entered by Judge BLODGETT, just previous to the great fire, dismissing the bill for want of equity.

An appeal was taken by Sawyer, and at the time of the fire the clerk was copying the record for the supreme court. After the fire it was supposed that this case, like all the cases in the different courts held in Chicago, had been forever set at rest. The probability of even getting up the case for a review by the supreme court was of a most shadowy kind.

Mr. Bradley, the efficient clerk, had given orders to the workmen engaged in removing the debris from the court-house ruins, to preserve all paper which might come to light in clearing away the brick and mortar, and, wonderful to relate, these workmen dug out and preserved, piece by piece, each paper that had ever been on the files of the court in this case.

In making up a transcript for the supreme court it is the custom of the clerk to first make out a list of the different papers on file, with the date of the file-mark, together with a minute of the docket entries.

This minute was also found, and the clerk was thus enabled to see that every paper had been found and to easily restore the docket entries.

Out of the many thousands of cases pending in the United States courts, we understand that this is the only one in which the complete case is preserved.

The supreme court has now reversed the case. It looks like a miraculous preservation for the purpose of reversal.

The counsel engaged in the case were Mr. Frederic Ullmann for complainant, and Messrs. Miller, Van Arman and Lewis for defendants.

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The Pacific Railroad Tax Case.

We publish in this number an important decision of the Supreme Court of the United States in the case of The Pacific R. R. Co. v. Maguire, determining that an act of the legislature exempting from taxation a "railroad," is violated by a subsequent constitutional ordinance imposing a tax upon its gross earnings. It is proper that we should here take occasion to correct what seems to be a gross misunderstanding in regard to the effect of this decision. One of the St. Louis daily papers has stated that this decision goes to the extent of declaring the tax imposed by the constitutional ordinance of 1865 on the Pacific, the North Missouri, and the St. Louis and Iron Mountain railroads utterly void. The court determined no such question, nor is the validity of the ordinance in question touched upon at all in the opinion which we elsewhere publish, except in so far as it conflicts with a previous legislative contract between the state and the Pacific Railroad Company. On the contrary, in the very recent case of The North Missouri R. R. Co. v. Maguire, the Supreme Court of the United States (opinion by Mr. Justice CLIFFORD) has expressly affirmed the validity of this ordinance. This opinion we shall probably publish at an early day.

The history of this litigation is briefly as follows: The cases of The North Missouri R. R. Co. v. Maguire and The Pacific R. R. Co. v. Maguire were argued together before the Supreme Court of Missouri at its March term, 1872. The former will be found reported in 49 Mo. 490, and the latter in 51 Mo. 142. The substantial question insisted on in behalf of the railroad companies in the Supreme Court of Missouri was that the constitutional ordinance of 1865, assessing a tax upon the gross earnings of these companies until 1868 of ten per cent., and thereafter of fifteen per cent., exceeded the general taxing power of the state and was repugnant to the constitution of the United States and void. The Supreme Court of Missouri, however, held in each of these cases that the constitutional ordinance in question was valid. In the Pacific Railroad case the additional point was ruled that there was nothing in the act of February 10, 1864, which amounted to a contract limiting the right of the state, through a constitutional ordinance, to impose the tax in question. These cases were taken by writ of error to the Supreme Court of the United States, where, as we have before stated, the case of The North Missouri R. R. Co. v. Maguire (49 Mo. 490) was affirmed, Mr. Justice CLIFFORD delivering the opinion. The Pacific Railroad case, however, stood upon a ground somewhat different. In that case, as will be seen from the opinion which we elsewhere publish, the legislature, by an act passed in 1852, exempted the "railroad" from taxation until it should declare a dividend, or, in case of failure to declare a dividend, until both its branches should have been completed for two years. The Supreme Court of the United States hold that the particular assessment in question having been levied before the road had been completed for two years, and before it had declared a dividend, was void, and that the constitutional ordinance afforded no warrant for this assessment, because in so far as it impaired the legislative contract it was invalid. The question of the effect of the exemption from taxation enacted by the act of 1852 was not raised at all in the Supreme Court of Missouri, but was urged for the first time in the Supreme Court of the United States; and as this was the only question passed upon in the latter court, it is seen the final decision, while it reverses as to the result, yet it in no sense overrules any position taken by the court below. If, however, the opinion of Mr. Chief Justice WAITE had prevailed, it would have precisely overruled the case in the court below. These cases, then, stand this way: The tax-collector may now go on and collect of the North Missouri Railroad Company the full tax authorized by the constitutional ordinance of 1865; and he may collect the same tax of the Pacific Railroad Company from the date of its first dividend, or from the date at which time both its branches had been completed to the state line for two years.

We regret to state that although we endeavored to get the full opinion in the Pacific Railroad case in time for publication in this issue, we have been obliged to print it as it appeared in one of the St. Louis papers. It is believed that an immaterial portion toward the close of the opinion is omitted.

Liability for Loss of Property through Deviation from Terms of Contract—Proximate and Remote Cause.

We find in advance sheets of 23 Ohio State Reports, sent us by the publishers, Messrs. Robert Clarke & Co., of Cincinnati, the interesting case of Daniels v. Ballentine, p. 532, presenting a very clear discussion of the above question. The defendants contracted to tow the plaintiff's barge, by means of a steam tug, from Bay City, Michigan, to Buffalo, New York. After the voyage had been commenced and been partly performed it was voluntarily suspended and delayed by defendants, the barge during the delay being exposed to none of the perils peculiar to the voyage. After the voyage was resumed, and while it was being duly prosecuted, a storm was encountered by which the barge was lost. Upon these facts it was held that the defendants, by the mere fact of the delay, did not become responsible for the loss of the barge, although the delay was unreasonable and unnecessary, and although, as the event proved, the barge, but for the delay, would probably have been safely towed to its place of destination. In such case the storm must be regarded as the proximate, and the delay as only the remote, cause of the loss.

Mr. Justice STONE, who delivered the opinion of the court, after discussing at some length the general principles applicable to the question of proximate cause of damage, said: "In the present case the route which defendants were necessarily to pursue in the performance of their contract, lay through Lakes Huron and Erie, and the rivers or straits connecting those waters. The delay is said in argument to have occurred in the St. Clair river. The record is silent upon this subject, but it appears that the voyage was, for the time, wholly suspended. After the delay, the barge was again taken in tow, and the voyage was resumed. It is, perhaps, fairly to be inferred that the barge was, in the meantime, in a place of safety, but upon this subject it is sufficient to say that it does not appear nor is it claimed that it was exposed during the delay to any of the perils incident to the voyage. Nor does it appear from any fact or circumstance in the case, that there was any reason to apprehend that the perils to be encountered in completing the voyage would be increased by the delay. No fault is imputed to the defendants in resuming the voyage at the time they did, and it does not appear that in anything

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which subsequently occurred they failed in any respect in the performance of their duty. The storm which caused the loss of the barge was encountered after the delay and while the voyage, after it had been resumed, was being duly prosecuted. As the event proved, the storm would not have been encountered if no delay had occurred, but this was merely a fortuitous result. It was not a consequence which "arose naturally, *i. e.*, according to the usual course of things," from the particular breach of contract complained of. Hadley v. Baxendale, 9 Exch. 341. The two events had, in the nature of things, no natural or necessary connection. It was, for aught that appears, as reasonable to expect that the delay would be the means of avoiding extraordinary peril in the further prosecution of the voyage as it was to expect a contrary result. And while it is true, as the event proved, that the storm which caused the loss would not have been encountered if there had been no delay, it is at the same time evident that if the delay had been greater, and the default of the defendants in that respect more flagrant than it was, the same favorable result would have followed.

"The delay, therefore, can not be regarded as the proximate cause of the loss. It constituted a breach of the contract, and for any injury naturally resulting therefrom the defendants were clearly responsible; but except by a conjunction, which there was no reason to anticipate, and which was merely fortuitous with a subsequent event, it had no agency in causing the loss of the barge. Of that loss the storm was the proximate and sufficient cause. Morrison v. Davis, 20 Penn. St. 171; Denny v. N. Y. C. R. R. Co., 13 Gray, 481; Railroad Co. v. Reeves, 10 Wall. 176.

"It is contended, however, on behalf of the plaintiffs, that the defendants are responsible on another ground. The delay, it is said, constituted in law a deviation which would have discharged the underwriter if the barge had been insured; and assuming that the defendants would, in that case, in the further prosecution of the voyage, have taken upon themselves all the risks covered by the policy, it is claimed that the plaintiffs, being their own insurers, are entitled to all the remedies they would have had if the barge had been insured by others.

"A deviation has, it is true, in some circumstances the effect to put an end to the contract of insurance, but in such cases the underwriter is discharged, not because the risks are increased, but because they are not the risks he contracted to assume. So long as the risks are varied, it is wholly immaterial whether they are increased or not. If, then, the defendants are responsible on the ground contended for, they would be equally responsible although it should be made clearly to appear that if there had been no delay, the same or even a worse storm would have been encountered. In short, the plaintiffs would in that case be enabled, by reason of the delay, to recover the value of the barge without averring, or being able to aver, that the delay caused the loss or operated in any way to their injury. The delay occurring, they would thus, without cost, secure the benefit of an insurance for the remainder of the voyage.

"If the barge had been insured against the peril by which its loss was occasioned, and it could be shown that the insurer was discharged by reason of the delay, a different question would have been presented. In such case, the facts being known to the defendants, the loss of the policy might well be held to be the proximate consequence of their wrongful conduct, but in such case the ground of the action would not be the loss of the barge, but the discharge of the underwriter, by reason of which the plaintiffs were deprived of the indemnity which they would otherwise have been able to obtain."

Taxation for the Payment of Railway-Aid Bonds —Effect of Legislative Restriction on the Power of Taxation.

The case of The State *ex rel.* Aull v. Macon County, which we publish on another page, presents an interesting feature in the great volume of litigation which has grown out of the bonds of municipal corporations issued in aid of railway enterprises. The opinion of Mr. Justice ADAMS presents the single question in the case in a clear light and with commendable brevity. The case simply was that the special act under authority of which the bonds in suit were issued, and which was recited on the face of the bonds as the authority for their issuance, and thus brought to the notice of the purchaser, restricted the amount of tax which should be levied in any one year for the purpose of paying the bonds, to one-twentieth of one per cent. upon the assessed valuation of the taxable property in the county. The county court had shown no disposition toward repudiation, but had exercised its power of taxation for the purpose of meeting the principal and interest of these bonds to the full extent of the grant of power to tax in the special act authorizing their issuance, and by so doing had succeeded in paying the interest from year to year, and also in providing a fund of $12,500 towards the liquidation of the principal. Having done this, they had exhausted their power, until the return of the period for apportioning a tax for the subsequent year. This being their position, it would seem that nothing could be plainer than that a mandamus would not lie to compel them to do what the law expressly restrained them from doing.

The general statute referred to by the court confers a general and unrestricted power of taxation for the purpose of paying the principal and interest of county bonds issued in aid of railways, in the following terms: "Any county court or city which has heretofore subscribed to the capital stock of any railroad in this state shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the county court or city council shall have all the rights and powers to provide funds to pay such subscription, as are granted to county courts and cities by this act, *and may levy a special tax to pay the interest on their bonds, or to provide a sinking fund to pay the principal.*" Revised laws 1855, p. 429, § 34. It will be seen that the court does not stop to discuss the effect of this statute. The principle that a special statute, operating particularly upon a given subject matter, excludes the operation of a general statute, where the two are inconsistent with each other, is so elementary and familiar that the learned judge doubtless deemed it unnecessary to direct particular attention to it.

What, then, is the *status* of the *bona fide* purchaser for value before maturity of these bonds? It is simply a case where, at the time he purchased the bonds, he was charged with notice by a recital on their face of a restriction on the power of taxation granted for the purpose of securing the

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payment of the principal and interest of the same. Having such notice, it was manifestly incumbent upon him, as a prudent man, to consult the records of the county and ascertain therefrom the amount of bonds of this particular series which had been issued, as well as the assessed valuation of the taxable property of the county, and from these data to compute the probabilities of the county court being able, with its power of taxation for this particular purpose thus restricted, to meet the yearly interest, and in five years to raise a sinking fund sufficient to pay the principal. Having received adequate notification of the restriction on the power of taxation subject to which these bonds were issued, it can not be claimed that this decision works any fraud against the innocent purchaser, but it would rather seem to be a case where the rule of *caveat emptor* applies in its full extent.

There appears to be nothing in this opinion, or in the conduct of the Macon County Court, which savors of repudiation. The amount of bonds of this series which was issued subject to this restricted power of taxation may have been, and doubtless was, improvident. Doubtless the county judges overstepped the mark in estimating the increase in the taxable wealth of the county which would accrue from the completion of the road in favor of which the bonds were issued, as well as from other causes. But the bonds will no doubt be paid. If, however, they are not again funded, and if no further legislation is obtained increasing the power of taxation applicable to them, their liquidation will take time, and the bondholders who have purchased these securities hastily and improvidently must wait.

The Macon county case would seem to be a much stronger case than that of Carroll County v. Reynolds, which it cites and relies on. There the securities in question were ordinary county warrants, issued to meet the current expenses of the county, and which the holders of them, in the first instance, were probably compelled to take or take nothing, and the restriction upon the power of taxation was by a general law. There would seem to be a hardship in that case, consisting in the fact that the county supervisors were upheld in exhausting their power of taxation to meet "current expenses" *accruing* while "current expenses" already accrued were for the time being repudiated—as though a man is under a greater obligation to provide the means of paying a debt which he expects to contract to-morrow than to pay one which he did contract yesterday. But in the Macon county case the purchasers of the bonds were notified in a peculiar manner of the infirmity to which they were subject, and the fact that the power of taxation granted in the particular instance has proved inadequate, works no injustice to them. They simply get what they bargained for—no more, no less.

What the result of a case of this kind would be in case of a fraudulent assessment, whereby the taxable property of the county were rated below its real value, would seem to present a very different question, and one where the bondholders would probably be entitled to relief upon principles of equity. No such question, however, appears to have arisen in the Macon county case.

We understand that it has been strenuously urged on behalf of the holders of the Macon county bonds that the present decision amounts to a judicial breach of faith, inasmuch as the Supreme Court of Missouri had decided in 1867 in The State *ex rel.*, etc., v. Macon County Court, 41 Mo. 453, that the subscription to the stock of the Missouri and Mississippi Railroad Company, in pursuance of which these bonds were issued, was a valid subscription. It is hence urged that these bonds went out to the money-markets of the world impressed in a peculiar manner with the sanction of the highest tribunal of the state, and that the present decision, ignoring the effect of the former, virtually repudiates them. It is thought that this is an entire misapplication of the case in 41 Missouri. That case, as we read it, simply decided that the charter privilege of receiving the subscription without a vote of the people was not repealed by a subsequent constitutional inhibition against such subscriptions, and that this particular issue of bonds was not rendered invalid by reason of such an inhibition. In the first sentences of the opinion in that case, delivered by Mr. Justice WAGNER, the 13th section of the charter of the Missouri and Mississippi Railroad Company is quoted. That section contains the very limitation on the power of taxation for the payment of these bonds, which is held to constitute a defence in the present action. So far, therefore, as that decision could have any effect upon the present question, it operated as an additional notice to the purchasers of these bonds that they were issued subject to the infirmity from which the bondholders are now suffering. Besides, the court in the present case expressly declare the validity of these bonds, and that the circumstance of the issue having been excessive does not render them invalid. There appears to be nothing in the opinion in the present case which excludes the idea that these bonds are valid and must be paid as soon as the limited taxing power granted for that purpose will permit.

Effect of the War upon Deeds of Trust.

The very important and interesting question of the effect of the late war upon deeds of trust given upon property situated in one of the loyal states as a security for unpaid purchase-money, the borrower residing in one of the Confederate States, has just received an exposition in the Supreme Court of Missouri in the case of De Jarnette v. De Giverville. The plaintiffs purchased from the defendants certain real estate in the city of St. Louis and gave their notes for the purchase-money, secured by a deed of trust. The notes were payable in one, two, three and four years, the last becoming payable on the 30th day of April, 1861. They failed to pay the last note when due, and, in consequence, the property conveyed by the deed of trust was sold by the trustee on the 9th of June, after publication of notice, as required by the deed. This action was brought to annul the sale and the deed made in pursuance thereof. It was alleged in the plaintiffs' petition that all the notes were paid except that which matured on the 30th of April, 1861, and that the plaintiffs were ready and willing to pay this also, but were prevented by a state of war existing at that time between the United States of America, of which Missouri was a part, and the Confederate States, of which Virginia was a part; and that the plaintiffs were, in 1857 and in 1861, and during the whole of the war which followed, citizens and residents of the county of Caroline, Virginia. By reason of the war existing it was alleged that the notice and sale under the deed of trust were fraudulent and void. It was averred that as soon as peace was restored the plaintiffs tendered to the purchaser of the land the amount due under the deed of trust, which was refused, and they

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prayed that the deed made by the trustees under the sale of June 9, 1861, be set aside and annulled. To this petition the defendants demurred, assigning for causes of demurrer that the petition showed no cause of action; that it appeared that at the time the default was made there was no suspension of intercourse between the citizens of Virginia and those of Missouri, and that even when the sale was made under the deed of trust there was no such suspension, and that there was no excuse for the non-payment of the note of the plaintiffs. The court below overruled the demurrer and gave judgment for the plaintiffs, and the case was brought by writ of error to the Supreme Court for review.

It is thus seen that the only substantial difference between this case and the case of The Washington University v. Finch, published in this journal (*ante*, p. 66) consists in the question whether a state of non-intercourse existed at the date of the sale. But in the view the court take of the case, this question becomes immaterial; because it is held, upon the assumption that a state of non-intercourse did exist, that it did not invalidate the sale. The opinion of the court was delivered by Mr. Justice WAGNER—VORIES and SHERWOOD, JJ., concurring, and ADAMS and NAPTON, JJ., dissenting. In the outset it is fully admitted that "since the decisions in the Supreme Court of the United States, in the cases of The Venice, 2 Wall. 258, 274; Mrs. Alexander Cotton, 2 Wall. 404, 419; Mauran v. Insurance Co., 6 Wall. 1, 14; The Ouachita Cotton, 6 Wall. 521, 530–31; Hunger v. Abbott, 6 Wall. 532–35; Coppell v. Hall, 7 Wall. 542, 554; McKee v. The United States, 8 Wall. 163, 166; and The United States v. Grossmayer, 9 Wall. 72—the question must be regarded as settled, that the late war between the Confederate States and the United States was a public war, and a war not only between the respective governments, but between all the inhabitants of the one territory on the one side and all the inhabitants of the other territory on the other side; so that all the people of each occupied the respective positions of enemies during the continuance of the war."

The court, however, rest their conclusion that the intervention of a war before the last note became due, which made intercourse unlawful between the grantor and grantee in the deed of trust, did not operate to suspend the power of the latter to sell, upon the familiar principle that while an alien enemy can not sue a friendly citizen in the courts of the latter's country, yet that no reason or policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and hence, that while an alien enemy may not sue, yet he is liable to be sued. This doctrine is enforced and illustrated by the following authorities: Mixer x. Sibley, 53 Ill. 61; Dorsey v, Kyle, 30 Md. 512; Thomas v. Mahone (Kentucky Court of Appeals), 12 Am. Law Reg. N. S. 433; Crutcher v. Hord, 4 Bush, 363; McVeigh v. United States, 11 Wall. 259. The court distinguished this case from that class of cases represented by Dean v. Nelson, 10 Wall. 158, and Ludlow v. Ramsey, 11 Wall. 581, where the mortgagee had been driven by military force within the confederate lines.

Having rested the conclusion of the court upon this ground, the learned judge proceeds to say: "But there is another aspect in which this case must be considered, and which is really the principal point, and upon which I would have been satisfied to have placed it had not the counsel for the defendants in error, plaintiffs in the court below, insisted in their briefs that the war produced an entire suspension of all proceedings whatever between the citizens of the respective sides, and avoided all judicial process. The sale was made under a deed of trust containing an agreement that in default of payment when the notes matured, the trustee, upon giving the requisite notice, should proceed to sell the property to satisfy the debt. It contained a power coupled with an interest, which was irrevocable in its character, and when the contingency arose calling forth its execution, the trustee was authorized to execute it regardless of the status of the grantors at the particular time. So, as far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the confederate lines or in the jungles of India, or even if they were dead. It may be conceded that they were in a place or in a condition where it was physically impossible for notice to reach them, but that would not alter the case, as the notice was not designed to be given for their benefit in the sense of notice to them. It was intended to notify the community that the sale would take place, in order that bidders might be present to purchase the property."

This position of the court is illustrated by Beatie v. Butler, 21 Mo. 213, where the grantor in a mortgagee with power of sale died before the sale, and it was held that the sale was nevertheless valid. The opinion then cites as directly in point the case of Harper v. Ely, 56 Ill. 179, and Washington University v. Finch, 1 CENT. LAW JOUR. 66. Judge WAGNER quotes at length from the opinion of Mr. Justice MILLER in the last named case, and declares that it presents an argument unanswerable, and so remarkably clear and satisfactory that nothing remains to be added. The judgment of the court below was therefore reversed and the petition dismissed.

In this connection it may be interesting to note what appears to be the chief argument adduced in opposition to the conclusion reached by the court in the case here considered. The whole force of it was given in a few sentences in the brief drawn by John E. Jones, Esq., of St. Louis, and filed by Hon. W. H. Letcher, of Virginia, in the Washington University case, *supra*:

"It is contended that the deed of trust in this case containing a power of sale and providing the manner of giving notice, is not within the rule laid down in the cases heretofore decided by this court. But there is no ground for the distinction sought to be made. In the first place, the sale could only be made when the notes became *lawfully* due and payable and default was made in the payment of the same. But the notes had not become due and lawfully payable, for the law intervened and prohibited the debtor from paying and the creditor from receiving, and how can it be that the notes are payable lawfully? If the money had been forwarded by the debtor and it reached him, he could not have applied it to payment of the notes, but should turn it over to the district attorney, whose duty it was made especially to enforce the proclamation of the president. The debtors were no way in default. No laches can be imputed to them. The law interfered and prevented the payment, and the statute of limitations would not run under such circumstances. Hunger v. Abbott, 6 Wall. 532. Are they at fault for not doing what the law would not permit them to do? Is it necessary to do more than to state the proposition?"

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This language certainly presents a strong argument and one which might well give rise to doubts and dissenting views. If the intervention of a war made it unlawful for the debtor to pay and the creditor to receive, how can it be said that the debtor was in default? And if the debtor was in no default, how can it be said that the event had transpired which warranted the trustee in executing the power of sale?

The cases of De Jarnette v. De Giverville, and The Washington University v. Finch, give additional strength to deeds of trust in Missouri as securities for money lent, and possess peculiar interest to those seeking to invest money on real-estate security in this state.

Taxation of Railway Earnings.—Legislative Exemption from Taxation.

THE PACIFIC RAILROAD COMPANY v. CONSTANTINE MAGUIRE.

Supreme Court of the United States, April, 1874.

1. **Taxation of Railway Earnings—Effect of Legislative Exemption**—The legislature of Missouri, by an act passed in 1852, enacted that "the Pacific Railroad and Southwestern Branch Railroad shall be exempt from taxation, respectively, until the same shall be completed, opened and in operation and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars and other property of such complete road, at the cash value thereof, shall be subject to taxation at the rate assessed by the state on other real and personal property of like value. * * * "Provided, That if said company shall fail for the period of two years after said roads, respectively, shall be completed and put in operation to declare a dividend, then the said company shall no longer be exempt from the payment of the said tax," etc. By a constitutional ordinance adopted in 1865, it was ordained that "there shall be levied and collected from the Pacific Railroad [and certain other railroads] an annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers, * * * from the first of October, 1866, to the first of October, 1868, and fifteen per centum thereafter; which shall be assessed and collected in the county of St. Louis, in the same manner as other taxes are assessed and collected, and shall be appropriated by the general assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the state and the bonds guaranteed by the state, issued to the aforesaid railroad companies," etc. Under this ordinance the defendant assessed in 1866 a tax against the Pacific Railroad Company of ten per centum upon its gross earnings before it had declared a dividend, and before two years from the date of its completion had elapsed. Upon these facts it is *held*:

(1.) That the act of 1852 created a contract between the state and the railroad company by which the railroad was exempt from taxation until it should declare a dividend on its capital stock, not, however, extending longer than two years after its completion

(2.) That the ordinance of 1865, imposing a tax of ten per centum upon the gross earnings before the road was completed and in operation, and before it had declared a dividend, was a violation of this contract, and that the levy for its enforcement was illegal.

2. —— **Tax upon Gross Receipts.**—A contract not to tax a railroad company or its property is broken by the levy of a tax upon its gross receipts for the transportation of freight and passengers.

Concurring and Dissenting Opinions.—The chief justice concurred in the result, but was of opinion that the assessment complained of was not a tax, but the exaction of payment of a debt due, and, as such, inconsistent with the act of February 10, 1864, which was a contract between the state and the company. Mr. Justice CLIFFORD and Mr. Justice MILLER dissented on the ground that the act of 1852 did not exempt the company from the tax imposed by the ordinance

In error in the Supreme Court of the state of Missouri.

Mr. Justice HUNT delivered the opinion of the court.

This is an action against a tax collector who levied upon property to collect a tax imposed by virtue of an ordinance adopted July 4, 1865, as a part of the constitution of the state of Missouri. The action was tried by the circuit court of St. Charles county upon an agreed state of facts, and judgment rendered in favor of the plaintiff below. An appeal was taken to the Supreme Court of Missouri, where the judgment in the circuit court was reversed, and judgment final was rendered to the effect that the tax was constitutionally and legally collectible from the company. From this judgment the company brings error to this court.

The first question is this: By the acts organizing this company, and by the acts loaning the credit of the state, and the proceedings under the same, was an agreement created on the part of the state that the Pacific Road should not be taxed until it was built and finished and had declared a dividend, and that for two years after it was finished it should be liable to taxation only in common with other property in the state at the same rate?

The right of taxation is a sovereign right, and presumptively belongs to the state in regard to every species of property, and to an unlimited extent. The right may be waived in particular instances, but this can only be done by a clear expression of the legislative will. Tomlinson v. Branch, 15 Wall. 469; Tomlinson v. Jessup, Ib. 454.

The same authorities and many others referred to in those cases, show that when a contract of exemption from taxation is thus established it is binding upon the state, and the action of the state in the passage of the laws violating its terms will not be sustained. Osborne v. Mobile, 16 Wall. 481; Humphrey v. Pegues, 16 Wall. 247, where the cases are collected. The principles of the law are sufficiently settled. The real question arises upon their application to the facts in the case.

By an act of March 12, 1849, the Pacific Railroad Co. was incorporated with a capital of ten millions of dollars, for the purpose of building a railroad from the city of St. Louis to a point in the western line of Van Buren county. Authority was given to the counties through which it should pass to subscribe for the stock, and it was invested also with the powers usually conferred upon such companies. By an act passed February 22, 1851, it was enacted that when $50,000 had been collected of the capital stock and expended in the survey and construction of the road, the bonds of the state to the same amount should be loaned to the road, and further loans were authorized not to exceed the sum of two millions of dollars.

By an act of December 25, 1852, certain public lands were vested in the company, and the company were authorized to build a branch road to the western boundary of the state south of the Osage river. Provision was made for the issue of an additional million of dollars of the bonds of the state to be used in aid of the work proposed, with precaution that subscriptions should have been made and should previously have been applied by the company to amounts stated, and that the bonds should not be sold at less than their par value, and that the road should be completed and put in operation within five years after the passage of the act. The twelfth section contained the following provisions: "The said Pacific Railroad and the Southwestern Branch Railroad shall be exempt from taxation respectively until the same shall be completed, opened and in operation and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars and other property of such complete road, at the cash value thereof, shall be subject to taxation at the rate assessed by the state on other real and personal property of like value. * * * "Provided, that if said company shall fail for the period of two years after said roads respectively shall be completed and put in operation to declare a dividend, then the said company shall no longer be exempt from the payment of said tax, nor from the forfeitures and penalties in this section imposed.

This act and its grants were accepted by an instrument under seal and filed with the secretary of state in compliance with the fifteenth section of the same act.

The road was completed and put in operation on the first day of April, 1866, but no dividend had been declared or paid when the levy in question was made, and two years had not elapsed from the completion of the road. On the fourth day of July, 1865, the present constitution of Missouri, together with an ordinance known as the railroad ordinance as a part thereof, went into effect. The provisions of the ordinance pertinent to this case are as follows:

SECTION 1. There shall be levied and collected from the Pacific Railroad, the North Missouri Railroad Co., and the St. Louis and Iron Mountain Railroad Co., an annual tax of ten per centum of

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all their gross receipts for the transportation of freight and passengers (not including amounts received from and taxes paid to the United States) from the first of October, 1866, to the first of October, 1868, and fifteen per centum thereafter; which tax shall be assessed and collected, in the county of St. Louis, in the same manner as other taxes are assessed and collected; and shall be appropriated by the general assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the state and the bonds guaranteed by the state, issued to the aforesaid railroad companies.

* * * * * * * *

SEC. 3. The tax in this ordinance specified shall be collected from each company hereinbefore named only for the payment of the principal and interest on the bonds for the payment of which such company shall be liable; and whenever such bonds and interest shall have been fully paid no further tax shall be collected from such company, but nothing shall be received by the state in discharge of any amounts due upon such bonds except cash or other bonds or obligations of the state.

SEC. 4. Should either of said companies refuse or neglect to pay said tax, as herein required, and the interest or principal of said bonds, or any part thereof, remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchises of the company that shall be thus in default, under the lien reserved to the state, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company.

In pursuance of this ordinance the defendant assessed a tax against the plaintiff for the year commencing October 1, 1866, of ten per cent. on $2,536,440, that being the gross earnings of the road for that year, which is the tax in question. By the agreed case it is stated that "this was assessed in the same manner as other state taxes were assessed in said county, ten per cent., as a tax under the ordinance hereafter recited, amounting to the sum of $253,644. Upon this state of the facts we are of the opinion, first, that the 12th section of the act of 1852 created a contract between the state and the railroad company by which the railroad was exempt from taxation until it was completed and put in operation, and until it shonld declare a dividend on its capital stock, not, however, extending longer than two years after its completion. Second, that the ordinance of 1865, imposing a tax of ten per cent. upon the gross earnings before the road was completed and in operation and had declared a dividend, was a violation of this contract, and the levy for its enforcement was illegal.

We omit a reference to other questions which have been argued, and express no opinion upon them. We base our opinion upon the effect of the statutes already cited.

The authorities which have been referred to show that a state legislature may make a contract to exempt a corporation from taxation by which it will be bound.

That the facts recited constitute such an agreement we think sufficiently plain. The Pacific corporation was unable to raise funds for completing its road. To induce it to go on with its work, and to induce individuals and counties to subscribe for what the legislature evidently deemed an enterprise of public benefit, it made loans of the credit of the state from time to time. To make the franchise still more valuable to the company, and to the end that individuals and counties should be induced to subscribe to the stock, the legislature added an exemption from taxation until the road should be completed and in operation, and should have declared a dividend. That the money value of this exemption was great is evident from the fact that the tax imposed for a single year, commencing October 1st, 1866, amounted to $253,644. This transaction amounted to a contract between the state and the corporation that there should be no taxation of the company until the occurrence of the stipulated events. Humphrey v. Pegues, 16 Wall. 244; Wilmington R. R. v. Reid, 13 Wall. 264.

In delivering the opinion in the last decided case, Mr. Justice DAVIS uses this language: "It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state can not violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. If the contract is plain and unambiguous, and the meaning of the parties can be clearly ascertained, it is the duty of the court to give effect to it the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests."

The statute of 1852 provided for an exemption from taxation of the "Pacific Railroad, its bed, and of its buildings, machinery, cars, and other property." The tax imposed by the ordinance of 1865 was an annual tax of ten per centum of all the gross receipts for the transportation of freight and passengers. It was directed "to be levied and collected from the Pacific Railroad." In Wilmington Railroad v. Reid (13 Wall. 264), it was held that a statute exempting all the property of a railroad company from taxation, exempts not only the rolling stock and real estate owned by it, and required by the company for the successful prosecution of its business, but its franchises also. In the case before us the road bed, buildings, and machinery, cars and other property not only, but the "Pacific Railroad" is declared to be exempt from taxation.

We can not doubt that a contract not to tax a railroad company or its property, is broken by the levy of a tax upon its gross receipts for the transportation of freight and passengers.

WAITE, Ch. J.—I concur in the judgment of the court which has just been announced, but not for the reasons assigned. If the assessments complained of is a tax, then I agree with a majority of the court in the opinion that it is a violation of the twelfth section of the act of December 25, 1852, and void. I think, however, it is not a tax, but an exaction of the payment of the debt due from the railroad company to the state, and as such, inconsistent with the provisions of the act of February 10, 1864, which, upon its acceptance by the company, became a contract between the parties, and binding upon each.

Mr. Justice CLIFFORD—I dissent from the opinion of the court in this case, because the act of the legislature referred to does not, in my judgment, exempt the company from the tax imposed by the ordinance.

Mr. Justice MILLER also dissents upon the same ground.

JUDGMENT REVERSED.

Railway-Aid Bonds—Mandamus to Compel Levy of Tax after Judgment—Effect of a Restriction on the Power of Taxation in the Act Authorizing the Issue of the Bonds.

STATE *EX REL.* AULL AND POLLARD v. THE COUNTY COURT OF MACON COUNTY.

Supreme Court of Missouri, St. Louis, April 20, 1874.

Present, Hon. WASH. ADAMS, " DAVID WAGNER, " H. M. VORIES, " T. A. SHERWOOD, } Judges.

1. Railway-aid Bonds—Mandamus to Compel Levy of Tax where the Statutory Limit of Taxation has been Reached.—Where the special act under which county bonds have been issued in aid of a railway company, and which is recited on the face of the bonds, restricts the power of taxation for the purpose of paying the principal and interest of such bonds to the levying a tax of one-twentieth of one per cent. on the assessed valuation of the taxable property of the county, a mandamus will not lie at the suit of a *bona fide* holder for value of such bonds purchased before maturity, to compel the county court to levy a tax greater than the limit so fixed, for the purpose of paying the principal and interest of the same; and this, although there was at the time of the issue of such bonds, and still is, a general law authorizing county courts which have issued bonds to railway companies to levy taxes without limitation to pay the interest on such bonds and to provide a sinking fund to pay the principal.

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Appeal from the Circuit Court of Macon County.

ADAMS, J., delivered the opinion of the court.

This was an application for a mandamus to compel the County Court of Macon County to levy a tax to pay the principal and interest of several railroad bonds held by the relators as purchasers thereof for value before maturity, which bonds had been issued in payment of a subscription made by the county of Macon to the capital stock of the Missouri and Mississippi Railroad Company. An alternatative mandamus was issued, to which defendants made their return, and the plaintiff filed a replication thereto, joining issue to the matter set up in the return.

Upon the final hearing the court found for the defendants, refused to make the mandamus absolute, and dismissed the petition. The plaintiff filed a motion for a rehearing, which was overruled, and the relators have brought the case here by appeal.

The county bonds referred to are in the following form:

"No. 1. Five years.

County of Macon, State of Missouri.

"$1,000. $1,000.

"Know all men by these presents, that the county of Macon, state of Missouri, acknowledges itself indebted to the Missouri & Mississippi Railroad Company (organized by an act of the general assembly of the state of Missouri), or bearer, in the sum of $1,000, which sum the county promises to pay at the office of the county treasurer, in the city of Macon, Missouri, on the 16th day of September, 1872, with interest at 6 per cent. per annum, which interest shall be payable annually on presentation of the coupons hereto annexed, at the office of the said county treasurer in the city of Macon, Mo. This bond being issued under and pursuant to orders of the County Court of Macon County for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the general assembly of the state of Missouri, entitled 'an act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865.

"In testimony whereof the said county of Macon has executed this bond by the presiding justice of the County Court of Macon County, under the order of said court, signing his name thereto, and by the clerk of said court, under the order thereof, attesting the same and affixing the seal of said court. This done at the city of Macon, county and state aforesaid, this 16th day of September, 1867.

[Macon Co. Seal.] JOHN FARRER, Clerk.

[Seal of Court.] A. C. ATTERBERRY,

Presiding Justice of the County Court of Macon County."

The coupons attached are in the usual form.

There is no controversy about the facts. The case was submitted on the alternative writ, the return of respondents, and the reply of relators. The following facts appear: The relators are *bona fide* holders for value of certain past-due bonds and coupons which are described in the writ, and which, as appears by recitals on the face of the bonds, were issued under orders of the County Court of Macon County for subscription to the capital stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the general assembly of Missouri, entitled "an act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865, and were delivered to said company in pursuance of a mandamus from this court. (See State *ex rel.* Missouri & Mississippi Railroad Company v. Judges Macon County Court, 41 Mo. 453.) The amount of bonds so issued and delivered was $175,000, but relators had no knowledge of the amount, nor do the bonds on their face disclose the amount. The subscription was made without the assent of two-thirds of the qualified voters of Macon county. The county in 1867 received 1,750 shares of stock in said company, which it still holds and votes at all meetings of stockholders for the election of directors and for other purposes, and enjoys all the privileges of other stockholders. The county court has every year, from 1867 to 1872, levied upon and collected from the tax-payers of the county a tax of one-twentieth of one per cent. to pay interest, as stated by respondent. As stated by relators, it has levied taxes sufficient to pay the interest, together with $12,500 of the bonds themselves, as they matured. Respondents have refused to pay the bonds and coupons in suit, and have refused to levy the requisite tax beyond one-twentieth of one per cent.

It also appears that the Missouri and Mississippi Railroad Company accepted its charter and organized under it in April, 1866, that the only authority for issuing the bonds in suit was contained in the thirteenth section of the charter. (Sess. Acts 1865, p. 86.) "It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, *and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year.*" That the assessed value of property in said county in 1867 was $5,145,810; in 1868 was $5,304,644; in 1869 was $5,191,626; in 1870 was $4,874,467; in 1871 was $4,264,260, and in 1872 was $5,466,434.

It is conceded that a tax of one-twentieth of one per cent. has been levied, and that it is wholly insufficient to meet the bonds and interest now due.

The point for us to consider is whether the County Court of Macon County is prohibited by section thirteen of the charter of the railroad company above quoted, from levying, in any one year, a tax of more than one-twentieth of one per cent. upon the assessed value of the taxable property in the county.

There seems to be no restriction on the power of the county as to the amount of stock to be subscribed or the amount of bonds to be issued in payment of such subscription. Prudence, indeed, would dictate that the county court, in the exercise of its discretion, ought not to have subscribed any more stock or issued bonds to any greater amount than they had authority to raise funds by taxation to meet the annual interest on the bonds, and the principal when they matured. But this, in my judgment, was a matter of discretion, and an excessive issue beyond the means of payment, of itself, does not render the bonds void.

Section thirteen of the charter above referred to entered into and formed a part of the bonds themselves, and these bonds must receive the same construction as though this section had been set out *in hæc verba* on their face.

There can be no innocent holder so far as the restriction upon the power of taxation is concerned. Each bondholder takes it subject to this restriction, and he must ascertain for himself whether there has been an over-issue. The records of the county court will show the amount issued, and he can examine for himself as to the amount of taxable property in the county.

The language of section thirteen is plain and positive, and will hardly admit of any other than a literal construction. It reads that the county court "may issue bonds therefor and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year."

A county is a mere quasi corporation, having only such powers as are delegated to it by the legislature. The county court is the administrative agent of the county, and can only exercise such powers as are conferred on it by statute.

At the time this railroad charter was passed, the general law authorized the county courts which had issued bonds to railroad companies to levy taxes without limitation to pay the interest on their bonds, and to provide a sinking fund to pay the principal. (1 Revised Laws 1855, p. 429, sec. 34.) This provision was continued in the General Statutes of 1865, and is still the law of this state. And no doubt this provision would have entered into and formed a part of these bonds, and might have so entered into the obligations of the contract as to prevent a subsequent repeal by the legislature, if there had been no restriction contained in the special

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act authorizing this subscription. But the very law authorizing the issue of the bonds in question also limits the power of the county court to levy a tax beyond one-twentieth of one per cent. for their payment in any one year. This limitation was enacted, not for the bondholders, but for the benefit of the tax-payers, so that they might not be harassed with a railroad tax, in any one year, too grievous to be borne.

The only taxes that can be levied by counties are such as are provided for by statute. The power of taxation is a sovereign right, which belongs alone to the state, and which can only be exercised in pursuance of laws which are passed by the legislature for that purpose. There can be no such thing as an implied power in a county court to levy a tax The power must be clearly and expressly given by statute. We are called upon to compel the County Court of Macon county, by mandamus, to do what the law does not authorize, but expressly forbids. In my judgment, this mandamus was properly refused. The Board of Supervisors of Carroll County v. The United States *ex rel* John Reynolds, decided by the United States Supreme Court, at the October term, 1873, reported in the Western Jurist for January, 1874, was a case taken by a writ of error from the Circuit Court of the United States for the district of Iowa That case is very analogous to the one under review, and fully maintains the doctrines of this opinion. It is true two of the judges dissented, but not on the point involved in this case.

Let the judgment of the circuit court be affirmed. Judge NAPTON, having been of counsel below, not sitting. The other judges concur.

AFFIRMED.

Federal Court Practice — Abatement of Action against Officers of the Government—Mandamus.

UNITED STATES v. BOUTWELL.

Supreme Court of the United States, October Term, 1874.

1. **Mandamus against Officer—Abatement.**—In the *absence of statutory provision* to the contrary, a mandamus against an officer of the government abates on his death or retirement from office, and his successor in office can not be brought in by way of amendment of the proceeding, or on an order for the substitution of parties.

2. **Mandamus.**—Office and nature of the remedy by mandamus considered by Mr. Justice STRONG

On motion. Mr. *R. M. Corwine*, in behalf of the owners of an order on the treasury of the United States, had applied to the Supreme Court of the District of Columbia for a mandamus on the Hon G. S. Boutwell, then secretary of the treasury, to pay it. That court refused the mandamus, and the case was brought, on error, by the relators here. After it had got into this court Mr. Boutwell resigned his place of secretary, and the Hon. W. A. Richardson was appointed to it. Hereupon Mr. Corwine moved for leave to bring in and substitute Mr. Richardson on the record as the defendant in the place of Mr. Boutwell. It did not appear that any application had been made to Mr. Richardson, as secretary, to pay the draft. Mr. Richardson, by his counsel, opposed the motion.

Messrs *R. M.* and *Q. Corwine*, in support of the motion, cited The Sapphire, 11 Wall. 168; Maddox v. Graham, 2 Metcalf (Ky.) 56; Hollister and Smith v. The Judges, etc, 8 Ohio State, 201.

Mr. *C. H. Hill, contra*.

Mr. Justice STRONG delivered the opinion of the court.

The office of a writ of mandamus is to compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or in another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards and what it seeks to enforce by a writ of mandamus is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It can not be directed to it. It is, therefore, in substance, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. Hence it is an imperative rule that previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which refusal can be conclusively inferred. (Tapping on Mandamus, 283.) Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded the cost must fall upon the defendant.

It necessarily follows from this that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court can not compel the defendant to perform it after his power to perform has ceased And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides, were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. As might be expected, therefore, we find no case in which such a substitution as is asked for now has ever been allowed in the absence of some statute authorizing it. On the contrary, after the statute of 9th Anne, chapter 20, section 1, it was the acknowledged doctrine in England that the rules and practice as to abatement by death, resignation or removal from office were the same in cases of mandamus as in personal actions. By that statute it was enacted that the prosecutor or relator may plead to or traverse all or any of the material facts averred in the return, the defendant having liberty to reply, take issue or demur, and it was directed that such further proceedings might be had as might have been had if the prosecutor had brought his action on the case for a false return. Thus mandamus became, in effect, a personal action against the defendant. See Chitty's General Practice, 3d ed., 1406–1409. This statute was in force in Maryland when the District of Columbia was a part of that state, and hence it is in force in the District now. Therefore, whatever may be the rule elsewhere, here a writ of mandamus must abate whenever the performance by the defendant of the personal duty it seeks to enforce has become impossible.

The law was changed to some extent in England by the later act of parliament of 1 William IV., chap. 21, sec. 5, by which it was enacted that in case the return to any writ (*of mandamus*) within the purview of the act should, in pursuance of an allowance made by it, be expressed to be made on behalf of any other person than the defendant, the further proceedings on such writ should not abate or be discontinued by death, resignation or removal from office of the person who made such return, but the same might be continued and carried on in the name of such person, and if a peremptory writ should be awarded, it might be directed to any successor of such person in office or right. No similar statute exists with us, and its enactment in England was a recognition of the rule that the death, resignation, or removal from office of the defendant worked an abatement of the action. It required a statute to change the rule, and to avoid injustice, the costs of the writ, when issued and obeyed, were committed to the discretion of the court.

And even the retirement of the defendant from office, and his consequent inability to perform the act demanded to be done,

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does not abate the writ, or necessitate its discontinuance; there is still an insuperable difficulty in the way of our directing the substitution asked for. We can exercise only appellate power. We have no original jurisdiction in the case Marbury v. Madison, 1 Cranch, 137; Kendall v. United States, 12 Peters, 526. But any summons issued, or rule upon Mr. Richardson requiring him to become a party to the suit, would be the exercise of original jurisdiction over both a new party and a new cause, for a duty which he would be required to perform would be his own, not that of his predecessor.

MOTION DENIED.

NOTE.—In many of the states their liberal statutes of amendments apply, either in terms or by judicial construction, to the writ of mandamus and the proceedings under it. The principal case relates to an official duty which rests upon the officer to whom the writ is directed. The Secretary v. McGarrahan, 9 Wall. 298. But where a duty rests upon a municipal corporation, it has been held that there is, in certain cases, an option to direct the writ either to the corporation in its corporate name (serving it upon the officers who have the power to perform its command), or to those officers whose duty it is to execute it, by their official designation. Tapping, 315, 317; Dillon Munic. Corp. sec. 699.

As to the effect of a change in the membership of a municipal council pending proceedings in mandamus against the council, and that the proceedings do not thereby abate, see Maddox v. Graham, 2 Metc. (Ky) 56, 63, 71; Louisville v. McKean, 18 B. Mon. 9, 13; Soutter v. Madison, 15 Wis. 30; Pegram v. Commiss., etc., 65 Nor. Car. 114. Dillon Munic. Corp., sec. 712 and cases cited.

Actions against National Banks in the Federal Courts—Local Jurisdiction.

W. S. MAIN, ASSIGNEE, v. SECOND NATIONAL BANK OF CHICAGO.

United States District Court, Western District of Wisconsin, April 21, 1874.

Before Hon. JAMES C. HOPKINS, District Judge.

1. **Suits against National Banks in Federal Courts—Territorial Jurisdiction.**—In a suit in one of the federal district courts against a national bank whose *habitat* is in another district, jurisdiction is not acquired by service of summons on the cashier of such bank, who happens to be found within the district in which the suit is brought.

H. S. Orton and *W. F. Vilas*, for plaintiff; *Tenneys, Flower & Abercrombie*, for defendant.

HOPKINS, J.—This is an action brought by the plaintiff, an assignee in bankruptcy, against the Second National Bank of Chicago, Illinois.

The suit was commenced by the service of summons upon the cashier, who was found within this district. The defendant moves to dismiss the suit for want of jurisdiction, because the defendant bank is located in Chicago, Illinois, and not within the western district of Wisconsin. In the argument filed in support of the motion it is claimed that a national bank can not be sued in any court *out* of the judicial district wherein it is "located" or "established." I do not think the general banking law admits of such an interpretation. The eighth section of the act of June 3, 1864 (13 U. S. Statutes at Large, 101), provides that such corporations "may sue or be sued in any court of law and equity as fully as natural persons." I do not think the provision in the 57th section of the act restrictive of the general authority, but that it was intended rather to enlarge the operation of the 11th section of the judiciary act of 1789 (U. S. Statutes at Large, 78), and to confer upon such organizations the right to sue and be sued in the federal courts in the district where located by a citizen of the same district; and I fully concur with Judge BLATCHFORD'S views contained in his opinion in The Manufacturer's National Bank of Chicago v. Baack, 8 Blatch. C. C. 137, that the banks organized under the general banking act of congress are to be deemed residents or inhabitants of the state or district where they are "located" and "established." The provisions of the act referred to by him are sufficient to warrant that conclusion, and if this were the only point, I should have no hesitancy in overruling the motion. But there is a question arising under the provisions of the 11th section of the judiciary act of 1789, which, as interpreted by numerous decisions of the federal courts, seems to me to constitute an insuperable objection to the plaintiff's right to prosecute this defendant in this court. That section provides that "no civil suit shall be brought before either of the courts (circuit or district) against an inhabitant of the United States, by any original process *in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.*" That the defendant was not an "inhabitant" of this district when this suit was commenced, is too plain for discussion. The remaining question is, was the defendant "found" here at that time? The defendant, as before stated, was "located" at Chicago; that was its *habitat.* That does not move around with the person of its officers; the corporation is not migratory. It could not, of its own will and without authority of law, change its location to this state. Therefore I must hold that this court has no jurisdiction over this defendant; that it was not "found" here within the meaning of that statute. In the case of The Bank of Augusta v. Earle, 13 Peters, 589, the court, in speaking of locality of corporations, says: "It must dwell in the place of its creation, it can not migrate to another sovereignty." This, it is true, was said of a state bank, but the same may, with equal propriety, may be said of a national bank. They have a local habitation—a place of business within a state or district—as much as a state bank. Justice NELSON, in Day v. Newark India-rubber Manuf. Co., 1 Blatchford, 628, and in Pomeroy v. N. Y. & N. H. R. R. Co., 4 Blatchford, 120, examined this question very fully, and arrived at the conclusion in both cases—notwithstanding there was a statute of the state of New York authorizing service to be made upon officers of such foreign company within the state, which would give the state courts jurisdiction of the corporations; that the corporations were not "inhabitants" of the state, and were not "found" there because their officers or agents resided or came into that district; that the officers were not the corporations, and the corporations were not, therefore, *found* within the district. This is a jurisdictional question, and "state laws can confer no authority on this court in the exercise of its jurisdiction, by the use of state process, to reach either person or property, which it could not reach within the meaning of the law creating it." Toland v. Sprague, 12 Peters, 328. I do not think the practice act of June 1, 1872 (17 Statutes at Large, p. 196), changes the rule. That relates to the practice and proceedings in suits against parties who may be prosecuted in the federal courts, but does not profess to enlarge the jurisdiction or to extend it over persons or cases not before within the cognizance of the court. As said in Tolond v Sprague, *supra*, p. 330, "The acts of congress adopting the state process adopt the form and mode of service only so far as the *persons* are rightfully within the *reach* of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts." I think the same construction should be given to the act of 1872 above mentioned; and so construed, it does not relieve the case of the question of the *habitat* of the defendant being without the district, and not, therefore, subject to the process of this court. The motion is therefore granted and the suit dismissed.

SUIT DISMISSED.

Taking Liberties with the Court—Compulsory Payment.

A correspondent in Boston sends us a brief which was submitted to the Supreme Judicial Court of Massachusetts in a notable case, and which we print below. The counsel for the defence in the case, who drew it, we believe usually writes over the *nom de plume* of Pelham. The rule is to hand

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the briefs to the judges before the arguments are begun, which was done in this case. After an inspection by the late chief justice and one of his associates, and a consultation between the two, in which much concern was apparent, the brief was returned to the counsel with the remark that it was not a proper brief to be read by the judges. We should agree with Mr. Pelham, that the case is interesting, not to speak of the affecting part. Trial by jury was waived, and the case was heard before the chief justice of the Superior Court, who found the payment was voluntary and entered a verdict for the defendant. The full court, however, upon argument, overruled him and decided that the payment was compulsory. Opinion by CHAPMAN, C. J. The opinion was especially unsatisfactory to the labor party. An appeal, as we believe is rarely the case in Massachusetts, was taken to the newspapers. The case excited much comment, ending, however, as such appeals usually end. The opinion was supposed to be in conflict with one given by the late Chief Justice SHAW, some years previously, in a somewhat similar case—Commonwealth v. Hunt and others, 4 Met. 111—in which the report says the case supposes the defendants were not bound by contract, but free to work for whom they pleased, or not to work at all if they so prefer. And as in that case, so in this, it was argued that since each one of the defendants had a right to quit the plaintiff's employment when he pleased, all must have that right. Judge SHAW had also said, in the case of Hunt and others above, that a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. But here there was no combination to violate a contract. It was said this distinction had been lost sight of in this case. A note at the end of the report says, after this opinion was given the case was settled by the parties. Our correspondent says this is true; but, he adds, it was settled by the plaintiff withdrawing his suit and paying his own cost, and the costs of the defendants likewise. As for the brief, we suppose that Mr. Pelham thought

"'Tis *liberty* alone that gives the flower
Of fleeting life its lustre and perfume."

SUPREME JUDICIAL COURT.

SUFFOLK, SS.

CAREW *vs.* RUTHERFORD *et als.*

DEFENDANTS' BRIEF.

The story of this case is interesting and affecting.

There was a man whose name was Carew, and he was a stonecutter and had a shop at South Boston, and he had contracted to furnish a great many stones, curiously cut, to Father Lyndon, who was then building the great Roman Catholic Cathedral. And this stonecutter was in need of other men, skilled in such stone-cutting, to cut these stones. And there was, at the same time, in Boston, an association of journeymen stonecutters. And most of the workmen of the best skill in that branch of industry in the city belonged to that association. The end in contemplation by the association, as set forth in the preamble, was "civilization." It was expected to reach it by "marching thereto hand in hand," stopping only occasionally on the way to "embrace the advantages which are to be derived from a thorough knowledge of business throughout this land." When in the autumn the swallows are about to take their flight to a better winter land, they assemble. Then together wing their way. Alone and unaided, few would survive the peril of the route. But how true it is, though the infinite is man's aim, the indefinite only, alas! is his right.

The constitution, or articles of association, provided, among other things, it should be especially the duty of the members to aid apprentices in acquiring a knowledge of "ornamental work." And to this end these articles further provided, that no such work begun in one yard should be sent away to be finished in another. Then, for the due enforcement of the articles of this constitution, it was still further provided, that in case any stonecutter should do any act injurious to the trade or association, he should be taken and deemed to be a "*scab*," and his shop should be styled a "*scab shop*," and the men who, after this sentence, continued to work for him, were to be denounced as "*inveterate scabs.*" I suppose this word "inveterate" was used to imply long-continued—on the principle, doubtless, that so great a crime could only be committed by one who had been long in criminal practice. There were some minor penalties to be imposed on the journeymen for simple misdemeanors, but none other on the employers. There was to be provided a fund for the sick and the ikers. And to prevent possible misapprehension, perhaps I ought to state, these strikers were not at all men who smote with their hands, but men who, in certain conditions, refused to use their hands to labor, preferring rather to suffer hunger and cold, like the old lady, who is said to have observed, "My daughter had rather cry than pick up chips."

Now it happened that this Mr. Carew sent his ornamental work, as it was called, away to be finished. This was reported to the association. The association chose a committee to enquire into the fact. The committee enquired. The fact was established. It was deemed to be injurious to the trade and to the association. He was adjudged to be a "*scab*," and his shop was a "*scab*" shop. His workmen left him.

The association voted it would take $500 as an "initiation fee," and remove the scab, if he so elected. He asked for a hearing. A hearing was granted to him. He humbly represented he had always been a good association man, and begged that the doom might be made less. The association adhered. The scab remained; and there was, moreover, a sore under the scab. He could not get skilled workmen to do his work. Nobody threatened him. There was no force or menace of force. No compulsion. Men said simply, "We won't work;" and they gave him a bad name. He laid his grief in the balance. There was a teasing desire. Scratching did not help it. It needed an ointment, and the price of that ointment was $500. The situation was not pleasant. He looked at his money and he looked at the scab. Whether it were better to part with both or to keep both? He took ten days to consider this question, and then made up his mind, what there was of it, to pay $500; and he paid it. And lo! the scab was removed!

A year and more passed, and Mr. Carew seeks to recover this money back. Jury was waived, and the judge who tried the case found the payment was voluntary, made under no mistake of facts, no duress of person or property, and no compulsion, but because the plaintiff deemed that his interest would be promoted by paying it. I cite Cunningham v. City of Boston, 15 Gray, 468; ——— v. Munroe, ——— 471.

Recent Decisions of the Supreme Judicial Court of Massachusetts.

[Compiled by Henry N. Sheldon, Esq., of the Boston Bar.]

Judgment—Estoppel.—The surety in a recognizance given by a judgment debtor, reciting the recovery of the judgment, can no more avoid the judgment by plea and proof than the original debtor. Way v. Lewis. Plaintiff recovered judgment against J. S. on a promissory note, and caused his body to be arrested on execution thereon. The judgment debtor, under a statute, recognized with surety to surrender himself for examination as to his estate. This condition being broken, the plaintiff brought suit on the recognizance against J. S. or his surety. The surety offered to show that J. S. had paid the judgment before judgment, and that plaintiff had taken the note in violation of an agreement with J. S. *Held*, that the evidence was inadmissible. *Ib.*

Witness—Criminal.—A person accused of a crime and voluntarily testifying in his own behalf under a statute allowing him so to do, waives thereby his privilege of not being compelled to criminate himself. Commonwealth v. Nichols.

Defendant was indicted for adultery alleged to have been committed with J. S. in Middlesex county. At the trial he testified in his own behalf that he had never committed adultery with her in Middlesex. On cross-examination he was asked whether he had ever committed that crime with her in Essex county. He objected to answer, on the grounds that it was incompetent and immaterial, and that the answer would tend to criminate himself. *Held*, that he was rightly compelled to answer. Ib.

Negligence.—It is for the jury to say whether a passenger on a horse-car is guilty of negligence in going to and standing upon the front platform, he having testified that there was not room for him in the car. Maguire v. Middlesex R. R. Co.

The mere fact that a passenger, injured while on the front platform of a horse-car, was drunk at the time, will not prevent his recovering damages against the company. Ib.

Unlawful Contract.—Under a statute providing that all persons using cans for the sale of milk shall have them sealed by an officer, and shall also be responsible for their correctness, and that the buyer may also demand to have them sealed, and imposing a penalty for the use of cans that have been condemned on examination, the sale of milk in unsealed cans is lawful, and the seller may recover price, unless the buyer has demanded that they be sealed. Ritchie v. Boynton.

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Lien.—Under a statute giving boarding-house keepers a lien for the price of board on the property of their boarders, the lien attaches as and when the board is furnished, although the board is payable at regular times and the lien is sought to be asserted for board for which the time of payment has not arrived. Smith v. Colcord. [In Fitch v. Newberry, 1 Doug Mich. 1, the court say that in the case of a maritime lien for freight, the relation of debtor and creditor must subsist between the owner of the goods and the carrier, so that an action at law might then be maintained for the payment of the debt sought to be enforced But the two cases are not irreconcilable.]

Notes and Queries.

A correspondent in Wyandott, Kansas, sends the following note of enquiry:

"Please look at sec. 41, chap. 93, p. 232 of the session laws of Kansas for 1873, and answer, whether a foreign corporation (insurance company) can come into Kansas, solicit subscriptions to its stock, and take a stock-note (permitted by its charter in the home of it creator) in payment for the subscription, and enforce a collection of the assessments upon the same in the courts of Kansas, never having complied with the requirements of said section. Is not the taking a subscription and receiving a stock-note 'business of insurance'—not strictly 'business of insurance,' but one of the agencies or instruments of the business, so connected with it that it is necessarily a part of it? The corporation is organized to do a 'business of insurance,' nothing else, and the moment it crosses the state line by its agent, in any manner attempting to aid the company, is it not a 'business of insurance?'"

We should be glad to hear from any of our Kansas readers on this question. From the fact that its solution depends upon a local statute, we do not feel warranted in attempting to answer it.

EDITORS CENTRAL LAW JOURNAL:—Among the enumerated powers by the charter conferred upon the city council of the city of Mattoon, Illinois, are the following:

"*Thirteenth.* To license, tax and regulate merchants, &c.

"*Fourteenth.* To license, tax, regulate and suppress hackmen, &c.

"*Fifteenth.* To license, tax, regulate, prohibit and suppress billiard tables, &c.

"*Sixteenth.* To authorize the proper officer of the city to grant and issue licenses, and to direct the manner of issuing and registering thereof, and the fees and charges to be paid therefor; * * * * * * but no license for the sale of wines or other liquors, ardent or vinous, fermented or malt, at wholesale or retail, by grocery-keepers, inn-keepers, or others, shall be issued for less than fifty dollars or more than one thousand dollars.

"*Seventeenth.* To restrain, regulate and prohibit the selling or giving away of any intoxicating or malt liquors by any person within the city, except by persons duly licensed."

These are all the provisions of the charter on the subject of intoxicating liquors.

By the sixteenth section, power somewhere to grant license is assumed but not conferred. The same may be said of the seventeenth section—the word "license" being omitted from the clause conferring power on this subject.

Has the council power to grant license to sell intoxicating liquors in the city, so as to protect the licensee from prosecution under the state law, which punishes him who sells without license? J. F. H.

ANSWER.—The question asked by our correspondent seems to relate to a local controversy, and its solution dependent upon, or at least liable to be influenced by, local or general legislation, with which we are not familiar. Such questions we can not undertake to answer. If all the data are given, we would incline to the opinion that the council possessed the power to grant licenses to sell intoxicating liquor; but whether such licenses would protect the licensees from prosecution under *state* laws might be a different question, and one entirely dependent upon the legislation of the state.

Book Notice.

LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED. By HERBERT BROWN, LL.D. Seventh American, from the fifth London edition, with references to American Cases. Philadelphia: T. and J. W. Johnson & Co. 1874.

Since 1845, when the first edition of this well-known treatise was published, five editions have appeared in England and seven in this country. It is a work which has an established place in the legal literature of both countries. By reason of its wider range and greater usefulness, it at once superseded Wingate's Maxims and other similar collections, and holds its place to this present without a rival; and as its learned author, in 1870, gave to the last English edition the benefit of a careful revision, the period is far distant when the work is likely to have a competitor for professional favor. This work, as well as the same author's "Commentaries on the Common Law," shows that he has thoroughly studied the principles of English jurisprudence, and that he was well fitted to collect and explain the Maxims of the English law, whether indigenous or adopted, and to point out their purpose, scope and limitations and the exceptions to which, in their practical application, they are subject.

The present edition is superior to any of the previous ones. It has been revised *in fact* as well as in name, and contains nearly 1000 pages. The judicial decisions of Great Britain down to the latest date have been examined and pressed into the service of the author and made to enrich and illustrate his pages. It is a somewhat popular impression that the work is chiefly useful to students, but this is, in our judgment, a mistaken notion. It is true that it does discuss elementary legal principles, and hence it is adapted to the wants of students, but as the author has drawn his principles and illustrations from adjudicated cases, his treatise is especially useful to the practicing lawyer, and to the judge—more useful, as we think, than to the mere student. The title-page informs the reader that the work contains "references to American cases." To some extent this is true, but the references are by no means copious or complete. It has no American editor, and unless it were properly edited it were better without one. Its practical value here would be much enhanced by a more full citation of the American cases, and we suggest to the enterprising publishers that they select a learned legal scholar from the American bar or bench, under whose auspices the next edition may some years hence be introduced to the profession.

Legal News and Notes.

—THE house judiciary committee has authorized a bill to be reported to the house allowing circuit and district judges throughout the United States to employ stenographers at a salary of eight dollars per day, to report the decisions and proceedings of their courts. This is considered as a very essential matter, and will very much facilitate the keeping of such records in a correct and proper manner.

—THE house committee on public lands have agreed upon a bill to protect settlers on railroad lands. It provides that where a settler has filed a claim in the interior department before the withdrawal of the land from settlement he shall not be dispossessed. The department now removes settlers from lands granted to railroads if they have taken possession subsequent to the location of the route. The measure is intended to protect a large number of settlers who are now oppressed by the rulings of the interior department.

—An amusing scene took place the other day in the Supreme Court of New York, special term, in New York city, at the conclusion of Dilleber v. Home Life Ins. Co. The case was a suit upon a policy of life insurance, and the defence was fraud in deceiving the company in regard to the health of the insured in the application for the policy. The evidence made out an unequivocal case of an attempt to swindle the company by procuring an insurance upon the life of a man who was known to himself and friends to be in an advanced stage of an incurable disease. Upon this testimony a motion was made by the defendant's counsel that the court direct a verdict for the defendant. Owing to the importance of the case, Judge VAN VORST took the papers and prepared a written opinion, at the conclusion of which he directed a verdict for the defendant.

"Listen to your verdict as recorded," shortly called out the clerk to the jury; "you find for the defendant?"

"No! no!" exclaimed the jurymen, all evidently being taken by surprise at this unexpected procedure.

"You are discharged," blandly observed the judge, and as they left, a more blank-looking set of jurymen was never seen.

This scene presents a curious theme for speculation. If trial by jury is a bulwark of popular right, what kind of a bulwark does it become where the judge coolly enters upon his record a verdict as the verdict of the jury, they at the same time shouting from their box "no! no!" And yet to such extremities of legal fiction have we come at last.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. }
S. D. THOMPSON, Ass't Editor. }

ST. LOUIS, THURSDAY, MAY 14, 1874.

{ SUBSCRIPTION: $8 PER ANNUM, in Advance

WE publish in this number the recent opinion of the Circuit Court of the United States for the District of Nebraska, ruling two new points under the act of congress of July 27, 1866, which relates to the removal of causes from the state to the federal courts—one concerning the *amount* necessary to entitle the party to a removal, the other as to the right of one alleged partner, who makes a separate defence, to have the cause transferred as to him.

THE opinion which we elsewhere publish, in [the case of Tappan v. The Merchants' National Bank of Chicago, will interest our readers, not only on account of the importance of the question itself, namely, the assessment for taxation of personal property, and in particular national bank shares, but also from the fact that it is the first opinion of the recently appointed Chief Justice of the United States. It presents a clear discussion of the subject, written in faultless English.

A RECENT number of the Albany Law Journal contains a long article on Religious Restraint of Trade, in which the learned editor takes occasion to illustrate the uses of legal journalism by "blazing a path," as the admirers of Mr. Bishop say, in advance of the courts, on the woman-praying-temperance crusade, which has lately had an absurd and spasmodic run in various parts of the country, and is now apparently subsiding. No doubt many a lawyer and many a layman has asked himself whether such demonstrations are tolerated by the law, and if not, of what species of offence do they consist? This question the Albany Law Journal lucidly answers: it is a *nuisance* in restraint of trade. This conclusion is enforced and illustrated by the following cases: Guille v. Swan, 19 Johns. 381; Gilbert v. Mickle, 4 Sandf. Ch. 357; Rex v. Carlile, 6 Car. & P. 637; and Fairbanks v. Kerr, 70 Penn. State, 86; s. c., 10 Am. Rep. 664.

IT seems that notwithstanding the high salaries which judges and law officers of the government receive in England, they are beginning to experience difficulty in filling those offices with men who would be considered the first choice for such positions. The post of solicitor-general has recently, it seems, been refused by Mr. Huddleston, Q. C., on the ground that he prefers his private practice and the position in parliament of an independent supporter of the government. Sir James Karslake is also reported to have refused the attorney-generalship on the plea of ill-health. Commenting on these declinations the Irish Law Times says: "We apprehend that this double refusal may be attributed to the fact that the leaders of the bar consider their practice as independent lawyers more advantageous to themselves than the official leadership and almost inevitable transition to the bench which attends the appointment as law officer. If this be so, some other means must be devised of securing to the government the services of the leading members of the bar, belonging to whichever political party may be in power."

If this suggestion is true when applied to the condition of things in England, it would be trebly true in America, where the salaries of our judges are disgracefully low. The judges of the highest courts in this country can not adequately feed their families and furnish their libraries with the miserable pittance which is eked out to them under the name of salary.

WE publish in another place the interesting case of Chapman v. Rose, recently determined in the New York Court of Appeals, expounding the right of a *bona fide* holder of a negotiable instrument as against the maker, who signed it without reading it, trusting to the fraudulent representations of another and supposing that he was signing a different paper. We learn that the case has excited a good deal of interest among the profession in New York, and do not doubt that its publication will be acceptable to our readers. Mr. Vanamee, of Middletown, N. Y., principal counsel for the plaintiff, through whose courtesy we have received the opinion, informs us that it is in conflict with the adjudications of all the Western courts of last resort except Iowa. However this may be, it seems to commend itself to reason and justice, its conclusion being based upon the principle that where one of two persons must suffer, it must rather be he through whose *negligence* the exigency has been occasioned. Besides it finds strong support in that public policy which is interested in upholding the negotiability of commercial paper. Negotiable bills and notes issued by private persons and corporations constitute a very large portion of the circulating medium by which the wheels of commerce are kept in motion. They are evidences of an enlarged credit, without which commerce, in the proportions to which it has attained in modern times, could not subsist. It must hence be apparent that any course of judicial decision which impairs the negotiability of such instruments, fetters and blocks the wheels of commerce. It is a "contractionist" policy of a dangerous character; for while it has a tendency to eliminate this class of paper from the exchanges of the world, it does not tend in the direction of those substantial benefits which flow from a specie basis of money. It simply has a tendency to impair and break down one of the leading evidences of commercial credit.

Fraud as a Ground for Annulling Marriage.

The case of Carris v. Carris, 1 Am. Law Times Reports, N. S. 41 (and which extends into the next number) contains a long and able discussion of this question. The discussion is divided into two branches. The first, whether the chancery court of New Jersey has succeeded to the powers of the ecclesiastical courts of England over this subject, and whether it hence has, without any express statutory grant of jurisdiction, power to annul a marriage on the ground of fraud. And this question is resolved in the affirmative, VANSYKEL, J., dissenting. The second question discussed is whether the fraud developed by the evidence in the particular case was of sufficient magnitude to avoid the marriage. The facts in proof were, that at the time the parties were married the complainant, the husband, believed from the acts of the wife and otherwise that she was chaste and virtuous; but nevertheless, so artfully had she and her friends concealed her condition, that two months after the marriage she was delivered of a full-grown child, begotten by some other man. The complain-

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ant found himself in a condition as perplexing as that of another man whose wife was delivered of a child a week after their marriage. This latter went to a cabinet maker and ordered a cradle, and told the mechanic that he might as well make him fifteen or twenty while he was about it, for his wife had a young one every week. In fact—

"A seven months' babe had been a truer gift;
Those *two* sweet moons confused his fatherhood."

Upon these facts the court held that the want of chastity and the concealment avoided the consent, and constituted such a fraud as would warrant a court of equity in declaring the marriage void *ab initio*.

Connected with this subject are some cases that bring together the sad and the comical in curious juxtaposition. In the case of The King v. The Inhabitants of Birmingham, 8 Barn. & Cres. 29, the marriage of a female pauper was brought about by fraud of the parish officers for the purpose of changing her domicile to the parish in which the husband was settled. It was nevertheless held that the marriage was valid, and that it operated to give the wife a settlement in the husband's parish. Precisely the same device was resorted to in a case in Vermont. The wife was a pauper, and so, it would seem, was the husband. They were settled upon different towns. Some of the inhabitants of the town which had the support of the wife, hired the husband for sixty dollars to enter into marriage with her in order to get her off their hands. The fraud was consummated, the marriage duly solemnized, and the wife's domicile thereby changed to the husband's town. About three weeks afterwards the wife was deserted, and, as it would seem, turned out to starve. Upon her petition the marriage was declared a nullity. Barnes v. Wyethe, 28 Vt. ——.

In a case in Tennessee, a husband, before his death, devised his plantation and six slaves to his wife "during her natural life or widowhood," with remainder to his children. After the death of the husband the widow became involved in debt; judgments were recovered against her and executions levied upon this plantation and these slaves. How to save to herself the use of this property was to her, no doubt, an all-important question; and, probably acting on the advice of some shrewd lawyer, she resorted to the experiment of entering into a marriage in legal form and solemnity with a drunken and degraded fellow, with whom, it seems, she never cohabited and never expected to cohabit. This done, of course the property immediately vested in the children and the creditor was defeated. The latter brought a bill in equity for the purpose of annulling the marriage on the ground that it was entered into solely in order to defraud him out of the satisfaction of his judgment. But the supreme court held that such a bill could not be maintained. The opinion was written by Judge McKinney, and is a fine illustration of the terse, clear and conclusive reasoning for which that jurist was distinguished. After showing quite conclusively that a court will not exercise its jurisdiction to annul a marriage on the ground of fraud at the suit of *third parties*, where the parties to the marriage contract do not complain, he puts the question involved in the particular case beyond doubt in the following sentences: "The interest of the defendant, Mary, was an estate upon condition, and her subsequent marriage with the other defendant was an absolute forfeiture of that estate as to herself, her creditors, and all other persons. This forfeiture she might incur at pleasure—it depended solely upon her own volition and act—and no power known to our law could have restrained her from doing so. It would be grossly paradoxical, then, to hold that a forfeiture lawfully incurred could be relieved against, or that a court of equity, though powerless to prevent the forfeiture by restraining the marriage, had nevertheless the jurisdiction to relieve against the consequences of such forfeiture." McKinney v. Clarke, 2 Swan, 321. The case of Castellar v. Simmons, determined about the same time in Tennessee, which has never been reported, but a copy of which the present writer has in his possession, presents the question in a still sadder aspect. The plaintiff recovered against the defendant a judgment of $1500 for a breach of promise of marriage. On the day after the summons was issued in the suit for the breach of promise, the defendant, Simmons, transferred his property to a third person to avoid the payment of the judgment which might be obtained. After recovering her judgment the plaintiff filed a bill in chancery to set aside this conveyance. Pending the chancery suit, the defendant, Simmons, proposed to marry the plaintiff, for the secret purpose of defeating her bill. The plaintiff was simple enough to consent, the ceremony was performed, and within ten minutes thereafter Simmons eloped with a strumpet and betook himself to parts unknown. When the wife discovered how wretchedly she had been deceived, she filed a bill in equity to annul the marriage, and the case coming before the supreme court, the same learned judge said:

"Has the Court of Chancery power to annul the marriage? In a case at Nashville [McKinney v. Clarke, *supra*] a creditor filed his bill to annul a marriage celebrated for the purpose of defrauding him of his debt. Relief in his case was refused. But here we are called upon by one of the parties to the marriage to grant relief against a fraud which the other party has, through the marriage, perpetrated upon her. In the opinion of a majority of the court we are compelled to announce that the marriage can not be set aside on this ground. Misrepresentations as to station, property and the like, afford no ground of relief against a marriage. The fraud in this case consists in the secret intention of the party to desert the wife. The object was to secure a pecuniary benefit. If this were a ground of relief, the courts of chancery would be crowded with applications of this kind.

"We are of opinion that the complainant is entitled to relief by divorce and alimony. But in the view we take, the sale, which would be void against a creditor (and such the plaintiff was until her marriage with the defendant, Simmons), would be valid as against the party himself, and as against the wife by the subsequent marriage, who can only claim under him. In this attitude the plaintiff now finds herself. The only relief, then, against the property will be to reach the purchase money so far as it remains unpaid. Though the answer states that the purchase money is paid, there is much in the case to attack it indirectly, and so much suspicion against it that we will require the purchaser to show the payment by clear proof. Cause remanded for proof on this point. Costs accrued and to accrue to be paid by defendant."

Totten, J., dissented.

So much for this interesting question. Without doubt the books contain many other cases equally curious and equally irreconcilable.

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The Arkansas Imbroglio—Some of its Legal Aspects.

We have hitherto refrained from making any allusion to the contest which unhappily threatens with bloodshed and civil strife the unfortunate people of Arkansas. With the political aspects of such a question, we of course, in these columns, can have nothing to say. Our attention has, however, recently been called to the *legal* aspects of the contest by a brief furnished us through the courtesy of A. M. Rose, Esq., of counsel for Baxter, and also by a brief submitted to the attorney-general on behalf of Brooks, which will be found in the New York Herald of May 8. These briefs enable us to seize upon and present to our readers the salient points of the contest; and these appear to be substantially as follows:

The constitution of Arkansas, after providing that the returns of every election for governor, lieutenant governor, secretary of state, treasurer, auditor, attorney-general and superintendent of public instruction shall be opened and counted by the president of the senate in the presence of the members of that body during the first week of the session, recites that "*contested elections shall likewise be determined by both houses of the general assembly, in such manner as is or may hereafter be prescribed by law.*" (Const. of Ark., art. VI, § 19.) By a statute in force at the time this constitution was adopted and still in force, it is also provided that "*all contested elections of governor shall be decided by the joint vote of both houses of the general assembly, and in such joint meeting the president of the senate shall preside.*" The statute then describes minutely the manner in which such a contest is to be conducted. These provisions would seem to be entirely decisive of the jurisdictional question involved in the contest; for the vesting of co-ordinate jurisdiction in any other tribunal over the same question would not only be absurd, but would have a direct tendency to produce anarchy and bloodshed. There can, therefore, be no intendment in favor of any other tribunal possessing such jurisdiction. If it exist, it can only be in pursuance of constitutional or statutory provisions equally strong and conclusive in their terms as those above recited. But to offset this express grant of jurisdiction there appears to be nothing in the constitution or laws of Arkansas, except a general grant of jurisdiction to the courts to hear and determine proceedings for the usurpation of office. This general grant of jurisdiction is found in the following provisions of the Arkansas code of 1874; and we understand that it is upon these alone that jurisdiction in the courts to determine proceedings for the usurpation of the executive offices of the state government is claimed:

"In lieu of the writs of *scire facias* and *quo warranto*, or of an information in the nature of a *quo warranto*, actions by proceedings at law may be brought to vacate or repeal charters, and prevent the usurpation of an office or franchise." § 522.

"Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him *either by the state or the party entitled in office or franchise* to prevent the usurper from exercising the office or franchise." § 525.

"For usurpation of *other* than county offices or franchises, the action by the state shall be instituted and prosecuted by the attorney-general." § 527.

"Where a person is adjudged to have usurped an office or franchise, he shall be deprived thereof by the judgment of the court, and the person adjudged entitled thereto reinstated therein; but no one shall be adjudged entitled thereto unless the action is instituted by him. And the court shall have power to enforce its judgment by causing the books and papers, and all other things pertaining to the office or franchise, to be surrendered by the usurper, and by preventing him from further exercising or using the same, and may enforce its orders by fine and imprisonment until obeyed." § 529.

On the principle that a statute which operates specifically and directly upon a given subject-matter excludes the operation from the particular subject-matter of an inconsistent statute couched in general terms (Sedgwick Stat. & Con. Law, 123), there seems little room to doubt that the constitution of Arkansas vests exclusive jurisdiction in the general assembly of hearing and determining "all" cases of contested elections to the executive officers of the state government, and that the jurisdiction granted to the courts by the general statutes last quoted refers to other and inferior offices. Again, the constitution having vested jurisdiction of "all" such cases in the general assembly, there would seem to be very clear ground to question the constitutionality of a statute vesting it in another tribunal. And a statute will not be interpreted so as to bring it in conflict with the constitution when such an interpretation can be avoided.

The votes for governor were counted by the senate as prescribed by law, and it was officially declared that Baxter had been elected by nearly 4000 majority. Now it had been held that the Supreme Court of Arkansas has original jurisdiction in all matters of *quo warranto*. Price v. Page, 25 Ark. 527. On the one hand it is claimed that Mr. Brooks suffered the legislature to adjourn without instituting any contest before that body, as prescribed by the constitution and statute above cited, but instead thereof instituted a proceeding against Baxter by *quo warranto* in the supreme court; and, on the other hand, it is asserted (and this is probably the fact) that Brooks presented his petition to the legislature asking to be allowed to contest Baxter's right to the office, and that body *refused to consider it.* It was rejected without being read. The supreme court, in the *quo warranto* suit, held that neither the supreme court *nor any other court* had jurisdiction over the question, but that such jurisdiction was exclusively vested in the legislature. The language of the court was as follows: "Under this constitution the determination of the question whether a person exercising the office of governor has been duly elected or not *is vested exclusively in the general assembly of the state, and neither this nor any other court has jurisdiction to try a suit in relation to such contest, be the mode or form what it may be, whether at the suit of the attorney-general, or on the relation of a claimant through him, or by an individual alone claiming a right to the office.* Such issue should be made before the general assembly. It is their duty to decide, and no other tribunal can determine that question. We are of the opinion that this court has no jurisdiction to hear and determine a writ of *quo warranto* for the purpose of rendering judgment of ouster against the chief executive of this state, and the right to file an information and issue a writ for that purpose is denied." In this opinion three of the five judges, namely, Judges GREGG, STEPHENSON

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and SEARLE concurred. Chief Justice MCCLURE dissented, and Judge BENNETT neither signed the opinion nor dissented.

This opinion was unanimously affirmed by the same court in the case of Wheeler v. Whytock, MS., 1873. The case was as follows: After the election in 1872, Mr. Wheeler, the candidate on the Grant-Baxter ticket, was declared to be elected auditor over Mr. Berry, the candidate on the Greeley-Brooks ticket. Mr. Berry brought his suit in the Pulaski Circuit Court against Mr. Wheeler, under the provisions of the code above cited. This suit was also pending some time. Mr. Wheeler at last applied to the supreme court for a prohibition against the circuit court to prevent it from exercising jurisdiction in the cause. The writ was ordered, the court holding unanimously that the case was governed by the decision in the case of *The State on the relation of Brooks v. Baxter*; that the jurisdiction of these contests was vested exclusively in the general assembly, and that no state court could interfere in the matter. It seems that Governor Baxter has been unable to get a copy of this opinion, although it is by law a public document.

Thus stood the case until the recent *coup d'etat*, and everybody supposed the question definitely settled by the legislature and supreme court. But in the meantime the two governors changed their political affinities. Baxter, who had been elected, or declared elected, on the "Minstrel" or Grant ticket, began to affiliate with the Democrats, and in the meantime Brooks, who claimed to have been elected on the "Brindletail" or Greeley ticket, came to a secret understanding with the republican leaders. This altered the case with the Supreme Court of Arkansas. It was now *your* bull that has gored *my* ox, as we shall presently see. The judicial trick which resulted in surprising Governor Baxter and ejecting him from the state-house and installing Brooks in his stead, is familiar to every person who has read the newspapers. If we except the celebrated midnight order of Judge DURELL, which, as appears from the testimony taken before the congressional sub-committee at New Orleans, was issued upon his own motion, it has no parallel in the judicial annals of our country. How it was done, we shall allow Mr. Rose's brief to tell:

"The country was in a state of most profound peace. There was no political strife or contest to awaken interest or incite a conflict, when, on the 15th of the present month, the fact became known that Mr. Brooks had gone to the state-house at a time when a heavy rain was falling and the streets were deserted, accompanied by twenty-five armed men, and had ejected Governor Baxter from the capitol. A little later it became known that Brooks had taken his oath of office before Chief Justice MCCLURE, and claimed to be acting under a judgment rendered in his favor in the above-named suit pending in the Pulaski Circuit Court. And here we may mention several extraordinary facts connected with this judgment, which we believe to be true, and which have not been denied, so far as we know. The judgment was rendered in the absence of Governor Baxter and his attorneys, when nearly the entire bar was in attendance on the federal court, and when it was the understanding of the bar that during that week no business in the circuit court would be taken up without consent; Judge DILLON, of the federal court, being present in the city, and being obliged to press the call of his docket. The judgment was made final on overruling the demurrer, although the *civil code of Arkansas*, section 154, provides that 'upon a demurrer being overruled, the party demurring may answer or reply.' The court also gave judgment against Governor Baxter for over $2,000 for emoluments of the office received by him, without any writ of enquiry or evidence that he had received any emoluments; all of which were acts only consistent with the idea that the court, as was a well-known fact, had no jurisdiction of the cause, and that the judge was acting with that caprice which is not restrained by official or judicial barriers. Perhaps no judgment was ever more speedily executed. The mandate outran rumor. Official mandate or writ there was none. The parties could not wait for any document of the kind to be made out. By their haste they took Governor Baxter by surprise. He was surrounded by no guards. Armed men entered his room and ejected him. It is contended that no writ was necessary—that the judgment itself amounted to an ouster. We shall not go into technicalities. Technical rules do not apply to such a proceeding. Bayonets and muskets could not give any moral strength to the so-called judgment. If the judgment had been of any force they would have been needless. The whole affair only admits of one explanation. It was a conspiracy, and has a very bad aspect."

It must be remembered that this proceeding, whereby Brooks was declared to be governor, was before a single *circuit judge*, in a case over which the supreme court of the state had twice declared that no court had jurisdiction. That a circuit judge should thus usurp a jurisdiction which the supreme court sitting above him had determined he did not possess, was a matter of great surprise; but it is a matter of greater surprise that the same supreme court, which had twice decided that no such jurisdiction existed in the courts, should affirm the circuit judge in the exercise of it. This they have done in the case of Brooks v. Page, state treasurer, the text of which, as telegraphed to the daily press, is as follows:

Application for mandamus:. Opinion by Chief Justice MCCLURE. The 12th section of chapter 164 of Gould's Digest reads as follows:

"For the purpose of carrying into effect the object and directions of the section last preceding, the further sum of fifty thousand dollars shall be and the same is hereby appropriated and placed at the disposal of the governor, to be drawn from the treasury under warrants from the auditor, to be issued on requisitions of the governor for the purposes specified in the preceding section, and for no other purpose.

The fourth section, to which the above reference is made, is as follows:

"SEC. 11. The governor is hereby authorized and it is made his duty to superintend generally everything required to be done by this act, and see that every branch of the service is properly conducted, and to see that the laws of the state are fully and efficiently enforced throughout the utmost limits thereof; and if the laws can not be enforced by ordinary means, nor by the means hereinbefore prescribed, it is hereby made the duty of the governor, as soon as it may appear to be necessary, to order out such number of the militia of this state as the service may require, and with military force take possession of the county and expel therefrom or seize and bring to trial all disorderly and disaffected persons without delay, and keep possession of all such by force until order is restored and the sovereignty and laws of Arkansas acknowledged and obeyed."

From the pleadings it appears that the relator, Joseph Brooks, styling himself governor of Arkansas, made a requisition for $1000 on the appropriation made by the 12th section of the act referred to, and that the auditor, in obedience to said requisition, drew his warrant on the treasurer for the amount specified therein, and that said treasurer refused

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to pay said warrant or issue treasurer's certificates therefor. In response to the prayer of the petition the treasurer admits his refusal to pay said warrant, and submits that he is not bound to do so because Elisha Baxter was declared duly elected governor; and that he took the oath of office, etc., and that in fact said Baxter is governor of the state of Arkansas, and not the relator, Joseph Brooks.

To the response the relator files a replication, alleging that by the judgment of the circuit court of Pulaski county he was adjudged the office of governor; that he took the oath of office, etc., and entered upon the discharge of the duties thereof, etc.

To the replication a demurrer is filed, the grounds being that said judgment is not sufficient in law to maintain an action. The only question that we deem it necessary to notice is: did the circuit court have jurisdiction to render the judgment in the case of Brooks v. Baxter? We feel some delicacy about expressing an opinion upon the question propounded, but under the pleadings it has to be passed upon incidentally, if not absolutely, in determining whether the relator is entitled to the relief asked for. His right to the office, if established at all, is established by the judgment of the circuit court of Pulaski county. We are of the opinion that the circuit court has jurisdiction of the subject matter and its judgment appears to be regular and valid.

Having arrived at these conclusions, the demurrer is overruled, and the writ of mandamus will be awarded as prayed for.

Signed by JOHN MCCLURE, Chief Justice; JOHN E. BENNETT, E. J. SEARLE, M. L. STEPHENSON, Asssociate Justices.

That a court of this character could thus overrule its own decision, twice pronounced and in substantially the same case, *and without attempting to assign any reason for so doing*, is astonishing. It enforces upon the mind the suggestion how deep and well matured was the plot which has so suddenly ended in a political *denouement* of which the history of our country affords but one parallel.

But whatever feelings must be entertained towards such a judiciary by every honest breast, concerning the arrest and spiriting away of two of the judges by Governor Baxter's militia there can be but one opinion. Whatever preconceived opinions they may have been known to entertain, and whatever predetermined judgment it may have been known that they were prepared to render, they had a right to assemble at the capital and sit in judgment, without molestation, upon any question that should come before them. Their arrest was an outrage which Governor Baxter has not had the courage to avow; which was unworthy of the dignity of American citizens, and which sinks those engaged in it to a position akin to Mexican or Haytian revolutionists. Doubtless those engaged in it honestly felt that they had strong public reasons for such an extraordinary measure, and the previous indecent conduct of three of these judges in telegraphing to the president that they recognized Brooks as governor, thus prejudging the whole case without a hearing, and the subsequent decision of the court go far towards justifying them; but it can not be doubted that the act will receive the general condemnation of the American people.

We have endeavored, in discussing this subject to divest it of its personal and political aspects, and to look upon it simply as a legal question. That Brooks was elected by a fair majority we do not deny, but fully believe. This has hitherto been generally claimed by the followers of Baxter. We think it equally certain that if an election were held to-day, Baxter would be elected by an equal majority and by substantially the same votes. But in our judgment, whether Brooks or Baxter be the legal governor is a question which the legislature has exclusive jurisdiction to determine. And when the legislature does determine the contest in the mode pointed out by law, that decision will be conclusive, and should be acquiesced in by the people and respected by the federal government. It now seems that the president has determined to let the legislature which is assembling settle the whole question, and to abide by and enforce that settlement.

It is to be understood, however, that these are the views of the undersigned alone, and for them he alone is responsible.

S. D. T.

Taxation of National Bank Shares—Chief Justice Waite's First Opinion.

JOHN W. TAPPAN, COLLECTOR OF TAXES, ETC., APPELLANT, v. THE MERCHANTS' NATIONAL BANK OF CHICAGO.

Supreme Court of the United States, April, 1874.

1. **Taxation of Personal Property.**—Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But for the purposes of taxation it may be separated from him, and he may be taxed at the place where it is actually located.

2. **National Bank Shares Personal Property.**—Shares of stock in national banks are personal property, made so in express terms by the act of congress under which such banks are organized. 13 Stat. at Large, 102, § 12.

3. **Taxation of National Bank Shares.**—*Held*, therefore, that the state within which a national bank is situated has jurisdiction for the purposes of taxation of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Chief Justice WAITE delivered the opinion of the court.

We are called upon in this case to determine whether the general assembly of the state of Illinois could, in 1867, provide for the taxation of the owners of shares of the capital stock of a national bank in that state, at the place within the state where the bank was located, without regard to their places of residence. The statute of Illinois, under the authority of which the taxes complained of were assessed, was passed before the act of congress, approved February 10, 1868 (15 Stat. at Large, 34), which gave a legislative construction to the words "place where the bank is located, and not elsewhere," as used in section 41 of the national banking act (13 Stat. at Large, 112), and permitted the state to determine and direct the manner and place of taxing resident shareholders, but provided that non-residents should be taxed only in the city or town where the bank is located.

The power of taxation by any state is limited to persons, property, or business within its jurisdiction. R. R. v. Pennsylvania, 15 Wall. 319. Personal property, in the absence of any law to the contrary, follows the person of the owner and has its *situs* at his domicile. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles and have been often acted upon in this court and in the courts of Illinois. If the state has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property.

Shares of stock in national banks are personal property. They are made so in express terms by the act of congress under which such banks are organized. 13 Stat. at Large, 102, § 12. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purpose of taxation, and give them a *situs* of their own. This has been done. By section 41 of the national banking act, it is in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of

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uch person or corporation in the assessment of taxes imposeds under state authority, at the place where the bank is located, and not elsewhere. 13 Stat. at Large, 112. This is the law of property. Every owner takes the property subject to this power of taxation under state authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the state in which the bank is established, for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the state in which he resides, and submitted to the taxing power of the state where, in contemplation of the law, his investment is located. The state, therefore, within which a national bank is situated has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly.

The state of Illinois thus having had, in 1867, the right to tax all the shareholders of national banks in that state on account of their shares, it remains to consider at what place or places within the state such taxes could be assessed.

It is conceded that it was within the power of the state to tax the shares of non-resident shareholders at the place where the bank was located, but it is claimed that under the constitution of the state resident shareholders could only be taxed at the places of their residence. We have not been referred to any express provision of the constitution to that effect. There is nothing which in terms prohibits the general assembly from separating personal property within the state from the person of the owner and locating it at appropriate places for the purposes of taxation, but it is insisted that sections 2 and 5 of article IX. of the constitution of 1848, which was in force when the act of 1867 was passed, contain an implied prohibition.

Section 2 directs that "the general assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise." Section 5 directs that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all property within the limits of municipal corporations belonging to individuals shall be taxed for the payment of debts contracted under authority of law." The corresponding provisions of the constitution of 1870 are in substance the same.

The object of these sections is to secure uniformity of taxation. That, it is said in Bureau Co. v. C. B. & Q. R. R. Co., 44 Ill. 238, is to be regarded as the cardinal principle, the dominant idea of this article of the constitution. But uniformity in this connection is only another name for equality, for the provision is for "levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." The value of the property being ascertained, the same rate of taxation must be laid upon all.

P operty is made the constitutional basis of taxation. This is not unreasonable. Governments are organized for the protection of persons and property, and the expenses of the protection may very properly be apportioned among the persons protected according to the value of their property protected.

The constitution does not undertake to fix the value of the property; neither does it prescribe any rules by which it is to be fixed That is left to the general assembly, for the provision in that respect is, "such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise." The mode and manner in which the persons appointed to make the valuation shall proceed, are left to the discretion of the general assembly. In fact, the whole machinery of taxation must be contrived and put in operation by the legislative department of the government.

As part of this machinery, taxation districts must be created. All property within the district must be taxed by a uniform rate. If property is actually within a district it is but proper that the legislature should provide that it should be listed, valued, and assessed there. In fact, the last clause of section 5, article IX., seems to make that a duty, for it provides that the general assembly shall require that all property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law.

This power of locating personal property for the purpose of taxation, without regard to the residence of the owner, has been often exercised in Illinois and sustained by the courts. City of Dunleith v. Reynolds, 53 Ill. 45. Since the adoption of the constitution of 1870, which did not enlarge the powers of the general assembly in this particular, very extended legislation has been had with a view to such location. Thus, live stock and other personal property used upon a farm must be listed and assessed where the farm is situated; property in the hands of agents at the place where the business of the agent is transacted; water-craft where they are enrolled, or, if not enrolled, where they are kept; the property of bankers, brokers, merchants, manufacturers, and many other classes of persons specially enumerated, at the place where their business is carried on. This became necessary in order that the burdens of taxation might be equally distributed among those who should bear them.

We do not understand the counsel for the appellee to dispute this power where the property is tangible and capable of having so to speak, an actual *situs* of its own; but he claims that if it is tangible it can not be separated from the person of its owner. It must be borne in mind that all this property, intangible though it may be, is within the state. That which belongs to non-residents is there by operation of law. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to the jurisdiction of the state, and they must obey its will when kept within the limits of constitutional power.

The question is then presented whether the general assembly, having complete jurisdiction over the person and theproperty, could separate a bank share from the person of the owner for the purposes of taxation. It has never been doubted that it was a proper exercise of legislative power and discretion to separate the interest of a partner in partnership property from his person for that purpose, and to cause him to be taxed on its account at the place where the business of the partnership was carried on. And this, too, without reference to the character of the business or the property. The partnership may have been formed for the purpose of carrying on mercantile, banking, brokerage, or stock business. The property may be tangible or intangible, goods on the shelf or debts due for goods sold. The interest of the partner in all the property is made taxable at the place where the business is located.

A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or capital invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides, but his property in this stock is protected at the place where the bank transacts his business. If he were a partner of a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in one case as in the other He requires for it the protection of the government there, and it

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seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly can not be an abuse of legislative discretion to require him to do so. If it is not, the general assembly can rightfully locate his shares there for the purpose of taxation.

But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules can not be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for their purposes of taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted. The courts permit this. Thus, in a case in Illinois, involving the system adopted for the taxation of bank shares, it was said by the supreme court (McVeagh v. Chicago, 49 Ill. 329) "in view of this legislation it must be apparent that a system of taxation for bank shares was designed peculiar to itself and independent of the general revenue laws of the state," and the authority of the law was sustained and enforced.

Again, it is said the law in question destroys the uniformity of taxation, because it provides for the collection of the taxes assessed on account of this kind of property in an unusual way. The constitution does not require uniformity in the manner of collection. Uniformity in the assessment is all it demands. When assessed the tax may be collected in the manner the law shall provide, and this may be varied to suit the necessities of each case.

Since the decree was rendered in the circuit court, the Supreme Court of Illinois has passed upon this same question and declared the law of 1867 to be constitutional. We might have contented ourselves by acknowledging the authority of this decision, but we are willing not only to acknowledge its authority, but to admit its correctness.

We have not felt called upon to consider whether the general assembly could, under the provisions of the act of congress, provide for the taxation of shareholders at any other place within the state than that in which the bank is located. It is sufficient for the purposes of this case that it might tax them there.

Other questions have been discussed in the argument, and among them one which relates to the power of the bank to interfere in behalf of its stockholders in the manner which has been done. We have not deemed it necessary to pass upon any of these questions, as those already decided are conclusive of the case.

The decree of the circuit court is reversed and the cause remanded, with instructions to proceed in conformity with this opinion.

DECREE REVERSED.

Removal of Causes from State to Federal Court —Act of July 27, 1866—Citizenship—Amount—Removal by Part of the Defendants.

JOHN McGINNITY v. FRANCIS A. WHITE *et al.*

United States Circuit Court, District of Nebraska, May Term, 1874.

Before DILLON and DUNDY, Judges.

1. **Removal of Causes—Citizenship.**—Under the act of July 27, 1866 (14 Stats. at Large, 306), as to the removal of suits from a state court into the federal court, it is sufficient, it seems, as respects citizenship, that the defendant applying for the removal is, at the time of filing his petition therefor, a citizen of another state, and the plaintiff a citizen of the state in which the suit is brought.

2. ——. **Amount in Dispute.**—It is sufficient in such case that the matter in dispute exceeds $500 besides costs *at the time* when the right to the removal accrues and is applied for.

3. **One of Several Defendants** sued as *co-partners* may, if the other requisites exist, have the cause removed to the federal court so far as concerns himself.

On motion by the plaintiff to remand the cause to the state court because it was improperly removed to this court. The removal was ordered by the state court upon the petition of Francis A. White, one of the defendants.

The record shows that the plaintiff commenced his suit in the state court, February 28, 1870, demanding, in his petition, of the defendants, five in number, as co-partners, $1,000 for work and labor. A summons claiming that amount was served. The defendants separately demurred for misjoinder of causes of action and parties defendant. On the first day of April, 1870, the demurrers were sustained and leave given to the plaintiff to amend the petition in forty days. On May 12, 1870, an amended petition was filed against the same persons as co-partners, and claiming of them the "sum of $445, with interest thereon at ten per cent. per annum from January 21, 1870, * * * for work and labor before that date performed by the plaintiff for the said defendants, co-partners in business as aforesaid." The original petition referred to certain written contracts, but the amended petition does not.

On July 22, 1870, Francis A. White answered separately, traversing the petition, and especially denying that he was a co-partner with the other defendants, as alleged therein. One of the other defendants, G. Frederick White, answered separately to the same effect. The cause was continued, and at the December term, 1870, at the instance of the two defendants last named, the venue was changed to another state court, and in that court the cause was continued from time to time by stipulation until the 11th day of April, 1873, when the defendant, Francis A. White, filed his petition for its removal to the Circuit Court of the United States for the District of Nebraska, and offering surety, &c.

The petition was under the act of July 27, 1866, and states, *inter alia*, that "the petitioner, Francis A. White, is now, and since the 19th day of February, 1873, has been a citizen of the state of New Jersey; that the plaintiff is, and was at the time of bringing the suit, a citizen of Nebraska; that the amount in dispute exceeds $500, exclusive of costs; that all the defendants, except David Everest, are citizens of some other state than the state of Nebraska (naming the states); that there can be a final determination of the controversy, so far as concerns the petitioner, without the presence of the other defendants as parties," &c. The petition offers surety, &c., and prays the removal of the suit to this court. The surety was accepted and an order made transferring the cause as prayed.

And now in this court the plaintiff moves to remand the same on two grounds:

1. The amount involved does not exceed $500.

2d. One of several alleged co-partners made defendants is not entitled to remove the cause, where some of his co-defendants are citizens of the state in which the suit is brought.

Stevenson and *Hayward*, for the plaintiff.

T. M. Marquette, for petitioner for removal.

DILLON, Circuit Judge.—I. The petition for removal was under the act of July 27, 1866 (14 Stats. at Large, 306). This enactment copies, in many respects, section 12 of the judiciary act as to the removal of causes into the federal courts, but it makes two important changes in that section; first, in authorizing, in certain cases, the removal by part of several defendants if some are citizens of the state where suit is brought, and others are aliens or citizens of some other state; second, in *extending the time* in which the application for the removal may be made, down to the trial or final

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hearing. But as respects the amount in the controversy, the language of the judiciary act is retained—"the matter in dispute must exceed the sum of $500, exclusive of costs."

In cases like the present the amount in controversy, for the purpose of the removal, is determined by the declaration or petition. In this case a demurrer to the original petition having been sustained, the plaintiff made his case by an amended petition filed May 12th, 1870, in which he claimed to recover $445 with ten per cent. interest from January 21, 1870. This is the only pleading on the record which the defendants were bound to answer, and the one upon which the defendant who subsequently applied to remove the cause, took issue. At the time when this amended petition was filed, and at the time when the petitioner for the removal of the cause took issue upon it, the sum demanded, including interest, did not amount to $500. But by continuances the cause remained pending in the state court until the 14th day of April, 1873 Meanwhile, to-wit: on the 19th day of February, 1873, the defendant, Francis A. White, who was served in Nebraska when the suit was originally commenced, became a citizen of New Jersey At the next term of the state court thereafter, he applied for the removal of the suit, and by this time, if interest on the sum demanded in the amended petition be included, the amount was more than $500.

Under these circumstances the question is, whether "the matter in dispute exceeded $500," within the meaning of act of July 27, 1866. Under the amendatory act of March 2, 1867 (14 Stat. at Large, 558), Mr. Justice MILLER has determined that a party to a suit who while it is pending becomes *bona fide* citizen of another state is entitled, if the other required conditions are met, to have the cause removed. Johnson v. Monell, 1 Woolworth, C. C. 370. As both acts give the right to apply for the removal "at any time before the trial or final hearing of the cause," I can see no difference in this respect between the act of 1866 and the act of 1867, and the reasoning in the case cited seems to be applicable here, and to favor the right of removal. Pending the suit in the state court, the defendant has in good faith become a non-resident of the state of Nebraska and a citizen of another state, and it is this which constitutes the substantial ground upon which the right, under the act of 1866, to the removal is based. If, then, the right to removal accrues upon the party becoming *bona fide* a non-resident citizen, is it not enough that the total amount then claimed against him by his adversary exceeds the sum of $500? The action being *ex-contractu*, the right to interest follows upon establishing the right to the principal sum, and may properly be included in determining the amount of the matter in dispute. I confess to doubts respecting the soundness of the foregoing view, but have adopted it because it seems to be equally consistent with the language of the act and more consistent with the reason and purpose of it than the opposite conclusion, denying the right to the removal on the ground that the amount was insufficient, when, if judgment should then be rendered by the state court, it would be for a sum greater than that which the act adopts as giving the defendant the right to the transfer.

II. This result makes it necessary to consider the other objection made by the plaintiff to the jurisdiction of this court, which is that the suit in its nature is not "one in which there can be a final determination of the controversy," so far as concerns the party applying for the removal, "without the presence of the other defendants as parties to the cause."

The five defendants are sued *as co-partners* for work and labor, and the separate answer of the defendant now before us puts in issue two cardinal propositions in the petition:

1st. That he was a partner with his co-defendants, and 2d. That the plaintiff is entitled to recover of him the amount claimed.

Under the legislation of congress and of the state of Nebraska, the plaintiff could have maintained an action against one or more of the defendants, and it would have been no cause of abatement that all the co-partners were not before the court.

If all the other defendants had failed to answer, the defendant who applied for the removal could have answered, as he did for himself, and the issues thus raised would have stood for trial. Why can they not be tried, as well in the federal as in the state court? And when tried, is not the controversy *finally determined*, so far as it concerns him, as effectually as if all the defendants were in the federal court?

If the plaintiff establishes that the defendant was a partner, and that the firm were indebted to him as he alleges, he recovers of the defendant and takes his judgment, and meanwhile his case proceeds as to the other defendants in the state court. And so, if the plaintiff fails, the defendant has judgment in his favor in the federal court, leaving the plaintiff and the other defendants to their litigation in the state court.

This view of the case encounters the objection that it may compel the plaintiff to litigate in two courts, but that objection obtains in every similar case which falls within the act of 1866, for the express purpose of that enactment is to give the non-resident defendant a right to litigate separately in the federal court, in cases where his rights can be finally determined, which of necessity, as well as by the plain letter of the statute, leaves the residue of the litigation in the state tribunal.

DUNDY, J., concurs.

MOTION DENIED.

NOTE.—"Final determination of controversy" as to the defendants who apply to remove. Bixby v. Couse, 8 Blatchf. 73; Tield v. Lounsdale (tenants in common), 1 Deady, 288.

"Final hearing or trial." Dart v. McKinney, 9 Blatchf. 359; Stevenson v. Williams, Sup. Ct. U. S. 1873; Waggener v. Cheek, 2 Dillon, 565; Akerly v. Vilas, 1 Abb. C. C. 284; Boggs v. Willard (where supreme court of state reversed and ordered bill to be dismissed—held too late to remove under act of 1867), 4 Ch. Legal News, 325; Johnson v. Monell (voluntary change of residence pending suit on right of removal), 1 Woolw. 390; Sands v. Smith, 1 Dillon, 290. The Supreme Judicial Court of Massachusetts hold that under the act of March 2, 1867, it is too late to remove after a trial has been entered on, although the jury disagree. Galpin v. Critchlow, 13 Am. Law Reg. (N. S.) 137; but see cases last above cited.

Act of March 2, 1867, is constitutional (Chicago &c., R. R. Co. v. Whitton, 13 Wall. 270), and does not repeal act of July 27, 1866. Fields v. Lamb, 1 Deady, 430.

And under act of 1867, all the defendants, not merely nominal, must be entitled to removal. Bixby v. Couse, 8 Blatchf. 73. In this case it is even said that "they must unite in the petition for removal, or there can be no removal of the suit." See Field v. Lownsdale, 1 Deady, 288; and particularly Sewing Machine Co. v. Sewing Machine Co., Sup. Ct. U. S., 1873.

Under act of 1866, even as amended by act of 1867, it is not necessary to state "prejudice or local influence" in the affidavit, the ground of removal being citizenship. Field v. Lamb, 1 Deady, 430–432; Allen v. Ryerson, 2 Dillon, 501.

"Amount in controversy." Interest may be included in determining the amount in controversy. Roberts v. Nelson, 8 Blatchf. 74; King v. Wilson (illegal taxes), 1 Dillon, 555.

Right of removal depends upon facts as they exist when the suit was brought (under act of 1789, sec. 12, Roberts v. Nelson, 8 Blatchf. 74), and when right is complete it can not be defeated by amendment or other action of the state court. Kanouse v. Martin, 15 How. 198; Ladd v. Tudor, 3 Woodb. & Minot, 325.

Negotiable Instruments — Effect of Signatures Fraudulently Obtained.

ALPHEUS CHAPMAN v. SILAS ROSE.

New York Court of Appeals, ——— Term, 1874.

1. **Negotiable Paper—Fraud—Negligence—Rights of Bona Fide Holder.**—If a person *negligently* signs a negotiable instrument, relying upon the representations of another as to its contents, whereby he is fraudulently induced to sign a different instrument from the one he had engaged to sign, he can not resist payment of the same when in the hands of a *bona fide* holder for value.

This was an action on a promissory note, brought by Chap-

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man against Rose, and tried at the Circuit Court at Newburgh, in November, 1871, before a jury, Hon. JOSEPH F. BARNARD presiding. On the trial it appeared that on the first day of February, 1871, a person, representing himself as Alfred E. Miller, came to the defendant, a farmer, at his barn in the town of Warwick, and asked him to take an agency for the sale of a patent hay-fork, which defendant finally consented to do. Miller then requested him to sign an agreement creating and accepting the agency, and also a printed order for one hay-fork, which order was attached at the bottom. He also requested defendant to execute a duplicate of the agreement and order, which he did; and Miller took the one and defendant kept the other. It was understood that defendant was not to pay for any forks until he had actually sold them. This was all that passed between them. About seven months afterwards the defendant was notified by the plaintiff in this suit to pay a promissory note, purporting to be made by the defendant February 1, 1871, for $270, payable to Alfred E. Miller or bearer, seven months after date, and transferred to the plaintiff before maturity. Defendant, although conceding that the signature looked like his, denied that he ever made the note, and the plaintiff brought this suit on it. The charge of the trial court, which is the ground assigned as error, is stated in the opinion. The verdict and judgment were for the defendant, and the plaintiff appealed. The judgment was affirmed at General Term (44 Howard's Practice Reports, 364), and the plaintiff again appealed.

W. Vanamee and *Charles H. Winfield* for plaintiff; *W. J. Groo*, for defendant.

JOHNSON, J.—The judge charged the jury that if the paper sued upon was never delivered as a note, the plaintiff must fail in the action, and that even if it was delivered and the plaintiff neglected to make proper enquiry as to its origin, he was not a *bona fide* holder and could not recover.

The exception to the charge was general, but if both propositions were erroneous the error can be reached and corrected, especially as the attention of the judge appears to have been called by request to charge to the precise grounds on which the charge is now claimed to be erroneous. The latter branch of the charge presents the question of notice to put a party on enquiry as affecting his right to be regarded as a *bona fide* holder. It is now, however, the settled law that mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide* holder. There must be proof of bad faith. That alone will deprive him of that character. Welch v. Sage, 47 N. Y. 143; Seybel v. National Currency Bank, Comm. of Appeals, 1873, MS.; Murray v. Lardner, 2 Wall. 110; Goodman v. Simonds, 20 How. 343. This part of the charge, therefore, can not be sustained. If, then, the appellant can maintain the position that the other branch of the charge is also erroneous, he will be entitled to a reversal of the judgment, notwithstanding the generality of the exception.

The evidence tended very strongly to show that the signature of the defendant to the note sued upon was obtained from him through a very gross and fraudulent imposition perpetrated upon him by one Miller; that when he signed it he supposed he was signing a paper of a very different character, and not an engagement to pay money absolutely. He had just before signed an order for the delivery to himself of a hay-fork and two grappling-pulleys, amounting together in price to nine dollars, for which he engaged to pay, and this paper now in suit was presented to him as a duplicate of that order, and was signed as such without examination or reading it, upon the statement of Miller, with whom he was dealing, that such was its character. There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was dealing instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith for value. The question which arises on the branch of the charge now under consideration is whether it is enough as against a *bona fide* holder to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that enquiry the attention of the judge at the trial was distinctly called, and the instruction which he gave and which was excepted to did not submit, but excluded, the consideration of it from the jury. It is quite plain that if the law is that no such enquiry is admissible, a serious blow will have fallen upon the negotiability of paper—it will be a premium offered to negligence. To ensure irresponsibility, only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it that it created no obligation. To avoid such evils it is necessary at least to hold firmly to the doctrine that he who by his carelessness or undue confidence has enabled another to obtain the money of an innocent person shall answer the loss. If it be objected that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representation of another, he puts confidence in that person, and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury and he ought to answer to it.

In Foster v. MacKinnon, L. R. 4 C. P. 704, the action was upon an endorsement of a bill of exchange, and the evidence was that the defendant endorsed it believing it to be a guarantee, that being represented to him as its nature by a person in whom he put confidence.

The judge charged the jury that if the defendant signed it not knowing it to be a bill, and believing it to be a guarantee, in consequence of a fraudulent representation as to its character, and if he was not guilty of any negligence or laches in signing it, he was not bound. The jury found for the defendant. Upon a review of the decision, and after a very full and able discussion of the questions involved, the court held the direction at the trial to have been right. But a new trial was granted upon the ground that they were not satisfied with the finding of the jury on the question of fact, as I understand it, in respect to the question of negligence.

In Whitney v. Snyder, 2 Lansing, 477, evidence had been refused that the defendant was unable to read, and that the note which he had in fact signed was represented to him to be an instrument of a different character and was signed by him under such a belief. The court held that the evidence ought to have been received, principally upon the grounds and authority of the case last cited, approving both branches of the rule as stated in that case, and adding that the case then in judgment was stronger for the defendant on the question of negligence than was Foster v. MacKinnon. This was clearly so, for in Whitney v. Snyder it appeared that the defendant could not read, and he was, therefore, compelled to put confidence in some one as to the contents of any paper which he might be called upon to sign. Indeed, the same exception in respect to negligence is recognized as a necessary element in the decision at General Term in this case. The difficulty is that at the trial the judge rejected that qualification of the rule, and held that if the party did not intend to make a promissory note he could not be held bound even in favor of a *bona fide* holder for value. The principle involved is recognized and in substance decided in Putnam v. Sullivan, 3 Mass. 45. In

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that case the defendants had left with a clerk some signatures on blank pieces of paper intended to be used as notes or endorsements, according to specific instructions. The clerk was induced by fraud to part with one of these blank signatures, and it was filled up as a note, leaving the signature to appear as that of a payee and endorsee. The action was by a holder in good faith, and the court giving judgment, by PARSONS, C. J., said: "The counsel make a distinction between the cases where the endorser, through fraudulent pretences, has been induced to endorse the note he is called upon to pay, and where he never intended to endorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail; as if a Chinaman had a note falsely and fraudulently read to him, and he endorsed it, supposing it to be the note read to him. But we are satisfied that an endorser can not avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here one or two innocent parties must suffer. The loss has been occasioned by the misplaced confidence of the endorsers in a clerk too young or too inexperienced to guard against the act of the promissors." Upon those grounds the endorsers were held liable.

In Douglass v. Matting, 29 Iowa, 495, the judge says: "It is better that the defendant and others who so carelessly affix their names to papers, the contents of which are unknown to them, should suffer from the fraud their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country thus interfered with and unsettled."

In all these cases the real ground of decision is not that the party meant to make a promissory note, but that, meaning to make an obligation in writing, and which was put in writing, that it might of itself import both the fact and the form and the measure of the obligation, he trusted another to fix that form and measure without exercising that supervision which was in his power, and by which perfect protection was possible. In such cases the rule is, that he is bound by the act of him who has been trusted, in favor of a holder in good faith.

The judgment must be reversed and a new trial granted, costs to abide the event.

JOHNSON, J., reads for reversal and new trial. All concur.

JUDGMENT REVERSED.

Constitutional Law—Effect of Laws Permitting Amendments in Pending Suits.

KENT v. GRAY.

Supreme Judicial Court of New Hampshire, August 15, 1873.

1. Retrospective Laws—Amendments.—A statute allowing writs to be amended by striking out the names of some of the plaintiffs can not, under the New Hampshire bill of rights, be constitutionally applied to suits pending at the time of its passage.

DEBT. "By Richard P. Kent, George A. Cossitt and George O. Rogers, the health officers of the town of Lancaster, who sue this action as well for the county of Coos as for themselves," against Hosea Gray, for penalties under Gen. Stat. chap. 101, sec. 8. The action was brought before 1872. At the November term, 1872, the plaintiffs moved to amend the writ by striking out the names of two of the plaintiffs, and the motion was reserved.

Ray & *Drew* and *Crawford*, for the plaintiffs.

Burns & Heywood, *Fletcher & Heywood* and *George A. Bingham*, for the defendant.

DOE, J.—Chapter 39 of the laws of 1872 provides: "In all civil proceedings, when two or more are joined as plaintiffs, the writ or other process may be amended by striking out the name of any plaintiff before the evidence is closed or the case is submitted," and "This act shall take effect upon its passage and apply to existing suits." Can this act be constitutionally applied to suits existing at the time of its passage?

In Rich v. Flanders, 39 N. H. 304, it was held by a majority of the court that the legislature could, by a general act, remove the common-law disability of parties to testify in pending as well as future suits. The objection to retrospective laws is declared in article 23 of the bill of rights to be that they "are highly injurious, oppressive and unjust." The objection is substantial, not formal, reasonable, not technical; and the reason of the objection, like the reason of all law, is entitled to consideration in its interpretation and consideration. The reason of the constitutional prohibition of retrospective legislation is the material and substantial injury, oppression and injustice caused by its practical operation. Taking the prohibition in the reasonable and equitable sense explicitly announced in the bill of rights, and applying it in that sense to the case of Rich v. Flanders, there is one view of the decision of that case which may give it the approval of some who, in other views, would be inclined to doubt its soundness.

The reason of the prohibition being the injustice of retrospectively converting right into wrong, or wrong into right, it might be argued that, in allowing both parties to testify in that case, there was no such transmutation, but merely a grant of equal rights to both parties by an impartial enlargement of the bounds of competent evidence on each side of the issue, not changing the issue, or the right to be established, or the wrong to be redressed, or the form or substance of the remedy; that giving both parties the additional means of showing the truth and proving and disproving the right asserted or the wrong complained of, and demonstrating what was right and what was wrong, was neither an injury nor oppression, nor injustice, in a moral or legal sense, and, therefore, not within the constitutional prohibition; that allowing the parties to testify did not alter the character of competent evidence, but only increased its quantity; that the defendant had no vested right in the exclusion of evidence and the suppression of the truth on the trial of an unaltered issue, upon the determination of which depended the vindication of an unaltered right by an unaltered remedy, or the discharge of the defendant from an unaltered claim on unaltered grounds in an unaltered process; that there could be no vested right upon which the additional testimony of the parties would have an injurious, oppressive or unjust effect in the sense of the words as used in the bill of rights; that the objection to such an impartial increase of the bulk of competent evidence, leaving the general character and weight of evidence unchanged, stands upon two presumptions not recognized by law—1, that the parties will testify falsely; 2, that the tribunal trying the facts will be incompetent to perform its duty, or that the more light a competent tribunal has, the more unable it will be to see the truth; that the constitutional prohibition is to be construed by the principles of natural justice on which it professes to rest, and which it professes to guarantee and enforce; that no principle of justice is violated by removing from both parties a disability to tell their own stories; that the act allowing parties to testify was an enabling and not a disabling act; that it merely enabled each party to put himself and the other party on the stand and throw more light on their unaltered controversy; that it would be a very different thing if the legislature should undertake to give artificial weight to a certain class of evidence in a pending suit, as by declaring certain proof to be *prima facie* evidence (Chappell v. Purdy, 12 M. & W. 303, 306, where Lord ABINGER thought the legislature did not intend, by an *ex post facto* law, to give one party to a suit already commenced so great an advantage over his adversary); that it would also be a very different thing if the legislature should undertake, by a disabling act, to render a competent witness incompetent in a pending suit; that it might be injurious, oppressive and unjust, by a retrospective statute to deprive a party to a pending suit of the means of showing the truth; that to destroy the competency of a witness might unjustly defeat the

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party having the burden of proof—might unjustly defeat either party, by depriving him of evidence of the truth on which he relied and had a right to rely; that the only escape from the conclusion reached in Rich v. Flanders is by way of the possibility of the tribunal being deceived by the untruth of the testimony of the parties, and of injustice being done to vested rights in consequence of the inability of the tribunal to discern the truth, and that such a possibility is no more ground for holding the application of the enabling act to pending suits to be unconstitutional than it would be for holding every change of the tribunal inapplicable to pending suits by reason of the possibility that the new tribunal might not ascertain the truth which, perhaps, the old tribunal would have ascertained.

An argument of that kind might be made in support of the doctrine of Rich v. Flanders on very narrow ground. We are not to be understood as saying that it is only on such a ground that the doctrine of that case can be supported; but it is suggested that if such a ground can be maintained, it would be sufficient for that case.

In the present case, at the time of the passage of the act of 1872, there were three plaintiffs, and they, jointly constituting the party plaintiff, had no right of action against the defendant, they had no right to be vindicated against him, and he was under no liability to them. This state of things the legislature undertook to change, by allowing two of the plaintiffs to withdraw—a proceeding which, if successfully followed, would, so far as these parties are concerned, change no cause of action into a good cause of action, and operate as a substantial creation of a new suit, that could be maintained, in place of an old one that could not. This is going far beyond impartially giving both parties additional means of proof. We see nothing in the doctrine of Rich v. Flanders that sustains legislation of this character; and we are of opinion that the act of 1872 can not be applied to cases pending at the time of its passage, and that the amendment desired by the plaintiff can not be made.

MOTION DENIED.

The New Jersey Pavement Case.

From a carefully prepared article in a New Jersey contemporary we learn that the decision pronounced by the Court of Errors and Appeals in the matter of the Broad street wooden pavement, in the city of Newark, is regarded by the lawyers of the state as the most important case decided in many years. This is on account of its far-reaching effects as to the vast amount of public improvements accomplished in this state during the past decade. The court having decided that all laws fixing any arbitrary proportion of the expense of improvements upon property are unconstitutional, and that payment can be exacted only in proportion to the actual benefits received, many of the assessments at present lying against property in the state can be resisted, and cities, towns and counties which ventured upon extravagant improvements in the flush times now departed, will find their burdens considerably augmented. The following history of this interesting case has been prepared by a well-informed writer in the Newark Morning Register:—

In the year 1868 the legislature passed a law authorizing the common council of Newark to cause any street in that city to be repaved, whenever a majority of the owners of the frontage on such street should apply to have the same done; and providing that, in case of such repaving, two-thirds of the costs and expenses thereof should be assessed upon such owners, and one-third thereof should be borne by the city treasury.

In the summer of 1869, Mr. T. W. Lord, then a member of the common council and the chairman of the street committee of said council, circulated a petition among the property-owners on a section of Broad street, between Canal and Market street, on which there is a double-track horse railroad, and succeeded in obtaining the signatures of twenty-four out of forty-nine such owners to said petition, which prayed the common council to repave the said section of Broad street with Nicholson wooden pavement. Many of the signatures were obtained by representations that the company owning the horse railroad would pay a large proportion (about one-third) of the expense of repaving, which, however, it afterwards refused to do, asserting that it never agreed to pay anything at all. The cost of repaving was very heavy ($37,500) and some of the property-owners affirmed that their bills were twice as large as they were informed they would be when they signed the petition. Before the Nicholson pavement was put down, the street was paved with cobble stones, with excellent crossings at convenient distances of heavy bridge stone, the cost of laying which cobble stone pavement had been in the year 1852 assessed upon and paid wholly by the property-owners aforesaid. This cobble stone pavement and the crossings were in as good condition as the rest of the pavement on Broad street, and there was no real necessity for a new one. The pavement no doubt needed repairing, but this the common council were bound to do by the provisions of the revised charter of the city, passed March 11, 1857, "without further direct assessment on the property on such street."

About one-half of the property-owners were opposed to the laying of a wooden pavement of any kind, and asserted that such a pavement would not last for five years, as the experiment of wooden pavements had been fully tested and utterly exploded fifty years ago. They said they would be perfectly willing to bear their proportion of the expense of a substantial stone pavement, although they were of the opinion that any repaving would be a public improvement for the public benefit, and should be paid for by the public. They were strengthened in this opinion by a decision of the Supreme Court of Pennsylvania, about that time (1869) delivered, to the effect that property which has once been assessed for paving could not legally be assessed anew for a repaving, inasmuch as in the eye of the law, such property, after once being so assessed, had reaped all the benefit which could possibly accrue to it from the paving process, and that a street once paved became thenceforth a public charge, its support merging in that of the other paved streets, to be borne by all the inhabitants of the city.

This decision, rendered by Judge SHARSWOOD, induced some of the property-owners, who did not petition for the repaving of Broad street, and also some of those who did sign the petition, under the representations aforesaid, to carry the matter by a writ of *certiorari* to the Supreme Court—they insisting that the act of 1868, above referred to, was unconstitutional and null and void. The wooden pavement was completed early in 1870, a little more than four years ago; and its present dilapidated condition fully justifies the opposition made to it by the "old fogies" who believed that stone was better than wood.

In the meantime, while the issue was pending in the supreme court, one of the property-owners sent the case to his friend, the Hon. Emory Washburn, ex-governor of Massachusetts, one of the professors in Harvard law school and the author of the standard treatises on "Real Property," "The Law of Easements and Servitudes," &c., with the request that it might be "mooted," that is, argued and decided in the law school connected with Harvard University. This was done. The case was thoroughly studied and elaborately argued on excellent and carefully-prepared printed briefs, and Professor Washburn gave his written opinion in favor of the property-owners and against the city, and that upon general principles and not upon merely technical issues.

The case was argued before Judges DEPUE, VAN SYCKEL and WOODHULL, of the New Jersey Supreme Court, November 10, 1870, Thomas N. Carter, Esq., representing the property-owners, and N. Perry, Jr., Esq., the city council of the city of Newark. The subject had been very carefully studied by both of these gentlemen, and their arguments were exhaustive. Cortlandt Parker, Esq., also made an argument in behalf of the city. At the June term of the court in 1871, Judge WOODHULL delivered the opinion of the court, which was in favor of the city, Judges DEPUE and VAN SYCKEL concurring. The opinion seems to have been based on the decision of the supreme court in the case of The State, Sigler Pros. v. Fuller Collector, delivered in June, 1870 (5 Vroom, 227), which was plainly in conflict with the ruling of the court of errors in the well-known case of The Tide Water Company v. Coster, in 3 C. E. Green, 518, which held that an assessment for benefits must be just and equitable, and not arbitrary, and that the only just and equitable assessment is one in proportion to benefits and limited to benefits, and that any other assessment is a taking, *pro tanto*, of private property for public uses, without compensation.

This was the main issue in the wooden-pavement case. There were other minor issues made by the property-owners, one of which was that 24

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was not a majority of 49, but they were all decided by the court in favor of the city.

The property-owners were dismayed and disheartened by this decision, but not demoralized. They at once took measures to carry up the case to the court of errors and appeals, the court of last resort in the state of New Jersey. After many delays and postponements it was argued last month by Mr. McCarter for the property-owners, and by Messrs. Francis and Parker for the city, before the vice chancellor (the chancellor not sitting in the case, as he had at one time been retained therein by the city), the chief justice, three supreme court justices and five lay judges. The arguments were very elaborate, Mr. McCarter alone occupying a whole day. On the 6th instant the opinion of the court was delivered by Chief Justice BEASLEY, all the members of the court, with the solitary exception of Judge DALRIMPLE, concurring. It was in favor of the property-owners. It is also rumored that Judge VAN SYCKEL, of the court below, had undergone a "change of heart" since June, 1871, and had concluded that the property-owners were right after all.

Leaving out side-issues, the great principles established by the court of errors are these: (1.) That the legislature has no constituional power arbitrarily to assess benefits for improvements, as they assumed to do in the act of 1868, by imposing on the property-owners two-thirds of the costs and expenses of a repaving, and that before any assessment for benefits can be levied, some approximation at least must be made to the extent of such benefits by the medium of a commission, or a jury, or in some other way. Or, as the chief justice illustrated it: Suppose the legislature had decreed that the whole cost of the wooden pavement should be borne by the properties on the corners of the streets, every one would exclaim against the law as an outrage. But it has done precisely the same thing in principle by decreeing that the property of these appellants is benefited to the extent of two-thirds of the costs of this repaving. The legislature has therefore exceeded its constitutional powers, and the act in question, so far as it assumes to fix benefits, is null and void.

(2.) That the legislature can not impose upon the owners of property adjacent to a public improvement any more of the cost of such improvement than is the measure of the benefit which such property derives therefrom, and that all the costs and expenses in excess of such benefit must be borne by the public at large. (3.) That the principles enunciated in the Tide Water case (3 C. E. Green, 518) are sound law.

Book Notice.

THE LAW OF SELF-DEFENCE—SELECT AMERICAN CASES ON THE LAW OF SELF-DEFENCE. By L. B. HORRIGAN and SEYMOUR D. THOMPSON. 1 vol. pp. 1006. Soule, Thomas & Wentworth: St. Louis.

This work covers the entire subject of the Defence of Person and Property. The subject is one which admits of separation from other branches of legal enquiry, and is therefore well adapted to distinct treatment. In view of the great multiplication of reports, well-prepared books on special topics are not only convenient and desirable, but almost an absolute necessity. Every lawyer who has a criminal case of assault or homicide, or a civil case of trespass, where the subject of the right of the defence of the person, or of the dwelling-house or other property, is involved, instead of having to examine scores of books, may find in this volume the entire body of the law, well arranged and critically discussed. The plan of the work is comprehensive. The sub-divisions of the subject, as treated, are as follows:

Part I. Defence of the Person.

Part II. Defence of the Habitation.

Part III. Defence of Property other than the Habitation.

Part IV. Of the Burden and Quantum of Proof where Self-Defence is Urged in Justification of Homicide.

In executing this plan the editors have selected not some but *all* of the *principal cases*, and published them, or such parts of them as relate to the subject *in extenso*, and then giving in the form of notes other cases, either in full or in an abbreviated form, by way of illustration or qualification. By this arrangement 174 cases have been given at length, and 300 more referred to with sufficient fullness to advise the reader of their general character. Theoretically viewed, the work would have been more artistic if the notes had contained only brief references to the cases therein referred to by way of illustration; but, practically estimated, this symmetry would have been gained at the expense of its real usefulness. It is to be remembered that works of this character are designed for the body of the profession, who mostly live in places where access to full libraries is not to be had, and therefore the more it is practicable to give them in the *original and most authentic* form, the better. This book is not a mere compilation of cases, but the annotations are so thorough and the editorial discussions so full as to make it in fact a treatise on the subject of self-defence. The work of the editors has been done with extraordinary care. They have even gone to the trouble of verifying and correcting the citations of authorities as given in the authorized publication of the reports. We take pleasure in assuring the profession that the work is one of real and great merits. The editorial work has been so done as to entitle the editors to the thanks of their brother lawyers throughout the country. An idea of the thoroughness of the book may best be had by a reference to the contents of a portion of it. For example:

Part I, includes the following heads: A.—Defence against Assaults and Demonstrations threatening Death or Great Bodily Harm. B.—Defence against Death or Great Bodily Harm, where the exigency arises in Mutual Combat. C.—Killing in Self-Defence, where the Necessity is Produced by the Wrongful Act of the Slayer. D.—Acting upon Appearances of Danger; and herein of the Imminence of the Danger, of previous Threats made by the Antagonist, and also of the Character of the Antagonist for Violence. E.—Defence against Unlawful Arrest. F.—Defence against Common Assaults. G.—Resistance to the Commission of Felonies. H.—Defence of other Persons. I.—Self-Preservation by the Destruction of Innocent Persons. J.—Concerning the Degree of Caution and Prudence which a Person must exercise in his Defence to avoid injuring Third Persons. K.—The Law of Self-Defence as applied to a State of Mixed War.

J. F. D.

Correspondence.

In transmitting the opinion in Kent v. Gray, elsewhere published, the excellent reporter of the Supreme Court of New Hampshire accompanied it with the following note to the editors, which, though not intended for publication, will, we are sure, interest our readers:

OFFICE OF THE STATE REPORTER,
ANDOVER, N. H., April 26, 1874.

EDITORS CENTRAL LAW JOURNAL:—I herewith send you the opinion of our supreme court in Kent v. Gray. It tells its own story. It will probably appear in Vol. 54 of our Reports. I shall be unable to commence Vol. 53 until about the first of May. I hope to send you during that month the first opinion, which will take from two to three hundred pages of the volume. The spirit of the case is this: Parish corporations (religious) came to us by inheritance. The parish was orthodox, but lapsed into Unitarianism. The pastor taught that Christ was the purest of men but was not divine. A majority of the parish sustained him. The minority brought a bill in chancery to eject him from the church, and a majority of the court granted the decree prayed for. Both opinions will appear. They cover the whole power of the court of chancery over such corporations. I am sure the opinion will interest you.

Very truly yours, JOHN M. SHIRLEY.

Legal News and Notes.

—THE legislature of California has passed a law giving juries power, where a prisoner is convicted of murder in the first degree, of commuting the punishment to imprisonment for life.

—THE subject of equalizing taxation is agitating the agricultural communities of the West. It is shown by statistics that in Illinois, while real estate is taxed at one-seventieth of its value, personal property is taxed at only one-twenty-sixth of its real value.

—Our correspondent at Little Rock apologizes for not sending more matter, by stating that it is almost impossible to obtain access to the records of the supreme court, and then only under the escort of a darky guard. We humbly implore Gov. Brooks to allow our correspondent to pass the

"Strict sentinels and stations thick
Of *darkies* watching round"

without hindrance—assuring the governor that there is nothing treasonable in his intentions.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, MAY 21, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

WE print elsewhere an opinion of the United States Court of Claims denying the application of Mrs. Belva A. Lockwood, a married woman, to be admitted to practice as an attorney in that court. Mrs. Lockwood is a licensed attorney practicing in the other inferior courts at Washington. In view of the fact that women are applying for admittance to the bar in various parts of the country, and in many cases with success, the case will no doubt interest our readers.

JUDGE BLATCHFORD, of the United States District Court for the Southern District of New York, has recently delivered an opinion in the case of Hobbell and Chappell, bankrupts, holding that if an assignee in bankruptcy employs an attorney, who renders legal services for him, the bill of the attorney should be presented by the assignee as part of his accounts, at the meeting of creditors where the assignee's accounts are required to be presented by section 27 of the bankrupt law The opinion will be found in the Legal Gazette for May 8.

WE publish elsewhere in this number notes of some interesting questions ruled by Mr. Justice MILLER in the case of The National Bank of Omaha v. Douglass County. The right of the national banks to sue by reason of their character as such in the federal courts of the district in which they are located is affirmed. The same point was recently decided in the same way by the Circuit Court of the U. S. for the Eastern District of Missouri. The points ruled by the learned justice concerning the remedy in equity in the circuit court to restrain the collection of illegal taxes are important and in one respect new.

A Legal Objection to Cremation.

The New York Times touches upon the vital objection to cremation in the following sentences: "People who think upon the matter, instead of talking and writing about it, foresee the terrible advantage and protection that the general establishment of cremation would inevitably give to the poisoner. In nine cases out of ten the crime of poisoning is detected by a chemical analysis of the contents of the stomach after interment. The investigation may be made weeks, or months, or years after the death of the victim. So long as the body exists undecayed the poisoner is not safe. But let the corpse be burnt into a handful of white ashes, and the danger of detection immediately disappears, and the chances of impunity for the murderer are infinitely multiplied, and with them, of course, the incitement to the crime."

To this the Albany Law Journal adds: "And we are informed by the public prints that the life insurance companies strenuously object to the custom for the same reason. We hardly think that the legislature would forbid the relatives of a deceased person from burning his body, if they desired to adopt that course, or compel the survivors to obtain an order to show cause why the remains should not be burned, simply to accommodate a life insurance company. It would seem that in suspicious cases of death the ordinary coroner's enquiry would answer every purpose. But the objection has more force when raised on behalf of the public, and however fanciful it may at first appear, seems on mature consideration to be founded in reason. It way well be that the practice of burning rather than of burying human remains would increase the crime of poisoning. Anything that might add to the facilities of this crime should be jealously avoided, for, in spite of the boasted advances of chemical science, its detection is even now quite uncertain, as several recent murder trials evince."

Investments by Trustees.

The American Law Register for April contains an article on the investment of trust funds, written by A. S. B., whoever he is, at the conclusion of which the law in relation to the subjects discussed is summed up as follows:

"1. Where there is no express power of sale in the instrument creating a trust, and none is necessarily implied, and the discretion of the trustee is the sole restriction upon investments, he will generally be protected where he has acted *bona fide* and with reasonable diligence and prudence. But in a state where the trustee is protected from loss which may arise from certain specified and so-called legal investments, the rule is much more stringent, and extraordinary care and diligence is required of the trustee as well as *bona fides*, and it is dangerous to invest trust funds in any other securities than in those thus indicated.

"2. But where there is no express power of sale given, and where none such can necessarily be implied from the nature of the trustee's duties, the only safe means of changing an insecure investment, left so by the creator of the trust, is to make the change under the direction of the proper court, and if done without such authority the trustee will be liable to the *cestui que trust* for breach of trust.

"3. Where there is no such power of sale and the trustee leaves unchanged an investment made by the testator, and loss ensues, he will generally be protected if acting with *bona fides*, even in cases where if there had been a power of sale and he had neglected to sell, he would have been liable under rule 1, laid down above.

"4. Where a bank or other corporation permits a trustee holding certificates of its stock, transferable only by one of its officers, and on which the name of the legal owner appears as trustee for another, to part with that stock, and no remedy can be enforced against the trustee, the corporation is held to have constructive notice of the contents of the instrument creating the trust; and if the trustee has exceeded his powers, or in any way committed a breach of trust with the involuntary aid of the corporation, the latter will be held liable to the same extent as the trustee.

"5. Executors and administrators have, *virtute officii*, a power to sell the estate of the decedent, and unless they have become trustees by the length of time which has elapsed since the conclusion of all the duties of the office of executor, a corporation permitting a transfer at their instance would not, without notice and if acting with *bona fides*, be held liable therefor."

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Compulsory Education.

The legislature of New York, which has just adjourned, passed a law making the education of children within certain ages compulsory. The Albany Law Journal comments upon it as follows:

"The compulsory education act, just passed by the legislature of this state, commands parents and guardians of children between eight and fifteen years of age to cause them to attend school at least fourteen weeks of each year, eight weeks of which shall be consecutive, or to cause them to be regularly instructed at home to the same extent, in spelling, reading, writing, English grammar, geography and arithmetic, unless the physical or mental condition of the child is such as to render such attendance or instruction inexpedient and impracticable, and affixes a penalty of one dollar per week for the first, and five dollars per week not exceeding thirteen weeks in any one year, for each subsequent infraction. The act also, in the second section, forbids the employment of any child under the age of fifteen years in any business during school hours of the public school in the school district where the child resides, unless the child shall have made the attendance or received the instruction above mentioned at least fourteen weeks of the fifty-two next preceding the year of such employment, and affixes a penalty of $50 for each infraction. If the parent or guardian is unable to furnish the requisite text-books, the same shall be furnished at the public expense. These are the main provisions. Machinery for their enforcement is provided. The wisdom of these provisions, especially of that of section 2, can scarcely be controverted. As a matter of public policy there can be no room for hesitation. It is best for society to have all its members intelligent. As to the matter of private right, it may be said that in a state of society no man has a right to be a dunce and a fool himself, nor to permit his children to grow up dunces and fools, unless nature is in the way. We regard the enactment as much more equitable and reasonable than the intelligence qualification required in some communities as a condition for the exercise of the elective franchise. The true way to get intelligent voters is to educate the masses from childhood. But we fear that the legislators have practically defeated the intent of the act by the permission to instruct at home. It must be observed also, that while in section two, relating to employment of children, there is a requirement that the attendance or instruction shall be upon or by a teacher qualified to instruct in the specified branches, there is no such requirement as to the home instruction in the first section. So we do not see why a child may not remain at home practically uninstructed, if he is only idle also. We think this point will bear looking into more closely by the law-makers."

End of the Arkansas Gubernatorial Contest.

We yield a small portion of our space in this number to publish the material part of the opinion of the federal attorney-general with reference to the armed contest for the governorship of the state of Arkansas. In the every-day practice of the lawyer questions of this kind will never occur, but viewed as a question of constitutional or public law, it is of unequalled importance. It relates to nothing less than whether the judiciary of a state will be tolerated in usurping a jurisdiction which the constitution of the state has expressly reposed in the legislative branch of the government, when the inevitable result of such usurpation is to create or attempt a political revolution in the state, and to overwhelm it with anarchy and bloodshed. In many of the United States political parties are so evenly balanced that the result of a gubernatorial election is not unfrequently determined by a few votes. It is manifest, then, that the peace and security of society require that contests for the possession of the executive offices of a state government should be speedily determined by one tribunal, without appeal, and to the exclusion of all others. When, therefore, such jurisdiction is clearly vested in the legislative department of a state government, to tolerate the exercise of it by the judiciary on the doubtful grounds which have been invoked in favor of it in this case, would be to set a precedent fraught with mischief and insecurity to the peace of every state in the Union. Happily the president, acting on the advice of his chief law-officer, has seen his duty clearly in this emergency, and, assuming the weight of responsibility which the constitution has laid upon him, has simply ignored the unwarranted and disgraceful exercise of judicial power by which Brooks for a time acquired and maintained possession of the capitol and archives of the state of Arkansas, and has issued his proclamation commanding him and his followers to disperse, designating them as "turbulent and disorderly persons."

The opinion of the attorney-general presents in clear language the only view which it would seem an unprejudiced and dispassionate lawyer could entertain of the question. Concerning the extraordinary usurpation of jurisdiction of the circuit judge of Pulaski county, he uses the following severe but just language: "That this circuit judge should have rendered judgment for Brooks, under these circumstances, is surprising; and it is not too much to say that it presents a case of judicial insubordination which deserves the reprehension of every one who does not wish to see public confidence an uncertainty and the good faith of judicial proceedings wholly destroyed." From his opinion it also appears that the extraordinary judgment of four of the judges of the Supreme Court of Arkansas sustaining the circuit judge in the exercise of this jurisdiction, and thereby overruling, but without noticing, their twice-pronounced decision to the contrary, was simply a judgment *in a moot case*, gotten up for the purpose of eliciting the opinion for public effect—the litigating defendant as well as three of the judges having previously sent a paper to the president informing him that they recognized Brooks as governor. The attorney-general "*refrains from comment*," but can not avoid declaring a conviction in which every honest lawyer must concur, that "a judgment obtained under such circumstances is not recognized as authority by any respectable tribunal." The full opinion will be found in the New York Herald of May 16.

Municipal Bonds—Mode of Collection.

The latest phase of the municipal bond controversy in the Supreme Court of the United States is presented by the case of Heine ——— v. Board of Levee Commissioners, decided on the 4th instant.

The suit was in chancery, brought in the U. S. Circuit Court for Louisiana by the holders of bonds issued by the board of levee commissioners for certain parishes (counties) in Louisiana. These boards are made by state of the statute *quasi* cor-

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porations with power to issue bonds and to provide for their payment by the levy of taxes upon the property within the district. The bill alleges a failure of the board to levy taxes to pay interest on the bonds; that the levee commissioners have pretended to resign their office for the purpose of evading this duty; that the plaintiffs have applied to the judge of the district court who was by statute authorized to levy the tax to pay the bonds if the levee commissioners failed to do so. The prayer for relief is that the levee commissioners be required to assess and collect the tax necessary to pay the bonds and interest, and if they fail, that the district judge be ordered to do the same. No suit at law had been brought or judgment recovered. A demurrer to the bill was sustained by the circuit court, and a decree thereon entered dismissing the bill, from which the plaintiffs appealed. The decree was affirmed by the supreme court, CLIFFORD and SWAYNE, JJ., dissenting. Mr. Justice MILLER delivered the judgment of the court. In discussing the various grounds put forward to sustain the *equity* jurisdiction, the learned justice, with the concurrence of the other members of the court, except the two justices above named, lays down the following propositions:

1. There can be no jurisdiction in equity to enforce the payment of corporation bonds until the remedy at law has been exhausted.

2. Where the law has provided that a tax shall be levied to pay such bonds, a mandamus after judgment to compel the levy of the tax, in the nature of an execution or process to enforce the judgment, is the only remedy.

3. The fact that this remedy has been shown to be unavailing does not confer upon a court of equity the power to levy and collect taxes to pay the debt.

4. The power to levy and collect taxes is a legislative function in this country and does not belong to a court of equity, and can only be enforced by a court of law, through the officers authorized by the legislature to levy the tax, if a writ of mandamus is appropriate to that purpose.

5. Taxes are not liens unless declared so by the legislature under whose authority they are assessed. Still less can a lien be created by the mere duty to assess taxes, which has not been performed.

In concluding his opinion, Mr. Justice MILLER holds the following striking language: "There does not appear to be any authority founded on the recognized principles of a court of equity on which this bill can be sustained. If sustained at all it must (*be*) on the very broad ground that because the plaintiff finds himself unable to collect his debt by proceedings at law, it is the duty of a court of equity to devise some mode by which it can be done. It is, however, the experience of every day and of all men that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which, in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must, in common with other men, submit to this calamity when the law affords no relief.

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the legislature to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee. In the case of Walkley v. Muscatine, and Rees v. Watertown, already cited, we have distinctly refused to enter on this course, and we see no reason in the present case to depart from the well-considered judgment of the court in those cases, especially the latter."

The Homestead Law and the Obligation of Contracts.

It will be remembered that we took occasion in a previous number (*ante*, p. 173) briefly to discuss the question whether homestead exemption laws are constitutional so far as they operate upon existing contracts. The force of the cases appeared to be that such laws were not unconstitutional, unless the amount exempted was so large as to withdraw the greater part of the property of the debtor communities from execution. The American Law Register for April contains a well-considered opinion of the Supreme Court of Mississippi, written by Mr. Justice SIMRALL, in which it is ruled that the right to seize and sell by judicial process a debtor's property in satisfaction of a judgment against him, is a material part of the remedy for the enforcement of the contract on which the judgment is founded; that any law of a state which materially increases the amount of property exempt by law from execution, over the amount allowed when the contract was made, impairs the remedy materially, and is therefore prohibited by the federal constitution; and that the exemption law of Mississippi, passed in 1865, which increased the homestead exemption from 160 acres of land, not exceeding $1500 in value, to 240 acres regardless of its value, is, when applied to debts created before its passage, in violation of that clause of the federal constitution which prohibits states from passing laws impairing the obligation of contracts.

After reviewing the cases which bear on the question, the learned judge says:

"The lesson of the adjudications is, that the creditor may trust to the law as it is when he contracts, to know how much of the estate of the debtor he may look to for satisfaction. The existing law is in the contemplation of both parties. That furnishes approximately a safe basis of credit. If subsequent law may come in, and deny satisfaction out of half the property before liable, it is too plain for argument or illustration, that such a statute seriously impairs the right.

"There is hardly room for doubt that the greatly enlarged exemptions under the act of 1865 come within the range and condemnation of these principles. This will be manifest by comparing the law of 1857 with that of 1865. The former exempted the lands and building occupied as a residence, no

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exceeding one hundred and sixty acres in quantity, and $1500 in value, including the improvements. The latter exempted 240 acres regardless of its value, so laid off as to include the dwelling-house and other buildings and the farm. The homestead as thus defined would, in all probability, equal half the value of the larger landed estates. Upon a critical examination it might perhaps turn out that half of the land estates of the freeholders of the state were placed entirely beyond the reach of creditors. It would embrace both in in quantity and value more than half of the cultivated lands. The effect of the law, in many instances, is to free from debt property worth ten or twenty thousand dollars, to place many debtors in comparatively affluent circumstances beyond the reach of the smallest creditor. Credits predicated on the basis of the law of 1857 may be perfectly solvent, and yet by the act of 1865 rendered insolvent. Such would be the consequences if the statute shall be construed to apply to pre-existing debts."

It will be seen by referring to the article written by us, that the case of Stephenson v. Osborne, 41 Miss. 119, 130, was invoked in support of what we supposed to be the prevailing rule. That case the Supreme Court of Mississippi now overrule. The opinion proceeds as follows:

"We would have no doubt or hesitation in declaring this statute void as to pre-existing debts, because of the inhibition of the constitution, but for the embarrassment caused by the case of Stephenson v. Osborne, 41 Miss. 130. Mrs. Osborne, as widow, claimed the exempt personal property under the act of 1865, her husband having died *since* its passage. This claim was contested upon the ground, as stated in the answer to her petition, that she had by a deed of separation from her husband renounced all her rights and claims upon his estate. It does not appear from the report that a concession of her demand would have injured the creditors. It was conceded by her counsel in his brief, that the law was unconstitutional as to pre-existing creditors. Her right was predicated in argument on the fact that the estate was solvent, indebted not exceeding $500, and that her husband died *after* the law was in force. The question was not whether the law was void because it impaired the obligation of contracts; but rather whether the widow could take the personal property exempted by the statute in force at the death of the husband. It may not have been necessary to decide this question to pass upon the validity of the law as to prior creditors. What was said in argument by the court on the last point, entitled as it is to the highest respect and consideration, might be accepted as *dicta*. We are strongly inclined to the opinion that the enlarged homestead, as defined in the act of 1865, is prospective—allowable against after-incurred liabilities. By express words, the homestead, under the act of 1857, may be claimed against future debts. The act of 1865 imports by its title to be an amendment of the existing laws. That purpose is clearly set forth in the seventh section, 'that this act shall be construed as amendatory of the exemption laws of this state, and not intended to repeal the said laws, otherwise than that the amendments shall supersede the former acts, so herein revised and amended.' The amendments mainly are an increase and description of the property, and directions as to preferring the claim, and settling doubts as to the right claimed. The prospective feature of the former law is not repealed by express words. If accomplished at all, it is by implication. Such repeals are not favored nor tolerated except for inconsistency and repugnance. Courts ought to assume that the legislature have declared how far the repeal shall extend, and will not enlarge it by implication, unless there is plain inconsistency and incompatibility; moreover, a statute should be so construed as that it may have effect. It is never to be inferred that the legislature intended to transcend the limits of its power. Statutes should be so interpreted, if the language and subject-matter will admit of it, as to conform to the fundamental law. A rendering which will harmonize with the constitution should be adopted, rather than one which shall be repugnant to it. In Gunn v. Barry, 15 Wall., the intimation is strong that the law of Georgia, which is much like our statute of 1865, was prospective in its effects; the state court, however, had decided otherwise.

"Accepting the decisions of the Supreme Court of the United States as conclusive authority upon constitutional questions, we are constrained to the conclusion that the adjudications of that court condemn the increased exemptions of 1865, so far as prior creditors are affected, as violative of the constitution. It was observed by the court in Stephenson v. Osborne, 41 Miss., that it had not met with an authority in which the constitutionality of exemption laws was raised and decided. Since that decision the case reported in 15 Wall. has been adjudged, and also a very well considered case reported in 22 Grattan, 266.

"To dissent from a former judgment pronounced in this court is always attended with serious embarrassment. It should never be done until mature reflection had engendered the clearest conviction. But in cases like this we are subordinate to the Supreme Court of the United States, and must receive the expositions of the constitution by that tribunal as authoritative and binding upon us. As a court it is our duty to pronounce the law, we can not, however, close our eyes to the consequences of our judgments, as they may affect the business and social interests of the community. We believe with confidence, that the conclusion to which we have come will promote public good. The principle vindicated will give stability and uniformity to the business and industries of the people. Individuals in their dealings and transactions will be governed in their credits and liabilities by a surer and more permanent standard. It may serve to check somewhat the disposition to risky speculation, and inculcate a sterner morality to respect the inviolability of contracts. It plainly teaches the lesson of self-reliance and self-dependence as a rule of conduct in business, and a better means of extrication out of embarrassments than periodic appeals to legislative power to interpose for relief."

The Personal Liability of Bank Directors for the Conversion of Special Deposits.

Some time since we received, through the courtesy of Thomas H. Hines, Esq., of Bowling Green, Kentucky, a copy of the opinion of the court of appeals of that state in the cases of The United Society of Shakers v. Under, and Wm. Davenport v. Underwood, in which the above subject is considered. We have deferred publishing it from time to time, hoping to find time to write a note to it. In the meantime it has been published in several of the legal periodicals, includ-

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ing the American Law Register for April, where it is supplemented with a note by Judge REDFIELD.

The force of the ruling is that bank directors will be held responsible to the depositors for the loss or converson by the bank of special deposits in such bank whenever they know of such conversion, or might have known of it by the exercise of such care and diligence as the law requires of such officers in representing the affairs of the bank; and that bank directors must be considered as affected with the knowledge of such facts as appear upon the bank books. The question arose on demurrer to the plaintiffs' petitions, the substantial allegations of which were that certain special deposits were made, and that the officers of the bank converted them—not to the personal emolument of the directors—but *to the use and emolument of the bank*, and that of such wrongful conversion and appropriation the defendants had, or could have had, by the most ordinary diligence, ample notice. It was also substantially charged in each petition that the defendants, acting as directors, "did, on various occasions, declare dividends when the condition of the bank did not justify the same, and so appropriated to themselves, they being the largest stockholders, large sums of money actually realized from the conversion of the plaintiffs' property as aforesaid."

In the opinion delivered by LINDSAY, J., the court say that "the liability of the bank in these actions does not depend alone upon the averment of want of care and fidelity upon the part of the directors. It is specifically charged that the deposits were sold by its officers and the proceeds thereof converted to its use and emolument with the knowledge of the directors. The facts thus alleged imply the conversion by the bailee of the bailor's goods, for which, at the common law, an action of trover would lie. The question here presenting itself for our decision is, whether the directors, who had knowledge of these alleged wrongful sales, can be held to answer personally for the deposits so converted."

Further on, the conclusion of the court is put upon clearer ground. The court say: "These appellants allege that their bonds were sold by the officers of the bank, and the proceeds paid out in the satisfaction of claims against it, and in the payment of dividends to the stockholders, and that of all this appellees had notice. Having notice, it was their duty, and they had full power in the premises, to prevent the sales. Failing in this, their subsequent action in directing the proceeds, or some portion thereof, to be paid out in the shape of dividends to the stockholders, including themselves, was a ratification of the conversion which they had theretofore wrongfully permitted. Considering their alleged wilful failure to discharge a plain duty, their ratification of the unauthorized sale and the appropriation to themselves of portions of the proceeds arising therefrom, there seems to be no valid reason, even under the rules of pleading at the common law, why they might not be held liable with the bank in an action of trover and conversion; but if there be well-founded doubt as to this conclusion, an action on the case would undoubtedly lie to compel them to make good a loss resulting from a palpable failure upon their part to discharge a plain legal duty, the performance of which the complainants had the right to demand at their hands, and the non-performance of which was the direct and immediate cause of the loss. It follows, therefore, that each of the two petitions under consideration sets out facts constituting causes of action, and this being the case, under our rules of civil procedure the general demurrer should have been overruled."

In his note to the case, Judge REDFIELD, while appreciating the high sense of justice implied in holding not only the bank, but also the directors, responsible for all the wrongful acts of the subordinate officers and servants of the bank, does not concur in the result reached. He says:

"The case being tried on demurrer will rest upon the legal force of the averments in the complaint. And these, as stated in the opinion, are only that the appellees 'and each of them had, or could have had, by the use of the most ordinary diligence and investigation, ample notice.' As this is an averment in the pleadings of the appellants, it must receive the least favorable construction towards them. In that view it imports, not that the appellees had notice, but that they might have obtained notice by proper investigation. And by looking into the averment in one of the cases we find that this notice consisted in: 'had notice, as well as from the ledger, books and accounts of said bank, as from its correspondence, reconcilements and statements.' This imports, on the proper construction towards the pleader, that if the appellees had examined all these sources of information they would have discovered that the bank, by their tellers and cashier, had put these bonds to their own use. But this only implies a notice after the fact of conversion, since the avails would only appear upon the books, probably, when converted into money. But that is not important here.

"But upon the most favorable construction for the appellants, these averments can imply nothing more than that the appellees were deficient in the exercise of the proper degree of care and diligence in the matter. But if any principle in the law of business corporations is entirely well settled, it is that the creditors of such corporations have no right of action against the officers for mere omission of duty—mere nonfeasance. Such defaults are only breaches of obligation towards the corporation, in which its creditors have no actionable interest. In the case of special deposits in a bank, the corporation is the depositary and not the officer receiving the same. Foster v. Essex Bank, 17 Mass. 479. There is thus no privity by way of contract or duty created between the depositary and any of the officers of the bank. It is competent for banks to receive the special deposits of their customers, but they are not obliged to do so whenever requested. Thatcher v. State Bank, 5 Sandf. Ch. 121. The bank in the case of special deposits are only gratuitous bailees, owing the lowest degree of care. Such deposits are not usually entered upon the books or certified to the depositor, but there are probably different practices in regard to this. The directors of a bank would not ordinarily know much in regard to such deposits, and could scarcely be expected to keep any lookout in regard to them. The president might know more than the ordinary directors, but even he could scarcely be considered as owing any special duty, and if he did, it would be to the bank and not the depositor. The cashier and tellers would naturally have the entire charge of such deposits, and their duty to the bank would extend only to seeing that they were not needlessly exposed to loss or damage, and no duty from such officers would be due the depositor.

"But, as said in Foster v. Essex Bank, *supra*, it would be

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a breach of trust for the bank or any of its officers to open a package left on special deposit, and whoever did or counselled such act, would be responsible to the owner for such tort. And if done by an officer of the bank for its use and benefit, there can be no doubt the bank would be responsible, and we think the bank would now be held responsible in such case, whether the avails went to its own use or not. The contrary was held in Foster v. Essex Bank, but the old idea that corporations were not responsible for the wilful act of their servants is now nearly abondoned and the more sensible rule adopted that corporations are responsible for all acts of their servants within the range of their employment.

"We have reviewed the cases upon this question in 1 Railways, § 130, pp. 532–542. One of the latest English cases on the point is Burns v. Poulson, L. R. 8 C. P. 563. See also Ward v. London Omnibus Co., 27 L. T. N. S. 761. In the late case of Swift v. Winterbotham, L. R. 8 Q. B. 244, it is held that a bank is responsible for the wilfully wrong act of its servant committed in the course of his employment. But it is not important to discuss this point here. The books all show that such officers and servants are liable to the owner of such special deposits for their own wilful acts, but not for mere negligence in the discharge of their duty to the bank, although the depositor may suffer an incidental loss thereby. Bowlin v. Nye, 10 Cash. 416; Angell & Ames on Corp. §§ 241 *et seq.;* Story on Agency, chap. XII, §§ 308 *et seq.* Mr. Justice Story thus states the rule: 'He [the agent] is not in general (for there are exceptions) [referring to cases of maritime contracts] liable to third persons for his own nonfeasance or omissions of duty in the course of his employment. *His liability in these latter cases is solely to his principal.* The early cases of McManus v. Crickett, 1 East, 106; Ellis v. Turner, 8 T. R. 531; Foster v. Essex Bank, *supra;* and Mechanics' Bank v. The Bank of Columbia, 5 Wheat. 326, and some others, wherein it has been held that the master is not responsible for any wilful act of his servant, since that is, *ipso facto*, a departure from the employment, may be said to have a kind of a half-dying existence still. But the introduction of railways has compelled the courts to hold corporations responsible for all acts of their servants, however wilful, providing they come fairly within the range of the employment and are professedly done on behalf of such corporations. And negligence is not inferrable from the loss merely; the burden of proof of negligence rests on the plaintiff. Smith v. Bank, 99 Mass. 605.

"But here the persons performing the wrongful acts complained of were in no sense the servants of the appellees. They were the servants of the bank, as much as any servants employed under the supervision of a superintendent are the servants of the common master. It would present a novelty in jurisprudence to hold the general superintendent of works personally responsible for the acts of his subordinate to those dealing with the owner, upon the ground that he did not restrain such subordinates from dereliction of duty. But that, in principle, is this case. And we can not suppose, if the bank were still solvent, any one would dream of maintaining this action."

—Sir Edward Thornton, who acted as umpire between Mexico and the United States in Indian depredation claims, has decided that the Gadsden treaty of 1853 exonerates us from all liability for the acts of the Indians. This decision is most important, as something like thirty-one millions dollars were involved in the claims.

The New Jersey Pavement Case.

THE MAYOR & COMMON COUNCIL OF NEWARK v. THE STATE, AGENS *et al.*, PROSECUTORS.

Court of Errors and Appeals of New Jersey, March Term, 1874.

1. **Constitutional Law—Assessments for Street Paving.**—A statute authorizing the expense of paving the road-bed of a city street, to be assessed in the proportion of two-thirds on the property abutting on the street, and the remaining third on the public at large, is unconstitutional.

2. ——. ——. **Assessments to be Proportioned to Benefits.**—Assessments for local improvements of this character may be made against the property peculiarly benefited, but such assessments must be made to the extent only of such peculiar benefits.

3. ——. ——. **Improvements of Sidewalks.**—This rule does not apply to the improvements of the sidewalk, which is to be regarded as subservient to the premises to which it is attached, and the expense of improving which may be charged wholly to the owner.

The seventh section of the charter of Newark (pamphlet laws 1849, pp. 206, 207) provides "That it shall be lawful for the common council, on the application of three-fourths of the owners of property in any street, to order the said street or section of the street to be graded, gravelled, paved, flagged or planked, either in whole or in part, in such manner as they shall deem most advisable," &c., and that after the said grading, gravelling, paving, &c., is once effected, then the city shall take charge of and keep the same in repair without further assessments. Acts 1849, pp. 206, 207.

A section of Broad street, between Market street and the Morris canal, was originally paved under the foregoing provision, and had been now repaved by virtue of the following section in the supplement to the charter passed 18th March, 1868, page 411, viz.: "That when more than one half of the owners of the frontage on the line of any street, or section thereof, which is now paved, shall apply to have such street or section repaved, it may be lawful for the common council to order and cause the repaving thereof, and they shall assess upon the owners of the lots fronting upon the line of such street or section thereof, two thirds of the cost and expenses of such repaving, and the city treasury shall bear the remaining one-third; and the city shall be entitled to all the old material, and said assessment to be made in all respects as were required by the act to which this is a supplement and the supplements thereto in cases of the original paving of streets."

Beasley, Ch J.—The writ in this case has brought before the court the proceedings in the assessment of the expenses incurred in repaving the road-bed of a portion of one of the public streets in the city of Newark. The cost of this work has been imposed in accordance with the directions of the legislative act authorizing their improvements in the proportion of two-thirds of such cost on the owners of the lots fronting on the line of the section of the street thus repaved, and the remaining third on the city treasury. It thus appears that the statute in question undertakes to fix at the mere will of the legislature the ratio of expenses to be put upon the owners of the property along the line of the improvement, and the question is whether such an act is valid.

This enquiry, thus involved, has of late been so exhaustively discussed in a crowd of judicial decisions, that I do not feel inclined to do more than to so far refer to general principles as may be necessary to explain clearly what I conceive to have been heretofore decided by this court.

The doctrine that it is competent for the legislature to direct the expense of opening, paving or improving a public street, or at least some part of such expense to be put as a special burthen upon the property in the neighborhood of such improvement, can not, at this day, be drawn in question. There is nothing in the constitution of this state that requires that all the property in the state, or in any particular subdivision of the state, must be embraced in the operation of every law laying a tax. That the effect of such laws

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may not extend beyond certain presented limits is perfectly indisputable.

It is upon this principle that taxes raised in counties, townships and cities are vindicable. But while it is thus clear that the burden of a particular tax may be placed exclusively upon any particular district to whose benefit such tax is to inure, it seems to me it is equally clear that when such burden is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the state, that we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it is impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right; for it would seem much more in accordance with correct theory to maintain that the power of selection of the property to be taxed can not be contracted to narrower hands than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burden of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burden of a tax upon specified property does not exist. If a statute should direct a certain street in a city to be paved and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such. If this can not be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limits, and the only enquiry is where that limit is to be placed.

This question was considered, and as it was supposed, was definitely settled by this court in the case of The Tide-Water Company v. Coster, reported in 3 C. E. Green, 518. The principle mentioned by that decision was that the cost of a public improvement might be imposed on particularized property to the extent to which such property was exceptionally benefited, and that any special burden beyond that measure was illegal. It was upon this principle that the case was rested.

The rule thus adopted stands upon the idea that it establishes a standard by which, with at least an approach to precision, an act of taxation may be distinguished from an act of confiscation.

So far as the particularized property is specially benefited, an exaction to that extent will not be a condemnation of property to the public use, because an equivalent is returned. And this is the ground upon which the abnormal burthen put upon the land owners is justified. Speaking on this subject, Chief Justice GREEN says: "The theory upon which such assessments are sustained as a legitimate exercise of the taxing power is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which as one of the community he receives in all public improvements, the precise extent of the assessment." State v. City of Newark, 3 Dutcher, 190.

It follows, then, that these local assessments are justifiable on the ground above, that the locality is to be especially to be benefited by the outlay of the money to be raised.

Unless this is the case no reason can be assigned why the tax is not general.

An assessment laid on property along a city street, for an improvement made on another street in a distant part of the same city, would be universally condemned both on moral and legal grounds. And yet there is no difference between such an extortion and the requisition upon a land-owner to pay for a public improvement over and above the exception benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubts, that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when property is specified out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess I can not distinguish an act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burthen; when his land is sequestered for the public use he contributes more than such quota; and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain.

When, then, the overplus beyond benefits from these local improvements is laid upon a few land-owners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the concise act is not within the proper scope of the power to tax. As it does not seem practicable to define the area upon which a tax can be legitimately laid, and beyond which it can not be legitimately extended, and as there is, as has been shown, necessarily a limit to the power of selection in such instance, the principle stated in the case cited is perhaps the only one that can be devised whereby to graduate the power. Consequently when the improvement, as in the present instance, is primarily for the public welfare, and is only incidentally for the benefit of the land-owner, the rule thus established ought to be originally applied and adhered to.

With the doctrine thus expounded the case of The State v. Fuller, 5 Vroom, 227, is not in harmony. This was an assessment for the improvement of a sidewalk, and in that feature differed from the present one, which is for the improvement of the road-bed. I think the difference is a substantial one. A sidewalk has always, in the laws and usages of this state, been regarded as an appendage to and part of the premises to which it is attached, and is so essential to the beneficial use of such premises, that the improvement may well be regarded as a burthen belonging to the ownership of the land, and the order or requisition for such improvement as a police regulation.

On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable.

But in the reported case there was another circumstance which illegalized the preceedings. A part of the expense of constructing the sidewalk on one side of the street was thrown on the owners of the other side of the same street. The portion of the burthen thus transferred was one-sixth of the expense, and it was directed to that extent to be imposed irrespective of the amount of any ascertained benefit conferred. This brought the case within the prohibition inherent in the rule laid down in the Tide-Water case, so that the proceedings should have been set aside. The suggestion that in this class of cases it will be presumed that the benefits equal the burthen imposed until the contrary is shown cannot prevail. If well founded, it would have led to a different result in the Tide-Water case. The only safe rule is, that the statute authorizing the assessment shall itself fix, either in terms or by fair implication, the legal standard to which such assessment must be made to conform. In no other way can property be adequately protected.

The other objections by the counsel for the plaintiff in error do not seem to me well founded. I can perceive no solid foundation for the position that the law under which the assessment in question has been made raises up a contract between the land-owner and the public. This statute declares that it shall be lawful for the common council, on the application of three-fourths of the owners of property in any street, to order, etc., and it then adds that after such grading, etc., is effected, then "the city shall take charge of and keep the same in repair without further assessment." The argument was that after the land-owners had petitioned and the

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work was done, a bargain was constituted, the essential stipulation of which is that the expense of keeping the street in order shall be borne by the public. But how is this language to be converted into that of contract? It is not so in form, for it makes no offer to the land-owner. Nor is the substance with which it deals the subject-matter of agreement. It does not purport to ask from the citizen anything which the state has not the right to demand. The purpose is to define the mode and the extent of the legislative power of the municipality. The power conceded might have been given in an unqualified form, but its exercise was restricted with the condition that it should not be used unless a certain proportion of the owners of property consented, and that the power should not be used a second time. But these limitations on the prerogative of local legislation are concessions to the citizens, and cannot with any show of reason be transformed into considerations moving from the citizen to the state on which a contract can be built up. The admission of such a doctrine would carry many mischiefs with it. Agreements could be inferred from a large number of the ordinary acts of legislature. Public roads are laid on the application of a certain number of freeholders, and the statute directs that after such roads are laid they shall be opened and maintained at the public expense. Why, under such circumstances, can not a contract be claimed as well as in the case now in hand? Numerous other examples of laws from which, by the same course of reasoning, contracts might be deduced will readily occur, if the mind is given to the subject.

Neither do the decisions which were cited lend, as it appears to me, the least countenance to the doctrine in question. These are all cases outside of the ordinary field of legislation, and in which the citizen was induced to do some act or yield up some right or property which could not be taken from him except by his voluntary cession. The true principle undoubtedly is, that when it is alleged that any part of the sovereign power has been parted with by force of an agreement, such agreement must be clearly manifested. The cases are largely collected in the excellent work of Justice Cooley on Constitutional Limitations, p. 280. The language of the present statute has not such an aspect, and the intendment that it was the intention to give up forever any part of the public control with respect of the mode of keeping in order the streets of a great city, is not entertained for an instant. This exception to the proceedings can not be sustained.

On the other points raised on the argument, I agree with the views expressed in the supreme court.

There are other legal difficulties in the mode of making assessments under the statutory provisions above criticised which were not stated on the argument, which I shall not further notice than to intimate that I am not to be understood as sanctioning them by my silence.

On the ground first above stated the judgment should be reversed.

JUDGMENT REVERSED.

NOTE.—We have heretofore adverted to this case (CENTRAL LAW JOURNAL, p. 245) and now propose to add but a few words concerning it. One leading proposition decided is that, as respects assessments upon abutters, there is a distinction as to the extent of legislative power between paving streets, and sidewalks as distinguished from streets. It is affimed that the legislature has the power to order the sidewalks to be paved at the sole expense of the adjoining owner, while the same power as respects the grading and paving of streets (proper) is denied. We do not recall any case elsewhere in which the same distinction is judicially asserted, while in many cases it has, impliedly at least, been denied, and the improvement of streets and sidewalks placed upon the same grounds.

The power to make local improvements at the expense of the adjoining property is a branch of the taxing power. The power to tax includes, in the absence of special constitutional restriction, the power to *apportion* the tax. The power of the legislature to direct all or at least some portion of the expense of opening and improving streets to be put as a special burden on the property in the neighborhood is conceded in the opinion to admit of no question. It is denied, however, that the *legislature* can fix the proportion of the expense to be borne by the adjoining owner and by the municipality at large, and the principle is asserted that the cost of the improvement may be imposed on the abutter only to the extent that his property is specially or exceptionally benefited—all beyond this, says the court, is illegal. The equity of this principle is obvious. The question of doubt is, who or what tribunal is to decide upon the extent to which the property is benefited? In other words, is the extent to which property will be benefited by improvements of a given character a legislative or judicial question? We should have been glad to have seen a fuller discussion of this aspect of the subject by the able and learned chief justice. Such improvements as grading and paving streets must be made by a general tax or a special assessment, or both. It has generally been considered that it was for the legislature to determine whether the expense should be borne in the one way or the other, or by a union of both. Municipality v. Dunn, 10 La. An. 57; People v Mayor, &c., of Brooklyn (leading case), 4 N. Y. 419. But the subject is full of difficulties, and some courts have, as in the principal case, asserted limitations on the power of the legislature. Hammett v. Philadelphia, 65 Pa. St. 146; Woodbridge v. Detroit, 8 Mich. 274; Hoyt v. East Saginaw, 19 Mich. 39; Cooley Const. Lim. 508; Dillon Munic. Corp. secs. 596, 597.

Married Women as Lawyers.

In re BELVA A. LOCKWOOD.

United States Court of Claims, May 11, 1874.

Hon. CHARLES D. DRAKE, Chief Justice.
EDWARD G. LORING, CHARLES C. NOTT, EBENEZER PECK, } Judges.

Married Women can not be Attorneys.—Under the constitution and laws of the United States a married woman is without legal capacity to take the office of attorney, and no court has power to admit her to such office.

NOTT, J., delivered the opinion of the court.

This is an application in effect, though not in purpose, to have the law declared to be that the wife of a judge of a United States court may appear at its bar, and being found duly qualified, be admitted to the practice of the law before her husband. This effect of the application has probably not entered the mind of the applicant, but it is, nevertheless, the duty of the court to survey the entire limits of the legal situation and foresee the effects which must necessarily follow the grant of her petition; for, if she be lawfully entitled to admission to this bar, no discrimination can be made between her and every other married woman, properly qualified, domiciled in the District of Columbia. If it be true that there is no law to prevent a woman from acquiring the office of an attorney, it is equally true that there is no law to forbid the wives of the judges and law officers of the government from acquiring the same privilege. Therefore, if we decide that this application should be granted, we must at the same time decide that two beings whom the common law regards, in every material interest, as nearly as possible, as one, can discharge, without detriment to the interests of public justice, the dissimilar duties of arbiter and advocate.

The applicant comes before us as a married woman, domiciled in the District of Columbia, where the common law, except as it may have been altered by statute, prevails. It is needless to say that a system of law which prohibited the husband and wife from occupying the legal relations of witnesses for or against each other, and which scrupulously assured to every suitor an impartial tribunal, never contemplated as a possibility that the rights of third persons might be confided to judges liable to be swayed by the most powerful influence known to the law or to humanity. That there has been no express provision by statute, and that there was no exceptional rule at common law, to prevent any such dangerous and scandalous practice, certainly indicates that the law has never been considered to authorize the admission of women to the bar. It is not to be understood that there is any immediate likelihood that the wives of the judges or law officers of the government will descend to any such impropriety. Nevertheless, two things may be said of the matter: First, that the administration of justice should not be left to depend upon any man or woman's

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sense of propriety; and, second, that whenever the wife of a judge or attorney-general is admitted to practice, she will speedily acquire a very lucrative practice, which may sufficiently piece out her husband's salary, but which will as quickly occasion suspicions of partiality and corruption on the part of that branch of the government whose power and usefulness peculiarly rest upon the respect and confidence of the community.

Before this application can be granted there are three questions which must be considerd: First, is there any statutory law allowing women to practice in the courts of the United States; second, if there be none, was there any precedent of the kind at the time when the court was established; third, if there is neither positive enactment nor established precedent to sustain this application, would a woman be entitled to admission at common law?

All of these questions, it is needless to say, must be answered in the negative. There is a statute relating to the separate property of the wife, but this is not a question of property. Admission to the bar constitutes an office. Its exercise is neither an ordinary avocation nor a natural right. It is an artificial employment created not to give idle persons occupation, nor needy persons subsistence, but its purpose is simply to aid in the administration of public justice. The question is not whether this and that person can make a living at the bar, but whether their admission to the bar will assist in carrying out the purposes of jurisprudence. Moreover, the statute which it was said, on argument, has "thoroughly exploded" the common-law notion that husband and wife are one, is copied from the New York married woman act (Session Laws 1849. p. 528), as to which it has been held by the highest court in the state that the act changes the common law only in the particulars specifically named; and hence, that while a married woman may convey or devise property under the act free from her husband's control, nevertheless, if she die intestate, her husband will take her personalty as heir at common law. Ransom v. Nichols, 22 N. Y. 110. The married woman act for the District of Columbia (16 Stat. L. 45) does nothing more than to allow a married woman to take and control "her sole and separate property;" to convey and devise it; to sue and be sued "in all matters having relation to it." The statute also expressly recognizes the fundamental principle of the common law that, husband and wife being one, can not traffic with each other, when it excepts from its enabling provision a "*gift or conveyance from her husband.*"

The common law has always regarded the family as the unit of society; the civil law the individual. Hence, at the civil law marriage was little more than a partnership into which indivduals could enter at will, the terms of which they could vary by agreement, the profits of which were to be the property of each, and the bands of which they might dissolve at pleasure. At the common law the family has always been regarded as a sacred entirety, with regard to which the rights and freedom and convenience and wishes of every person connected with it must yield. Its bands were indissoluble, and the duties and obligations connected with it were to be scrupulously enforced. For an absolutely Christian and moral community, whose property consists chiefly of land, the common law in respect to marriage would still continue to be the perfection of human reason. But the unhappy recurrence of drunken or profligate or spendthrift husbands with patient and industrious wives, and the great accretions of personal over real property, in modern times, have rendered some changes in the common law desirable, which are, for the most part, concessions by the mass of society in favor of its unfortunate exceptions. The common law was not unmindful of the natural rights of women or of wives, but regarding the family as the unit of society, it was inevitable that it should cast the burdens and responsibilities of life upon its head. If the husband possessed land before marriage, the wife by marriage instantly acquired an inchoate estate in it for her future support. If he should acquire land after marriage, for the same reason it became in a measure subjected to her, and no conveyance to him could be devised which would elude her right to dower. If an injury was done to her inheritance he was compelled to unite with her in her suit and assume the responsibility of its expenses, but if he died before judgment the action survived to her alone. If an estate was given to both or was acquired by purchase, they took neither as joint tenants nor as tenants in common. For the common law regarding them as but one person, held that they could not take by moieties and be both seized of an entirety; that neither could sell without the consent of the other, and that the survivors would take the whole. He was liable for her debts before marriage, though they were concealed from him, and for them his goods might be sold and his body thrown into prison. He was bound to provide for her in a manner suitable to her condition in life, and if he abandoned her, or they separated by consent, he lost not the liability, and when he sent her away he was said "to send his credit with her." Nay, if she abandoned him and returned, and he refused to receive her, his liability nevertheless returned with her, and he might be sued for her support. Her frauds and torts committed during coverture were his jointly with her, though he were ignorant or absent when they were committed, and if they were done by her in his presence they were his alone. If the remedy sought was by imprisonment, though the wrong was exclusively hers, he only was liable to be imprisoned.

When we pass from the relations of husband and wife to the office of attorney we find several responsibilities inseparable from it which seem inconsistent with the holding of the office by a woman. In cases of misconduct by an attorney he may be attached by the court and imprisoned, but if the attorney were a married woman she might come in and say that the misconduct occurred in her husband's presence, and that at common law it was by his compulsion. She might misapply the funds of a client, or be guilty of gross neglect or fraud, and the husband be sued at common law for the wrong which she committed as attorney. In the case now before us it has been intimated that the admission of the party is sought with the husband's knowledge, and that she may be appointed by his consent. But a court can not make an exceptional rule which will apply to one party and not to another, nor can it change the existing law so as to hold a woman to the full responsibility of an attorney, nor can it change the legal relations of husband and wife "by consent" any more than it can grant divorces "by consent."

So far as the rule of this court is concerned it contemplates only the admission of men. Its language is that "*no counsel will be permitted to practice in the court unless he is a man of good moral character.*" It can not be denied that the masculine gender, which is generally used in statutes, frequently embraces the feminine; but if a masculine word receives any such latitude of construction it is when it is applied to those cases where law and custom recognize men and women as standing upon the same ground of right or responsibility, the general rule being that words are to be construed according to their usual meaning. Certainly it is not obligatory on courts to construe them otherwise, unless that is made obligatory by legislation. There is no such legislation affecting this court or its rules, and certainly when our rules were made the word "man" was used in its usual and literal meaning, and, so used, expressed all that the court then intended.

If the statute require that the owner of a city lot shall remove the snow from his sidewalk, it will be held to extend to men, women and children; for the statute is directed indiscriminately to the owners of property, and pre-existing law and usage have regarded the owners of property as liable to certain charges upon it, without reference to their age or sex. But the word "man" in a statute exacting military service, would not be construed to include women, for the pre-existing law, that is to say, the established usages of society, have never regarded women as liable to render such service.

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For the same reason the word in the rule can not be held to include women unless women have heretofore been regarded as capable of filling this office. If the word "man" in this rule can be enlarged, against all pre-existing usage, by the loose construction of a court, so as to include men and women, then the word man in a statute enforcing military service in like manner can be extended at the will of the judiciary. Where a statute provides that all able-bodied citizens between certain ages shall perform military service, and then, like the conscription act, 3d March, 1863 (12 Stat. at Large, 731, sec. 2), excepts a "father" in one case, a "son" in another, and a "brother" in a third, and finally declares "that no persons except such as are herein excepted shall be exempt," it would be within the discretion of a court to say that the statute included women in the term "persons." The rule of construction unquestionably is that a statute can never be extended to a new subject-matter, nor used to alter what under prevailing usage exists, by giving to its words a meaning which, so far as regards that statute or that subject-matter, they were never before supposed to possess. If a judge could at his fancy so construe this rule of the court as to hold that women may be attorneys, I do not see upon what legal ground he would be restrained from holding that they must be soldiers, for the difference between the two is simply a distinction of taste or sentiment as to which the opinions of mankind change and vary. Some persons who regard women as eligible for admission to the bar would recoil from exacting of them military service. Others would think that both were equally beyond their sphere. I have been at the bar and in the military service, and my experience leads me to the conclusion that women are as well fitted for the one as for the other. Another person having had similar experiences may reach an opposite result. It is said that modern ideas have brought down many occupations within the reach of women which were supposed to belong exclusively to men; but in nothing have modern ideas done so much of this leveling as in the art of war. In the hand-to-hand conflicts of antiquity women were manifestly unable to cope with the physical natures of men, and from necessity were exempt. But hand-to-hand conflicts are as obsolete as the wager of battle. The light breech-loading carbine demands activity rather than strength. Woman as a soldier would have little to do besides marching and shooting and being shot. It is said that a well-read, intelligent, honest woman will make a better attorney than an ignorant, vicious, unscrupulous man. This is true; but it is equally true that a healthy, active woman will make a better soldier than a decrepit man. Some considerations of public policy also intervene in favor of the latter course. There may be occasions when the conscription of women as soldiers, if permissible at law, will seem to verge on absolute necessity; but as to attorneys it can hardly be supposed that there will ever be a time when their scarcity will greatly endanger the public safety. These reflections I have indulged in, not from any serious apprehensions of their realization, but to illustrate how dangerously fallacious is the reasoning which invites a court to attempt the overthrow of existing law.

It is not for the judiciary to intermeddle with the question as to what is or what is not the "proper sphere of woman." It is enough for judges to know that her legal position is, by an unwritten law, interwoven with the very fabric of society, and that when society frames constitutions of government it places them upon a foundation of its own immemorial usages, which society can reconstruct, but as to which it may be doubted whether even the legislative power has authority to overturn.

It is said in the argument that the whole subject of the admission of attorneys is within the discretion of a court, but this is not strictly true. Admission to the bar constitutes an office. In the first days of attorneys of record the office existed only by appointment of the crown, and during our earlier history the power of appointment was exercised exclusively by the colonial governors. In both England and this country the power of appointment was conferred upon courts by statute. 4 Henry IV. chap. 18; New York constitution, 1777, sec. 27; *in re* Cooper, 22 N. Y. 80. The appointment to the office by a court is a judicial act. *Ex parte* Secombe, 19 How. 9. Refusal to admit a person conceded to be properly qualified is a judgment subject to the reversal of an appellate court. *In re* Cooper. Disbarring an attorney is likewise a judicial act, in like manner subject to be reversed. *Ex parte* Heyfron, 7 How. Miss. 127. Courts of the United States for convenience recognize admission to the bar of state courts as proof of qualifications, and accept the introduction by a member of their own bar as testimony of personal and professional good character; but these are merely evidence on which the court acts, and its action remains as before a judicial decision. *Ex parte* Garland, 4 Wall. 333.

It is to be understood that the decision of this court does not rest upon those grounds which would make its judgment final. We do not, in legal effect, pass upon the individual application before us, but refuse to act upon it for want of jurisdiction. Our decision is not necessarily final, and there is express authority for saying that if we err the supreme court can review our error and give relief to the applicant by mandamus. Roberts' Case, 8 Court Claims, 118. The position which this court assumes is that under the laws and constitution of the United States a court is without power to grant such an application, and that a woman is without legal capacity to take the office of attorney.

MOTION DENIED.

NOTE.—The above case will no doubt interest many of our readers. While we are inclined to concur in the result reached, we cannot but regret that the *legal obstacles* which exist in the present state of the common law in this country to the admittance of married women to the bar, had not been more fully stated. When we began reading the opinion we supposed that Mrs. Lockwood was the wife of some federal judge, but on enquiry we learn that she is not the wife of any judge, but that her husband is a doctor of medicine. Form the outset of the opinion to its close, the reader can not fail to be impressed with the conclusion that the learned justice who pronounced the judgment of the court entertains very strong views upon the question. Indeed the opinion can scarcely be said to be couched in that calm and dispassionate language which should characterize judicial argument. Where the learned justice takes occasion to declare that "for an absolutely Christian community, whose property consists chiefly of land, the common law in respect to marriage would still continue to be the perfection of human reason," he utters an encomium upon the common law which eminent writers have uttered before him. But it is nevertheless true that there are lawyers quite as enlightened who, upon a comparison between the common and the civil law in their respective treatment of married women, believe the former to be a little better than an aggregation of barbarism. If we might resort to particular illustrations, as the learned justice has done, we could point to the fact that, upon the death of the husband, the wife is entitled, for her support, to a life estate in *one-third* of his realty; while upon the birth of a child capable of inheriting, the husband becomes vested with an interest in *all* of the wife's realty, which upon her death ripens into a freehold for life. How this can be pronounced the perfection of human reason, even as applicable to a purely Christian community, is more than we can see. On the contrary, it seems the very essence of barbaric injustice, unworthy of the jurisprudence of a nation which claims to be enlightened, but worthy only of the source from whence it derived its origin—worthy of the policy of the rude hordes which, from the frozen forests of Germany and of Scythia, descended like a curse upon the Roman world.

The learned justice descends into particulars to explain what the common law *was* with reference to the status of married women, but he does not explain with equal clearness what her status *is*, nor does he present in a satisfactory manner the disabilities under which she at present labors, which would prevent her from assuming the responsibilities of an attorney. If these had been fully developed and properly presented, they probably would have been found insuperable. But instead of clearly discussing this, the only *legal* question involved in the case, a considerable portion of the opinion is devoted to a discussion of the question of policy involved in it. Upon this question of policy the opinion of the great mass of the legal profession will no doubt accord with that of the learned justice, but there are some enlightened lawyers who think otherwise. But, however this may be, so long as the court profess to decide it, not as a question of policy or propriety, but as one of *jurisdiction*, this part of the opinion appears to be quite irrelevant. More especially would this remark seem to be applicable to that part of it which institutes a

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comparison between women as lawyers and women as soldiers. Indeed, that was little better than a sneer.

With reference to the doubt which the learned justice expresses whether even the legislative power has authority to overturn what society has established as the status of married women, we may be pardoned for suggesting that it is generally supposed among lawyers that the enacting of a measure by the legislature is the highest evidence that it is in accordance with public policy. State v. Clark, 54 Mo. We believe that it has never been supposed in this country that courts possess the power to declare a statute a nullity, unless it is found to conflict with the written constitution—the organic law. We may therefore indulge in the supposition that if congress should, in its wisdom or folly, see fit to pass a law making married women eligible to the office of attorney in the federal courts, even the Court of Claims might, on reflection, feel obliged to succumb.

It is to be observed that the opinion concludes that *a woman* is without legal capacity to take the office of attorney. It is perhaps to be regretted that the learned justice had not, in this concluding sentence, confined himself to the case in judgment—that of a *married* woman. Several courts, perhaps equally as respectable as the Court of Claims, have admitted *single* women to practice at their bar. This has been done by the federal court at St. Louis, and also by that at Chicago. In the later court, before his honor Judge BLODGETT, a lady attorney appeared a few days since and won her maiden case. From the report of the case in the Chicago Legal News, as well as our knowledge of the high standing of the court, we may presume that it was fairly won—not by overwhelming the learned judge with "the most powerful influence known to the law or humanity," but "by request and such fair [legal] question as soul to soul affordeth." S. D. T.

Right of National Banks to Sue in the Federal Courts where there is a Remedy in Equity to Restrain the Collection of Illegal Taxes—Jurisdiction of Federal Courts in Equity in such Cases.

FIRST NATIONAL BANK OF OMAHA, NEBRASKA, v. THE COUNTY OF DOUGLAS, NEBRASKA, AND EDWARD F. McSHANE, ITS TREASURER.

United States Circuit Court, District of Nebraska.

This was a bill in equity for an injunction to restrain the collection of taxes levied by the commissioners for the defendant county, on behalf of the state of Nebraska and of the county, upon the capital stock of the plaintiff.

At the May term, 1872, a motion was made by Mr. *Woolworth*, counsel for the bank, to the court, Mr. Justice MILLER presiding, for an injunction, which motion was opposed by Mr. *Cowen*, counsel for the county, on the ground of want of jurisdiction.

Mr. Justice MILLER held:—

1. National banks may, by reason of their character as such, sue in the federal courts.

2. A part of the taxes sought to be restrained being for the state of Nebraska, and the county treasurer being by the revenue law of the state required to pay the same into the state treasury when they are collected, and no provision being made by law for an action or other proceeding against the state for the recovery of them back if illegally exacted, the plaintiff has no adequate remedy at law, and equity will intervene by injunction to restrain their collection.

3. When a county treasurer holds one warrant in which he is commanded to enforce payment of both state and county taxes, which for a common reason are illegal, equity, having jurisdiction to restrain the treasurer from enforcing the payment of the state taxes, may proceed to the determination of the validity of the county taxes as well, and restrain them also.

4. The First National Bank of Omaha filed its bill against the county of Douglas and its treasurer, to have it declared that taxes for 1870 and 1871, levied by the state of Nebraska and the county of Douglas upon the capital stock of the bank were illegal, and to restrain that officer "from making distress upon the property of the plaintiff as he threatened to do, and from all other proceedings to enforce the payment" of the taxes. On motion for an injunction the defendant objected to the jurisdiction of the court as a federal court, and also as a court of equity. *Held*, that there was jurisdiction to entertain the bill and allow an injunction.

INJUNCTION ALLOWED.

The Arkansas Imbroglio—Opinion of the Attorney-General.

The attorney-general has submitted to the president his opinion in the Arkansas case, wherein Elisha Baxter and Joseph Brooks, each claiming to be governor of the state, had made application to the president for aid to suppress the insurrection. After quoting from the constitution of Arkansas the section providing for the opening of and publishing of election returns for state officers, under which Baxter was declared governor, and the clause providing for contested cases, under which the lower house of the assembly rejected Brooks' petition for contest by the decisive vote of 33 to 9, the attorney passes to proceedings of Brooks in the courts, he in substance says:

Subsequently to the vote in the lower house, the attorney-general of Arkansas, upon petition of Brooks, applied to the supreme court of the state for a *quo warranto* to try the validity of Baxter's title to the office of governor, in which it was alleged that Baxter was a usurper, &c. That court denied the application upon the ground that courts of the state had no right to try and determine the question presented, because exclusive jurisdiction in such cases had been conferred on the general assembly by the constitution and laws of the state. Brooks then brought suit against Baxter in the Pulaski Circuit Court under the civil code of Arkansas. Brooks states in his petition that he received more than 95,000 votes, and that Baxter received less than 30,000 votes for governor, and after declaring that Baxter has usurped the office, prays that it may be given to him by judgment of the court, and that he may recover $2000, the emoluments of the office. This presented to the courts the simple question of a contest for the office of governor. Baxter demurred to the petition on the ground that the court had no jurisdiction of the case, and afterwards, on the 15th of April, the court, in absence of defendant's counsel, overruled demurrer, and without further pleadings or any evidence in the case, rendered judgment for Brooks in accordance with the prayer and petition. Brooks, within a few minutes thereafter, without process to enforce execution, of said judgment, and with the aid of armed men, forcibly ejected Baxter and took possession of the governor's office. On the next day after the judgment was rendered Baxter's counsel moved to set aside, alleging among other things as grounds therefor, that they were absent when the demurrer was submitted and final judgment rendered; that the judgment of the court upon overruling the demurrer should have been that the defendant answer over, instead of which final judgment was rendered without giving any time or opportunity to answer the complaint upon its merits; that the court assessed damages without any jury or evidence; and, finally, that the court had no jurisdiction over the subject-matter of the suit. But the next day this motion was overruled by the court, when the president, in pursuance of a provision of the constitution of the United States, was called upon by the executive of the state to protect it against domestic violence. It appears to be his duty to give the required aid, especially when there is no doubt about the existence of violence. But where two persons claim to be governor, and make calls upon the president under the constitution, it becomes necessary for him to determine which of the persons is the constitutional governor. The constitution of Arkansas is decisive of this question as between Baxter and Brooks. According to the constitution and laws of the state, the votes for governor were counted, and Baxter declared elected, and he at once was duly inaugurated.

Assuming that no greater effect is to be given to counting the votes in the presence of the general assembly than ought to be given to similar action by any board of canvassers, yet, when it comes to decide a question of contest, the general assembly is converted by the constitution into a judicial body; its judgment is as conclusive and final as is the judgment of the supreme court of the state on any matter within its jurisdiction. The parties to such contest plead and produce evidence according to practice provided in such cases, and the controversy is invested with the forms and effect of a judicial procedure.

Mr. Brooks appears to claim that when the contest for governor is decided by the general assembly, the defeated party may treat the decision as a nullity and proceed *de novo* in the courts. This makes the constitutional provision as to contest of no effect, and proceedings under it an empty form. Looking at the constitution alone, it appears perfectly clear that the courts of the state have no right to try the contest about the office of governor, but that exclusive jurisdiction over that question is invested in the general assembly.

There is a decision made by the supreme court upon the precise question presented in the case of Brooks v. Baxter. Berry was a candidate for state auditor on the same ticket with Brooks. Wheeler, his competitor, was declared elected by the general assembly. Berry then brought suit under § 525 of the code, in the Pulaski Circuit Court to recover the office. Wheeler applied to the supreme court for an order to restrain proceedings, and that court issued a writ of prohibition forbidding said court to proceed, on the ground that it had no jurisdiction in the case as to the questions of law involved.

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The cases of Berry and Brooks are exactly alike. That this circuit court should have rendered judgment for Brooks, under these circumstances, is surprising, and it is not too much to say that it presents a case of judicial insubordination which deserves the reprehension of every one who does not wish to see public confidence an uncertainty, and the good faith of judicial proceedings wholly destroyed.

Taking the provision of the constitution which declares that contested elections about certain state officers, including governor, shall be determined by the general assembly, and that provision of law which says all contested elections of governor shall be decided by the legislature, and decisions of the supreme court affirming the exclusive jurisdiction of that body over the subject, and the conclusion irresistibly follows that said judgment of the circuit court is void. A void judgment binds nobody. Section 525 of the code, under which this judgment was rendered, is no doubt intended to apply to county and other inferior officers, for which no provision is elsewhere made.

Respecting the claim that Brooks received a majority of votes at the election, it must be said that the president has no way to verify that claim. If he had it would not, in my opinion, under the circumstances of this case, be a proper subject for his consideration. Perhaps, if everything about the election was in confusion and there had been no legal count of votes, the question of majorities might form an element of discussion. But where, as in this case, there has been a legal count of votes, and the tribunal organized by the constitution of the state for that purpose has declared the election, the president ought not to go behind that action to look into the state vote. Frauds may have been committed, but unhappily there are few elections where partisan zeal runs high in which the victorious party, with more or less of truth, is not charged with acts of fraud.

There must be an end to this controversy upon the subject. It would be disastrous to allow the proceedings by which Brooks obtained possession of the office to be drawn into precedent. There is not a state in the Union in which they would not produce conflict, and probably bloodshed. They cannot be upheld or justified upon any grounds, and, in my opinion, Baxter should be recognized as the lawful executive of the state of Arkansas.

Since the foregoing was written the attorney-general says:

I have received a telegraphic copy of what purports to be the decision of the supreme court of Arkansas, delivered on the 7th instant, from which it appears that the auditor of state, upon requisition of Brooks, drew his warrant on the treasurer for the sum of $1000, payment of which was refused. Brooks then applied to the supreme court for a writ of mandamus upon the treasurer, who set up by way of defence that Brooks was not governor of the state, to which Brooks demurred, and thereupon the court says:

"The only question that we deem it necessary to notice is, 'Did the circuit court have jurisdiction to render judgment in the case of Brooks v. Baxter?' We feel some delicacy about expressing an opinion upon the question propounded, but under the pleading it has to be passed upon incidentally if not absolutely determining whether the relator is entitled to the relief asked for. His right to the office, if established at all, is established by judgment of the circuit court of Pulaski county We are of opinion that the circuit court had jurisdiction on the subject-matter, and its judgment appears to be regular and valid. Having arrived at these conclusions, the demurrer is overruled and the writ of mandamus will be awarded as prayed for."

To show the value of this decision it is proper that I should make the following statement: On the 20th of April Brooks made formal application to the president for aid to suppress domestic violence, which was accompanied by a paper signed by Chief Justice McCLURE and Justices SEARLE and STEPHENSON, in which they stated that they recognized Brooks as governor; and to this paper is also appended the name of Page, the respondent in the above named proceedings for mandamus. Mr. Page, therefore, did not refuse to pay the warrant of the auditor because he did not recognize Brooks as governor, but the object of his refusal evidently was to create such facts as were necessary to make a case for the supreme court. Accordingly pleadings were made up by parties both of whom were on the same side in the controversy, and the issue so made was submitted to the judges virtually pledged to give the decision wanted; and there, within the military encampment of Brooks, they hurriedly but with delicacy, as they say, decided that he is governor—a decision in plain contravention of the constitution and laws of the state, and in direct conflict with two other recent decisions of the same court deliberately made.

I refrain from comment. More than once the Supreme Court of the United States has decided that it would not hear argument in a case made up in this way, and a decision obtained under such circumstances is not recognized as authority by any respectable tribunal. No doubt this decision will add to the complications and difficulties of the situation, but it does not affect my judgment as to the right of Baxter to the office of governor until it is otherwise decided upon.

Legal News and Notes.

—THE Supreme Court of Missouri adjourned its St. Louis term on Monday last after delivering opinions in forty-three cases. These we shall hereafter abstract or publish in full, according to their importance, as fast as our space will permit.

—JUDGE WOODRUFF, of the United States Circuit Court, and Judge WILLIAM E. CURTIS, of the Superior Court, have accepted an invitation of the faculty of Yale College to pass upon prize essays to be presented by the senior class of the law school of that college.

—WE have seen in the Nashville Republican Banner a letter of Hon. Philip Lindsley, of Nashville, taking strong grounds, and assigning his reasons at length, in favor of calling a convention to amend the constitution of that state. We understand that a erable portion of the public press are taking ground in favor of a ention. There are doubtless defects in the constitution of that state, but they relate to subjects political rather than legal in their character.

—THE Financier says that the attorney-general of Wisconsin has given the opinion that the new law regulating railroad charges is constitutional, and it is reported that measures will be instituted to enforce obedience to it. On the other hand, it is understood that Messrs. Evarts, Hoar, B. R. Curtis, and other eminent counsel, have advised the Milwaukee & St. Paul, and Chicago & Northwestern companies that the law cannot stand if brought before the courts. It is probable that a test case will be made with these companies, which will virtually decide the constitutionality of the tariff laws of Illinois and other Western states as well as that of Wisconsin.

—NEW ORLENS city bonds of 1854, originally issued in exchange for the stock of the New Orleans, Jackson and Great Northern R. R. Co., having recently fallen due, have been protested for non-payment. The city was authorized to offer in exchange for them a new issue of twenty-year bonds, or the new consolidated-loan seven-per-cent. gold bonds, but holders refused both these offers, and now the secondary liability of the railroad company—having received and sold the bonds—is being discussed. The company holds that in merely transferring these securities it did not become liable for them. So far as we know, the question of such liability has not been thoroughly determined, and this case, if brought before the courts, as now seems probable, will become of great interest to all holders and dealers in coupon bonds.—*The Financier.*

—THE fruits of repudiation are already becoming visible in the action of the foreign bondholders in attempting to divert capital from the development of the valuable coal and iron interests of Virginia. The commissioners sent to London for that purpose had succeeded in interesting not only English capital but English miners in the enterprise. But just as these projected arrangements were being completed, a circular was issued discouraging in every way such investment, and declaring it a measure of common prudence to abandon it because no private investment can be safe where the obligations of justice, morality and law are set at defiance by the community, as disclosed in the refusal of Virginia to pay the interest on her bonded indebtedness. Not only is the London council prepared to oppose the investment of English capital in states where unpaid principal and interest is claimed, but they have invoked the attention of their continental allies to the same.

—THE 54th volume of New Hampshire Reports promises to be one of the most valuable that has been published in this country for many years. It will contain four very important cases, respectively known as the "Church Case," the "Exemplary Damage Case," and the "Mortgage Trust Case." It is understood that the first will take at least 250 pages of the volume; the second, 50 pages; the third, 100 pages, and the fourth 50 pages. These will be followed by what is known as the "Mink Case"—a case arising in a comparatively trivial circumstance, but in which the court (DOE, J., delivering the opinion) discuss the law in relation to the defence of property, more exhaustively, perhaps, than it has ever been discussed in any other case. An idea of the thoroughness with which the judges of the Supreme Judicial Court of New Hampshire do their work may be inferred from the fact that Judge DOE consumed six solid months in the preparation of his dissenting opinion in the "Church Case," exhausting every authority he could find bearing upon the question.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, MAY 28, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

THE valuable note in this number to the case of The Dollar Savings Bank v. The United States, is from the pen of John N. Rogers, Esq., of the Davenport bar. It has been prepared at our request, and we hope occasionally to be favored in like manner by the pen of this accomplished lawyer.

The United States Supreme Court Reports.

The profession have long desired that CURTIS' Decisions of the Supreme Court of the United States, which closed with the 17th volume of Howard, might be continued by some person equally competent. We were therefore gratified to receive recently from Messrs. Morrison, of Washington, an announcement that they had arranged with Mr. Justice MILLER to take up the work where Judge CURTIS left it. The title page of the first volume under the editorship of Justice MILLER is before us, and is as follows:

"Cases argued and adjudged in the Supreme Court of the United States, at the terms of December, 1855, 1856, 1857 and 1858; being the terms embraced in the 18th, 19th, 20th and 21st volumes of Howard's Reports. Reported by SAMUEL F. MILLER, LL.D., one of the justices of the said court."

We suppose that it is contemplated to bring this series down to the present time—at all events this ought to be done, so as to give the profession an uniform edition of the Reports of the highest judicial tribunal in the country. Judge MILLER's well-known faculty of extracting and stating the *principles* of cases will give to his labors in this direction an especial value.

The Brinkley Divorce Case—a Singular Suit.

Most of our readers are familiar with this celebrated case, which has now been in the courts for several years. The defendant, Hugh L. Brinkley, is a great-grandson of Judge Overton of Tennessee—a very able judge, whose decisions did much towards shaping the early jurisprudence of that state. If the writer's recollection serves him right, Overton, Jackson and Winchester were the founders of the city of Memphis—having purchased the land and laid out that city by a tripartite deed in the year 1818 or 1820. By large and judicious investments, Judge Overton left to his descendants an immense landed property, a large portion of which will descend, in right of his mother, to the defendant in this suit. The interesting question in the divorce case is, whether there was in fact any marriage, the complainant asserting that there was, though not solemnized according to the forms of law, and the defendant asserting that the complainant was simply a kept mistress. While the suit was pending in the Chancery Court of Memphis, an application for alimony pending the suit was made, and having been heard upon affidavits, was denied by the Chancellor. This interlocutory decree was considered decisive of his views on the merits of the case, and the suit was therefore dismissed in Tennessee, and a new action brought in the Supreme Court at New York city. Judge BARNARD, of that court, awarded alimony pending the suit, and his ruling was affirmed in the supreme court.

At the time of this writing the case is on trial in the Supreme Court at New York city, before Judge VAN BRUNT. Messrs. *Beach & Brown* representing the plaintiff, and *W. H. Anthon* the defendant. Subjoined is a synopsis of Mrs. Brinkley's testimony, as given in the Daily Register:

"Mrs. Elizabeth Brinkley was placed on the stand and gave evidence at great length. She is a lady of very prepossessing appearance, was elegantly dressed, and gave her evidence with great delicacy and decision. She stated that she had known the defendant in her youth, but had again renewed the acquaintance in the year 1864, when she was staying at a boarding-house in Twenty-fifth street. She was then twenty-one years of age, and Mr. Brinkley proposed matrimony to her, but he said he must be married without any form or the attendance of any witnesses, as his father, who was a Southerner, and upon whom he was dependent for future property, would object, as he was very proud and well connected. She at length entertained Mr. Brinkley's proposals, who promised on a certain day to bring her a ring and go through a form between themselves. In April, 1864, he came to the house where she was staying, but brought no ring, instead of which he made a vow by a gold cross which he took from his watch-guard and gave her, and which had been the property of his mother; that, as he hoped to meet that deceased relation in heaven, he would acknowledge and act towards her as a wife. His mother was possessed of considerable property to which his father then held the right, and which would come to him and his sister. Being thus married to him, he removed her to several first-class boarding-houses and hotels, and they traveled to many places in the states as man and wife, and went eventually to Memphis. They lived as man and wife together for five years, moved in good society, and were so recognized. In 1868, Mr. Brinkley, at his father's instigation, refused any longer to recognize her as his wife. She commenced proceedings against him in the courts at Memphis, and subsequently in the courts of this state. In 1870, before Judge BARNARD, she was awarded $1,000 to conduct her case, and $25 per week for maintenance, and her husband objecting to this allowance, it was confirmed on appeal to the supreme court. A diary, which she had kept since 1865, was put in evidence, which she stated was always open to her husband's view, and was constantly read by him. Defendant's attorney cross-examined her at great length about it, in reference to the certainty of her husband's having seen it, and particularly some marked passages; but she persistently maintained his perfect knowledge of its contents.

The Right to Keep and Bear Arms for Private and Public Defence.

The second amendment of the constitution of the United States recites that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Similar provisions will probably be found in the constitutions of most of the states. Thus the constitution of Texas declares that "every person shall have the right to keep and bear arms in the lawful defence of himself or the state, under such regulations as the

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legislature may prescribe." Art. 1, § 13. So the present constitution of Tennessee provides that "the citizens of this state have a right to keep and bear arms for their common defence; but the legislature shall have power by law to regulate the wearing of arms with a view to prevent crime." These and similar provisions in the constitutions of other states have been discussed in several cases, and with the apparently growing habit of legislatures to restrict the wearing of arms, their exposition assumes increasing importance. The provision in the federal constitution does not appear ever to have received exposition in the Supreme Court of the United States, but the state tribunals have furnished a series of interesting decisions upon the subject, referring either to the federal or to the state constitution.

1. The first of these appears to have been Bliss v. Commonwealth, 2 Littell, 90, determined in the Court of Appeals of Kentucky in 1822, and relates to the question we shall consider first—the *manner* of carrying weapons. The constitution of Kentucky provided "that the right of the citizens to bear arms in defence of themselves and the state *shall not be questioned.*" It was held that a statute providing that "any person in this commonwealth, who shall hereafter wear a pocket-pistol, dirk, large knife, or sword in a cane, *concealed as a weapon*, unless when travelling on a journey, shall be fined in any sum not less than one hundred dollars," etc. This statute was held to be in conflict with the constitutional guaranty, and hence void—one of the three judges dissenting. The court said: "That the provisions of the act in question do not import an entire destruction of the right of the citizens to bear arms in defence of themselves and the state, will not be controverted by the court; for though the citizens are forbid wearing weapons *concealed* in the manner described in the act, they may nevertheless, bear arms in any other admissible form. But to be in conflict with the constitution it is not essential that the act should contain a prohibition against bearing arms in every possible form. It is the *right* to bear arms in defence of the citizens and the state that is secured by the constitution, and whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution. If, therefore, the act in question imposes *any* restraint upon the right, immaterial what appellation may be given to the act, whether it be an act *regulating* the manner of bearing arms or any other, the consequence, in reference to the constitution, is precisely the same, and its collision with that instrument equally obvious." And the court further on declare that "in principle there is no difference between a law prohibiting the wearing of *concealed* arms and a law forbidding the wearing of such as are exposed." And, therefore, the defendant having been convicted and fined for carrying a sword concealed in a cane, the judgment was reversed.

The next case in order of time appears to have been The State v. Mitchell, 3 Blackf. 229, determined in the Supreme Court of Indiana in 1833. The ruling is diametrically opposed to that in the Kentucky case. The report does no more than mention the point ruled in the briefest terms, but it would seem that the Indiana constitutional provision was simply "that the people have a right to bear arms for the defence of themselves and the state." And the statute (Laws of Ind., ed. of 1831, p. 192) which was held not in derogation of this provision provided that "every person, not being a traveller, who shall wear or carry any dirk, pistol, sword in a cane, or other dangerous weapon *concealed*, shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars."

This ruling was followed by the Supreme Court of Alabama in 1840, in The State v. Reid, 1 Ala. 612. The provision of the Alabama constitution was almost identical with that of Indiana. It provided that "every citizen has the right to bear arms in defence of himself and the state." And it was held that this provision was not infringed by a statute which provided that "if any person shall carry *concealed* about his person any species of fire-arms, or any bowie-knife, Arkansas tooth-pick, or any other knife of the like kind, dirk, or other concealed weapon, the person so offending shall, on conviction thereof, before any court having competent jurisdiction, pay a fine of not less than fifty nor more than five hundred dollars," etc. The statute was held not in conflict with the constitutional provision. And this ruling was reaffirmed in Owen v. The State, 31 Ala. 387. The Supreme Court of Alabama in the former case say: "The constitution, in declaring that 'every citizen has the right to bear arms in defence of himself and the state,' has neither expressly nor by implication denied the legislature the right to enact laws in regard to the *manner* in which arms shall be borne. The right guarantied to the citizen is not to bear arms upon all occasions and in all places, but merely 'in defence of himself and the state.' The terms in which this provision is phrased seem to us necessarily to leave with the legislature the authority to adopt such regulations of police as may be dictated by the safety of the people and the advancement of public morals." And further on they say: "We do not desire to be understood as maintaining that in regulating the manner of bearing arms, the authority of the legislature has no other limit than that of its own discretion. A statute which, under pretence of *regulating*, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional. But a law which is intended merely to promote personal security, and to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the constitution." And the court also say: "Under the provision of our constitution, we incline to the opinion that the legislature cannot inhibit the citizen from bearing arms *openly*, because it authorizes him to bear them for the purpose of defending himself and the state, and it is only when carried openly that they can be effectively used for defence." 1 Ala. 616, 617, 619.

The distinction here taken in regard to the *manner* of carrying or wearing weapons, has been followed in several later cases. Thus in Nunn v. The State, 1 Kelly, 243, decided in 1846, the Supreme Court of Georgia held that a statute of that state, so far as it sought to suppress the practice of carrying certain weapons *secretly*, was valid, inasmuch as it did not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms; but that so

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much of it as prohibited the wearing of certain arms *openly*, was unconstitutional and void. To the same effect, see Stockdale v. The State, 32 Ga. 225, and the very thoroughly considered case of The State v. Buzzard, 4 Ark. 18. So it has been held in several cases in Louisiana, that a statute prohibiting the carrying of *concealed* weapons did not infringe the right of the people to keep and bear arms, but was simply a measure of police, prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society. The State v. Jumel, 13 La. An. 399; The State v. Smith, 11 La. An. 633; The State v. Chandler, 5 La. An. 489. The same conclusion was reached by the Supreme Court of Tennessee in 1840 in Aymette v. The State, 2 Humph. 154, but upon somewhat different grounds, as we shall see further on; and is also supported by Andrews v. The State, 3 Heiskell (Tenn.) 165.

[TO BE CONTINUED.]

Taxation of Savings Banks—Remedy for Collection of Taxes by Action at Law.

THE DOLLAR SAVINGS BANK, PLAINTIFF IN ERROR, v. THE UNITED STATES.

Supreme Court of the United States, No. 203, October Term, 1873.

1. **Taxation of Savings Banks—Act of July 13, 1866.**—The act of congress of July 13, 1866 (14 Stat. 138), authorizes the levy and collection of a tax upon the accumulated earnings carried to the contingent fund of a savings bank, although such bank is without stockholders or capital stock, and merely does the business of receiving deposits to be loaned and invested for the sole benefit of its depositors.

2. **Internal Revenue Laws—Construction by Commissioner of Internal Revenue.**—The rule that when a judicial construction has been given to a statute the re-enactment of the statute is in effect a legislative adoption of that construction, does not apply to the construction placed upon an internal revenue law by the commissioner of internal revenue. Such a construction is not a *judicial* construction within the meaning of this principle.

3. **Remedy for Recovery of Tax—Debt in U. S. Circuit Court.**—The United States may maintain an action of debt in one of its circuit courts for the recovery of such a tax.

4. **——. Government not Concluded by Remedies Enumerated in Statute.**—The common-law rule that where a statute creates a right and provides a particular remedy for its enforcement, such remedy is generally exclusive of all common-law remedies, does not apply to the government. The king, in England, and in this country the state or government, is not bound by a statue unless named therein by express words. It is therefore held, *arguendo*, that the United States are not prohibited by the internal revenue law from adopting any remedy for the recovery of its revenue which is known to the laws of the state where the revenue accrues.

5. **——. Assessment.**—In a suit by the United States to recover the tax imposed upon the contingent fund of a savings bank, it is not necessary that there should have been an assessment.

In error to the Circuit Court of the United States for the Western District of Pennsylvania.

Mr. Justice STRONG delivered the opinion of the court.

The facts found by the special verdict are that the plaintiff in error is a banking institution, created by the laws of the state of Pennsylvania, without stockholders or capital stock, and doing the business of receiving deposits to be loaned or invested for the sole benefit of its depositors; that the charter authorizes the retention of a contingent fund, accumulated from the earnings, to the extent of ten per centum of its deposits, for the security of its depositors; that the bank has earned and added to the said contingent fund, or undistributed sum, from July 13, 1866, to Dec. 31, 1870, one hundred and seven thousand dollars; and that such earnings were carried to and added to said contingent or undistributed fund semi-annually, on the first days of January and July in each year.

Upon this state of facts, the first question presented is whether the act of Congress of July 13, 1866, which was an amendment to the internal revenue law, 14 Stat. 138, authorizes the levy and collection of a tax upon the accumulated earnings carried to the contingent fund. It is very plain that the first intent of the act was to impose a tax upon all the earnings, income or gains of the institutions mentioned therein. The language of its one hundred and twentieth section is, "there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due whenever and wherever the same shall be payable to stockholders, policy-holders, or depositors, or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or territories, whether specially incorporated or existing under general laws; *and on all undistributed sum or sums made and added during the year to their surplus or contingent funds.*" This tax the banks, trust companies, savings institutions, and insurance companies are required to pay, and they are authorized to deduct it from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid. It is, however, only so much of the tax as is levied upon dividends or sums of money due and payable to stockholders, policy-holders, or depositors, etc., which they are authorized to deduct. Thus it appears the tax is laid upon two subjects: the one dividends, or sums due and payable, and the other the undistributed surplus of gains and earnings carried to a surplus or contingent fund. These subjects, though together making up the entire net earnings, are distinct from each other; and they are thus treated throughout the section as well as throughout other sections of the act. If the portion of the act which we have quoted was all, it would not admit of a doubt that both these subjects—the dividends, or annual or semi-annual payments, and the sums added to the contingent fund—are made taxable.

It is argued, however, that savings institutions were relieved by the proviso to the section. That, of course, is to be construed in connection with the section of which it is a part, and it is substantially an exception. It takes out of the operation of the body of the enactment that which otherwise would be within it. It restrains the generality of the previous provisions. Its language is: "Provided, that the tax upon dividends of life insurance companies shall not be deemed due until such dividends are payable; nor shall the portion of premiums returned by mutual life insurance companies, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends." But, so far as it relates to savings banks, the only subject of the proviso is the annual or semi-annual interest allowed or paid to the depositors. It makes no reference to the undistributed surplus which may be carried to a surplus fund. That it leaves as it was in the body of the section, subject to the tax therein imposed. And to us it appears quite plain that such was the intention of congress. Had it been the purpose to exempt savings banks from liability to pay the tax on both the interest paid to its depositors and on all undistributed sums carried to the surplus fund, the plain mode of expressing such a purpose was to say in the proviso that such banks should be excepted from the operation of the section. If such was the purpose, why except them expressly from the operation of a part of the section only? Why take out one subject of taxation specifically, and leave the other unmentioned? And still more. If, as the plaintiff in error contends, it was intended that savings banks should pay no tax on either of the two subjects mentioned in the body of the section, why were such banks mentioned in the section at all? The broad construction of the proviso contended for makes it plainly repugnant to the body of the act, and it is, therefore, inadmissible.

Our attention has been called to the fact that in 1867, and again

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in 1870, the commissioners of internal revenue construed the proviso as exempting savings institutions from the tax upon all sums added to their surplus or contingent funds, and that the act of congress of July 14, 1870, which reduced internal taxation, employed substantially the same language respecting savings banks as that contained in the act of 1866. In view of this the plaintiffs in error argue that congress required the commissioner to prescribe what returns savings banks should make; that this made it his duty to put a construction on the law; that he did so, and held that such institutions were not required to return undistributed earnings carried to a surplus fund, and that after this practical construction had been made and acted upon more than three years, congress re-enacted the tax, reduced in amount, in the same words. Hence, it is inferred, the construction given by the commissioner was adopted. It is doubtless a rule that when a judicial construction has been given to a statute, the re-enactment of the statute is generally held to be, in effect, a legislative adoption of that construction. This, however, can only be when the statute is capable of the construction given to it, and when that construction has become a settled rule of conduct. The rule, we think, is inapplicable to this case. In the first place, the decisions of the internal revenue commissioner can hardly be denominated judicial constructions. That officer was not required by the law to prescribe what returns savings banks were required to make. That was prescribed by the act of congress itself, and he had no power to dispense with the requisition. There is, therefore, no presumption that his decisions were brought to the knowledge of congress when the act of 1870 was passed. And again, the construction he gave is an impossible one, for, as we have seen, it makes the proviso plainly repugnant to the body of the section.

We are constrained, then, to hold that the act of congress does impose upon the plaintiffs in error the tax to recover which the present suit was brought.

The second error assigned is that the circuit court erred in holding that an action of debt is maintainable in that court for the recovery of taxes.

We do not perceive that the question presented by this assignment was raised or even mentioned in the court below, and it is not clear that it may first be raised here. But if it may, the answer must be that the taxes may be recovered in an action of debt brought in the circuit court.

The argument in support of the assignment of error is that the United States has no common law; that the thirty-fourth section of the judiciary act enacts that the laws of the several states shall be the rules of decision in the trial of actions at common law, of which debt is one; that the act of congress which imposes the tax on savings banks, provides a special remedy for its assessment and collection, and that it is a principle of the common law of Pennsylvania, that when a statute creates a right and provides a particular remedy by which that right may be enforced, no other remedy than that afforded by the statute can be used.

It must be conceded that in the section of the act (act of 1866, sec. 120) which required savings banks to pay the tax, they are also required to render to the assessor or assistant assessor a list of the amount of taxes, with a declaration under oath attached thereto, on or before the tenth day of the month following that in which any dividends or sums of money may be due and payable, and for any default in rendering such a list they are liable to a penalty. The act also declares that "in case of any default in making or rendering said list or return, or any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal." What those general provisions are may be seen in other sections of the act which prescribe assessments, delivery thereof to the collectors, and distraint if necessary.

It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other states, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies.

But it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule therefore rests upon a presumed statutory prohibition. It applies and is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the internal revenue law the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the government. They may be obligatory upon tax-collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the state. It is a familiar principle that the king is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. 11 Reps. 74; King v. Allen, 15 East, 333. He may even take the benefit of any particular act, though not named. 7 Reps. 32; Potter's Dwarris on Statutes, 151–2. The rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts. It may be considered as settled that so much of the royal prerogative as belonged to the king in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution. Com. v. Baldwin, 1 Watts, 54; People v. Rossiter, 4 Cowan, 143; U. S. v. Davis, 3 McLean, 483; U. S. v. Williams, 5 McLean, 133; Com. v. Johnson, 6 Barr, 136; U. S. v. Green, 4 Mason, 427; U. S. v. Hoar, 2 Mason, 311; U. S. v. Hewes, Crabbe's Reps. 307.

It must, then, be concluded that the government is not prohibited by anything contained in the act of 1866 from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason. And we do not find that either in England, or in Pennsylvania, it has been held to be applicable. On the contrary, in England, informations for debt, and exchequer informations for discovery and account, to recover duties on importations, have been of frequent occurrence, though the acts of parliament have provided a different remedy for enforcing the payment. Numerous such cases are reported in Bunbury's Reports, 155, 299, 300 and 339. See also Comyn Dig. Debt, A. 9; 1 Rolle, 383. And in United States v. Lyman, 1 Mason, 482, Judge STORY held that debt might be maintained in the circuit court for Massachusetts to recover duties upon imported goods, a doctrine reasserted by this court in Meredith v. The United States, 13 Peters, 486.

Nor is there anything in the objection that the taxes for which judgment has been recovered in this case had not been assessed. No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers, or by the law itself. In the present case the statute required every savings-bank to pay a tax of five per cent. on all undistributed earnings made or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank [?] (Att'y Gen. v. ———, 2 Austruther, 553), and without more it

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made the bank a debtor. We think, therefore, the second assignment of error cannot be sustained.

The judgment is affirmed.

Mr. Justice BRADLEY, dissenting.—I dissent from the judgment of the court, on the ground that an action will not lie for a tax of the kind in question in this case, unless it be first entered on the assessment roll. The assessment roll should be regarded as conclusive as to the persons or things liable to taxation. If it is not—if the matter is left open so that any person or corporation may be prosecuted for taxes at any time—it leaves the citizen exposed to many hazards, and to the mercy of prying informers, when the evidence by which he could have shown his immunity or exemption has perished. If an action of debt without an assessment can be brought, what is the limit of time within which it must be brought? To what statute of limitations is the government subject? It seems to me that the decision introduces a new principle in the system of taxation, dangerous to the rights of the citizen and the peace and security of society.

I am authorized to say that Mr. Justice FIELD concurs in this dissent.

JUDGMENT AFFIRMED.

NOTE.—On the question whether debt or assumpsit will lie in favor of the state or a municipal corporation to recover a tax when the statute provides another special mode of collection, and is silent as to the remedy by action, the American authorities are not entirely in accord.

In Maryland it is held that assumpsit will lie on the implied promise arising on the legal obligation to pay the tax (The Mayor, etc., of Baltimore v. Howard, 6 Har. & J. 383, 394), even though a special remedy is given by the statute, this being cumulative only. Dugan v. The Mayor, etc., 1 Gill. & J. 499, 502. See also Gordon's Ex'rs v. The Mayor, etc., 5 Gill. 231, 242; Clemens v. The Mayor, etc., 16 Md. 208. So in Illinois it has been held that debt will lie in favor of a county to recover a personal tax, though the tax act gave a summary remedy by distress and sale of personal property. Ryan, Assignee, v. Gallatin Co., 14 Ill. 78. TRUMBULL, J., says (p. 83): "The remedy by distress is not necessarily exclusive. It is a summary proceeding, and will ordinarily be resorted to out of choice by collectors; but there may be cases when it would be ineffectual, as in this instance, when there was no personal property to distrain. As has been already shown, a legal liability existed against the assignees to pay the taxes, and an action of debt is an appropriate remedy to enforce such a liability whenever the ordinary proceeding by distress would be ineffectual." To the same effect is the opinion of TREAT, C. J., in Dunlap v. Gallatin Co., 15 Ill. 9, a case which grew out of the preceding one.

The same rule, in substance, is held in California. The State v. Poulterer, 16 Cal. 514; City of Oakland v. Whipple, 39 Cal. 112.

See also Portland Dry Dock, etc., Co. v. Trustees of Portland, 12 B. Mon. 77, 80; Mayor, etc., of Jonesboro v. McKee, 2 Yerg. 167; City of New Orleans v. Graihle, 9 La. An. 561, in which cases it does not appear what special remedy, if any, was given by the statute.

To these should be added the principal case, above reported.

On the other hand, in City of Camden v. Allen, 2 Dutch. (N. J.) 398, it was directly held that an incorporated city could not maintain an action of debt for a tax assessed under its charter when the charter gave a summary remedy for non-payment by distress and sale of property and arrest of the person. The doctrine of the court appears to be, in substance, that a tax is not a *debt* for which an action will lie at common law, and that the statutory remedy is exclusive. This is the only express decision to that effect which has come under our notice, but in other cases there are *dicta* which more or less support it. Thus in Shaw v. Peckett, 26 Vt. 482, it was held that a tax does not carry interest unless given by the tax act; and it was further said (p. 486), "The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding purely *in invitum*."

In Peirce v. City of Boston, 3 Met. 520, it was held that a tax was not the subject of set-off, under a statute limiting the right of set-off to demands founded in judgment or contract, express or implied. In the opinion it is said that for the collection of taxes "no right of action is given, with a few special exceptions, growing out of death of the parties," etc. And in Crapo v. Stetson, 8 Met. 393, holding that a tax collector cannot maintain an action in his own name to collect the tax, the opinion further states that "It is well settled that the law gives no remedy for the collection of taxes other than those provided by statute." And there is a similar dictum by PARSONS, C. J., in Andover, etc., Turnpike Co. v. Gould, 6 Mass. 40—a case relating to the right of a private corporation to maintain assumpsit against a shareholder for an assessment on his subscription for shares. In Packard v. Tisdale, 50 Me. 376, the same point was decided as in Crapo v. Stetson.

To sustain a personal action for a tax, of course there must be a personal obligation on the defendant to pay. Many taxes and assessments impose no such liability, but merely operate as liens or charges on the specific property assessed. In such case the remedy is against such property only. If an assessment is made a lien on the property, and no special mode of enforcing it is provided, a suit in equity may be maintained for that purpose. McInerny v. Reed, 23 Iowa, 410; Merriam v. Moody, 25 Iowa, 163.

As to when a tax will create a personal liability or charge upon the tax-payer, see United States v. Lyman, 1 Mason, 482; Meredith v. United States, 13 Pet. 486, 493; People v. Seymour, 16 Cal. 332, 342-4; Litchfield v. Vernon, 41 N. Y., 123, 135; Litchfield v. McComber, 42 Barb. 288, in which it is said (p. 295), "The personal obligation of the owner to pay is to be inferred from the authority to levy the tax by distress and sale of his goods and chattels, which is found in all or nearly all the assessment laws." J. N. R.

Railway-Aid Bonds — Charter Privilege of Receiving Subscriptions without a Vote of the People.

THOMAS J. FOSTER v. CALLAWAY COUNTY.

United States Circuit Court, Western District of Missouri, April Term, 1874.

Before DILLON and KREKEL, JJ.

1 **Railway-Aid Bonds—Charter Privilege of Receiving Subscriptions not Repealable.**—The power conferred upon counties along the route of the Louisiana and Missouri River Railroad Company by the charter of that company of March 10, 1859, to subscribe for its stock without a vote of the people, was not taken away, as respects Callaway county, by the amendatory act of March 24, 1868.

2. ——. **Questions Discussed.**—The provisions of the state constitution as to aid to railways, amendatory acts and titles to acts discussed.

This is an action upon coupons attached to bonds issued by the defendant to the Louisiana and Missouri River R. R. Co. or bearer, dated January 1, 1869.

The answer denies the authority of the County Court of Callaway county to issue the bonds, and this denial rests upon the grounds mentioned in the opinion of the court. The cause was submitted to the court upon the pleadings, an agreed statement of facts, and the record of the County Court of Callaway County in relation to the issue of the bonds. The plaintiff is admitted to be the owner of the bonds for value.

The defendant insists that the bonds were issued to the *south branch* of the Louisiana and Missouri River R. R. Co. under the act of the 24th of March, 1868, and not under the act of March 10, 1859, both of which are referred to in the opinion of the court; and the defendant further insists, as there was no vote of the people as required by the constitution of 1865, and as no part of what is claimed to be the "*main line*" of the road is within the county of Callaway, that the bonds were issued without authority of law, and are void.

It is admitted that the county has paid interest on the bonds for 1870 and 1871, and has also paid a small part of the principal.

It is also admitted that no vote of the people of the county was had authorizing the subscriptions by the county court.

The bonds were made payable to the Louisiana and Missouri River R. R. Co., or bearer, and contain the following recital:

"This bond is issued by Callaway county by authority of an act of the general assembly of the state of Missouri, approved March 10th, 1869, as amended by an act approved March 24th, 1868."

The other facts appear in the opinion.

J. D. Stevenson and *Ewing & Smith*, for plaintiff; *O. Guitar, T. C. Reynolds, Lay & Belch, Jeff. Jones, Boulware & Flood*, for the county.

PER CURIAM.

(DILLON and KREKEL, JJ., concurring.)

On the 10th day of March, 1859, the general assembly of the

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state of Missouri passed an act authorizing the organization of a railroad company under the name of the Louisiana and Missouri River R. R. Co., with a capital stock of three millions of dollars, and granting it power to "mark out, locate and construct a railroad from the city of Louisiana, in the county of Pike, by the way of Bowling Green in said county, to some suitable point on the North Missouri R. R., intersecting said road between the southern limits of the town of Wellsville in Montgomery county and the northern limits of the town of Mexico in Audrain county, thence to the Missouri river, at the most eligible point on the line the most suitable and advantageous as regards distance, grade, cost of road and permanent value of same."

In this act of incorporation power was given "The the *county court* of *any county* in which *any part* of *the route* of said railroad may be, to *subscribe to the stock of said company*, and to invest its funds in the stock of said company, *and issue the bonds of such county* to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county." No popular vote was required as a condition to the exercise of this power by the county courts. Before any subscription by Callaway county to the stock of the company, a number of the surveys of the route of the road had, according to the agreed statement of facts, been made, some of them running through Callaway county and others through Boone and Howard, and not touching any part of Callaway county. On the 16th day of January, 1868, the county court of Callaway county appointed Thomas B. Harris "commissioner and agent of the county of Callaway to take stock in and subscribe to the capital stock of the Louisiana and Missouri River R. R. Co. the sum of five hundred thousand dollars, being 5,000 shares of one hundred dollars each of said capital stock, said subscription to be paid by the issue of county bonds, * * as may be required by said company during the progress of the construction of said railroad from some point west or southwest of the North Missouri R. R., on either the Wellsville or Jefftown routes, as surveyed through said county through the city of Fulton [in said county], and by way of New Bloomfield [in said county] as near as practicable to the Missouri river." This subscription of $500,000 by the commissioner thus appointed by the county was made by him on the books of the company on the same day (January 16, 1868), as appears by a recital on the records of the county. Three smaller subscriptions were afterwards made by the order of the county court to the stock of the Louisiana and Missouri River R. R. Co. The Louisiana and Missouri River R. R. Co., it is agreed, subsequently to the said 16th day of January, 1868, "located and built the road now operated, running from Louisiana in Pike county to Mexico in Audrain county, and located and graded throughout and partially completed the road running from Mexico to Glasgow (in Howard county) on the Missouri river, and completed the road now running and operated from Mexico in Audrain county by way of Fulton in Callaway county, through Callaway county to a point therein on the Missouri river opposite Jefferson City."

The constitution of the state of Missouri in force at the time of the passage of the act of incorporation of the Louisiana and Missouri River R. R., on the 10th day of March, 1859, contained no provision restraining the legislature from authorizing subscriptions to railroads in any manner it saw fit, but the present constitution, which went into effect on the 4th day of July, 1865, contains this provision: "The general assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall consent thereto."

In reference to laws in force at the time of the going into effect of the present constitution of the state, it has this provision: "All statute laws of the state now in force, not inconsistent with the constitution, shall continue in force until they shall expire by their own limitations, or be *amended* or repealed by the general assembly."

In reference to the subject and title of laws, the present constitution has this provision: "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed."

A further provision of the constitution is, "No act shall be revised or re-enacted by mere reference to the title thereof, nor shall any act be *amended* by providing that designated words thereof shall be struck out and others inserted in lieu thereof; but in every such case, the act revised or re-enacted, or the act or part of *amended*, shall be set forth and published at length as if it were an original act."

With these constitutional provisions in force, the legislature, on the 24th day of March, 1868 (laws 1868, p. 97), which was *after* the subscription of $500,000 by the defendant, undertook to amend the original act of incorporation of the Louisiana and Missouri River Railroad Co., by increasing its capital stock, fixing the terminus of the road, authorizing the location and construction of a *branch* road, and granting power to carry into effect the provisions of the act. It may be proper, although not strictly necessary, to notice here one question discussed by counsel and by the state supreme court in the Saline county case (State v. Saline Co. Court, 51 Mo. 350), as to whether the act of March 24th, 1868, is an *amendatory* act; and as to this point it seems to us only necessary to state that the amendment of 1868, aside from the title, repeats nearly the whole of the original charter, *verbatim*, embodying in it new provisions only, thus literally complying with the constitutional provision cited, requiring an *amendment* to be "set forth and published at length as if it were an original act."

Looking thus at the amendatory act, it can not, as we think, be held that the legislature undertook thereby to create by special act a *new* corporation, which, under the constitution (art. 8, sec. 4), it was prohibited from doing.

As to the constitutional provision requiring that an act shall not relate to more than one subject and that expressed, in its title, our opinion is that the mischief sought to be provided against was the passing of acts having no title at all, a false title, or mixing up matters incongruous and having no relation to each other. The whole of the amendatory act embraces but one subject when viewed with reference to the matter in hand, viz.: the building of a railroad, and this is sufficiently expressed in the title. With the question of the validity of the amendatory act, so far as it relates to counties *south* of the Missouri river, we have no concern and pass no opinion, having to deal here with Callaway county, on the *north* side of the river, and in which a part of the Louisiana and Missouri River R. R. might, by the original charter of March 10, 1859, be located and built.

The question as to whether the legislature in 1868 had authority to *amend* the charter of 1859 would seem to be settled by the constitutional provision above cited in respect to amending statute laws as expounded by the Supreme Court of Missouri in the case of The Cape Girardeau and State Line R. R. Company (48 Mo. 468) and the late case of The State *ex rel.* etc., v. Greene County. [Not yet published.] But we do not mean to be understood as holding that the power of *amendment* of charters would exist to the extent of conferring by way of amendment powers prohibited by the express provisions of the constitution of 1865.

Callaway county is undoubtedly on the line of the railroad as contemplated in the original charter, and hence the county court had the right to subscribe, provided any part of the road was within it. At the time of the county's subscribing the $500,000 stock under the original charter and prior to its amendment, some of the lines of the route of the railroad had, in fact, been run through Callaway county, as admitted by the agreed statement of facts.

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The order of subscription speaks of paying out the bonds as the work of construction progresses through the county.

The Supreme Court of Missouri has so repeatedly decided, under provisions such as those contained in the charter of the Louisana and Missouri River R. R., that the county courts had the right, unaffected by the constitution of 1865, to subscribe without submitting the question to the people, that it is not necessary to dwell upon the point, or do more than refer to the late case of Smith and Hall v. Clark County [1 Cent. Law Jour. 5; S. C. 54 Mo. —], in which the former decisions are cited and affirmed; and to the still more recent case of The State *ex rel.* etc., v. Greene County.

Another question discussed by counsel relates to the effect of the recital in the bonds, which were made payable to the "Louisiana and Missouri River Railroad Company" or bearer, that the same were issued in conformity to the act of the 10th day of March, 1859, and the amendatory act of March 24th, 1868. Under our view, the amendatory act did not create a new corporation, and we are inclined to think that it did not take away the power of the county court to subscribe for the stock as conferred in the original charter of the company, and that it should not be held to do so as respects the *bona fide* holder of bonds which purported on their face to be issued under the authority of the charter. And this view finds a very strong support in the decisions of the supreme court of the state affirming the power of the counties along both the main line and branches, to subscribe for the stock under the provisions of charters antedating the present constitution, in the Macon, Sullivan and Greene county cases.

As to the amendatory act calling the road running through Callaway county the "South Branch," after the main subscription had been made to the Louisiana and Missouri River Railroad to aid in building a road surveyed and afterwards built through Callaway county, this cannot affect the *bona fide* holders of the bonds.

From the evidence and the original charter of 1859, it would appear as though the road, as now built through Callaway county, was the *main* line, or, at least, as much the main line as the line farther west, which does not touch Callaway county. The limitation in the charter of 1859 of the capital stock to three millions, scarcely sufficient to build a road of a hundred miles, the direction of the road from Louisiana by way of Bowling Green, crossing the North Missouri R. R. west of Wellsville and east of Mexico, thus narrowing down as it were the objective points, all indicate that the nearest place on the Missouri river was in the minds of the originators of the road, as well as of the legislature when it passed the charter.

We have adverted to the nature and effects of the amendatory act because these subjects have been largely discussed by counsel, and not because they are absolutely necessary to reach a conclusion in the present case.

We place our judgment on this ground: The plaintiff is a *bona fide* holder of the bonds issued by the county. These bonds recite that they are issued by virtue of the power conferred upon the county by the original charter of the company of March 10, 1859, as amended by the act of March 24th, 1868. The act of March 10, thus recited, did give the power, and that power is not taken away by the amendatory act of 1868, but according to the decisions of the supreme court of the state, above mentioned, remains unaffected by the provisions of the constitution of 1865, requiring a popular sanction to such subscriptions. All of the subscriptions were made to the "Louisiana and Missouri River Railroad Company," the original corporation, and not to the branch mentioned in the amendatory act.

As there was legislative power in the county to make the subscription and to issue the bonds, and as the county court has exercised this power and issued the bonds which have found their way into the hands of the plaintiff, a *bona fide* holder for value, the decisions of the Supreme Court of the United States conclude the county from making the defence here attempted, and this whether the amendatory act be or be not void, and whether the county was or was not authorized to transfer the subscription to what is called the *South Branch*, or to apply the money raised by the sale of the bonds to the building of that branch.

It may further be remarked that the record of the county court shows that the proceeds of the bonds issued by the county were applied to the building of a road substantially along the line to which the subscription was made on the 16th day of January, 1868; that the work progressed thereby and the bonds issued from time to time; that the minor changes in the line of the road were assented to by the county court; that the road passes through the entire body of the county, and is in full operation, and that the two years' interest and part of the principal of the bonds had been paid. Under these circumstances it seems to us that no one, familiar with the decisions of the Supreme Court of the United States upon the general question, and of the Supreme Court of Missouri to the effect that the power of the county court to subscribe without a vote of the people survived, unaffected by the constitution of 1865, can reasonably anticipate any but one result.

The case, in the aspect in which it is viewed by the defendant's counsel, presents some new questions, and it is certainly one of great moment to the county, as it involves in its consequences a liability of over half a million of dollars.

We are relieved of much of the weight of responsibility we would feel by the consideration that our judgment is not final, and that the record can so easily be put in a shape to present the merits of the case for the decision of the Supreme Court of the United States. In our opinion the plaintiff is entitled to judgment.

JUDGMENT ACCORDINGLY.

NOTE.—In the case of San Antonio v. Gould, 34 Tex. 49, it was held that the charter of a railroad company, which contained a provision that the city of San Antonio might subscribe to the capital stock of the road, and issue its bonds in payment of the same, was obnoxious to that provision of the Texas constitution (art. 7, § 24) which provided that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." But this ruling is in direct conflict with San Antonio, v. Lane, 32 Texas, 405 — a suit upon the same securities — where the reverse was held in a well-considered opinion. And in order to reach the result arrived at, it was necessary to overrule not only San Antonio v. Lane, but also the still earlier case of San Antonio v. Jones, 28 Tex. 19, where the same securities were likewise sustained.

How far State Decisions are Binding upon the Federal Tribunals — The "Married Woman's Law" of Alabama.

NANNIE C. MITCHELL v. J. B. LIPPINCOTT & CO.

Circuit Court of the United States, Southern District o Alabama. In Equity, April 27, 1874.

1. **State Decisions, how far Binding on the Federal Courts.** — Where it became necessary for the federal court to determine whether a married woman had power, under the "married woman's law" of Alabama, to mortgage her separate estate to secure her husband's debts, it was held that the court would follow the *present* interpretation of that law by the Supreme Court of Alabama, and not a previous interpretation, the two being in conflict with each other.

2. ——. The adjudications of a state court construing the statutes of the state regulating the rights of married women and the validity of mortgages executed by them upon their real estate fall within that class of cases where the federal courts are bound to follow the state decisions.

3. —— The question in what cases the federal courts are under obligation to follow the decisions of state tribunals considered at length and the authorities collated.

Under the Married Woman's Law of Alabama (code of Alabama, §§ 2371, *et seq.*), a married woman has no power to mortgage her separate estate to secure a debt of her husband, and such a mortgage is void.

This cause was submitted for final decree upon the pleadings and an agreed statement of facts.

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A. R. Manning and *Percy Walker*, for the complainant; *T. N. Macartney* and *M. E. Macartney*, for the defendants.

WOODS, Circuit Judge.—On the 19th of March, 1866, there was conveyed to the complainant, who was a *feme covert*, by deed of that date, certain real estate in the city of Mobile. The deed, in the granting clause, purported to convey the premises to the said Nannie C. Mitchell, her heirs and assigns forever. The *habendum* and *tenendum* clause is as follows: "To have and to hold the above granted and bargained premises unto the said Nannie C. Mitchell, her heirs and assigns, to the sole and proper use, benefit and behoof of the said Nannie C. Mitchell, her heirs and assigns forever."

On the 17th of February, 1869, the complainant, jointly with her husband, executed a mortgage on this property to the defendants. The mortgage was not to secure any debt of the complainant, but was, in part, to secure one for which her husband expected to become liable.

The mortgage contained a power of sale, and the debt secured thereby not having been paid in full, the defendants advertised the premises for sale.

This bill was filed for a perpetual injunction to restrain the defendants from selling the property under the mortgage.

The claim of the bill is that the premises were the separate property of the complainant as a married woman, and that under the laws and jurisprudence of this state she could not encumber her separate estate for her husband's debts, and that her mortgage for that purpose is absolutely void.

The "married woman's law," as it is called, was passed in 1850, and is found in the Revised Code, § 2,371, *et seq.* Section 2,371 declares that "all property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband."

The complainant claims that under this provision of the law, as now construed by the supreme court of the state, the mortgage upon her said property was absolutely void, for want of power in her to encumber it for the debt of her husband.

The defendants claim that under the decision of the supreme court of the state, construing the "married woman's law," the estate a *feme covert* might acquire, as at common law, was not interfered with by this act. So that after the passage of this act a married woman in this state might hold *two* kinds of separate estate, each governed by different laws. One was called her separate estate under contract or deed, and the other her separate estate under statute, or statutory separate estate. That the distinction was that if she held by a deed which used words of such significance as to exclude the marital rights of the husband, the deed itself gave her a separate estate, and the rules of the common law governing such an estate applied; but if the conveyance under which she held used no such words, or the estate came to her by descent, then she held it as separate estate under the code, and the rules of law governing such an estate were laid down by the code. That when the estate was a separate estate by deed or contract, the wife might, as at common law, encumber it by mortgage properly executed for her husband's debts.

The defendants claim that this construction of the law was maintained by the supreme court of the state until after the execution of the mortgage to them by complainant; that, under the law as so construed, her estate was a separate estate by deed, and that she might well encumber it for her husband's debts. They cite Cowles v. Morgan, 34 Ala. 535; Paulk v. Wolfe, 34 Ala. 541; Gunter v. Williams, 40 Ala. 561; Nunn's ad'r v. Givhan, 45 Ala. 375.

It is, however, conceded by the defendants that since the date of this mortgage the supreme court of the state has adopted a different construction of sec. 2,371 of the Revised Code, and that they now hold that there is no distinction between the two sorts of separate estates; that both are governed by the code, and that in no case can a married woman mortgage her separate estate, however acquired or held, for her husband's debts.

But the defendants insist that this court is not bound to follow these later adjudications, but should adhere to the law as construed by the court at the time the contract was made.

In my judgment this claim of the defendants is not well founded.

The mortgage to the defendants, as above stated, bears date the 19th of February, 1869. In January, 1869, the supreme court of the state decided the case of Bibb v. Pope, reported in 43 Ala. 190. In this case it appeared that on August 10, 1860, there was conveyed to Mrs. Evelyn Pope, who was then intermarried with Augustus Pope, the premises in controversy, "to have and to hold the same to her, her heirs and assigns, to her use and behoof forever." On the 6th of April, 1866, Pope, the husband, borrowed 10,000 of the plaintiff Bibb, for which he gave his bill of exchange, and he and his wife executed to Bibb a mortgage, with power of sale on the said premises, to secure the payment of the same.

Pope failed to pay the bill at maturity, and Bibb advertised the property for sale. Thereupon Mrs. Pope, by her next friend, filed her bill for a perpetual injunction to enjoin the sale, claiming that the mortgage was void.

I have been thus particular in the statement of this case, that it may appear how nearly it resembles in its facts the case at bar.

In deciding the case the court said:

"The only question discussed at the bar was whether Mrs. Pope was bound by said mortgage, and whether her statutory separate estate was liable to be sold under it to pay her husband's debts. This question has not heretofore been settled by any decision of this court."

The court then decides that if the sale of the separate estate of the wife to pay the husband's debts was permitted, the whole purpose of the law, so far as it protects the wife's separate estate, would be defeated, and that the wife had no power to mortgage her separate estate for her husband's debts.

Conceding that the decisions of the supreme court of the state had been, as claimed by defendants, up to the case of Bibb v. Pope, it is clear that the rule was broken over by this case and a different one adopted. And this decision was made before the date of the mortgage.

The ruling in this case has since been adhered to by the court. Cowles v. Marks, 47 Ala. 620; Ellett v. Wade, 47 Ala. 464; Denechaud v. Berry (not yet reported).

But suppose, as claimed by the defendants, the rulings had been as stated by them until after the delivery of the mortgage to them, and the construction of the law had then been changed, which construction ought this court to follow?

The defendants say that we are bound to enforce the law according to the construction given it at the date of the mortgage.

In support of this position they cite the case of Gelpke v. Dubuque, 1 Wall. 206, in which the Supreme Court of the United States says: "The sound and true rule is that if the contract when made was valid by the laws of the state, as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the legislature or decision of its courts altering the construction of the law.." Also Havemeyer v. Iowa City, 3 Wall. 303; Olcott v. Supervisors, 16 Wall. 678; Insurance Company v. Debolt, 16 Howard, 432.

It is to be observed that the case in 16th Howard was the case of a contract made by the state, and the court held that the rule of interpretation which required the federal to follow the state courts in the construction of the laws of the state "were confined to ordinary acts of legislation, and did not extend to the contracts of the state, although they should be made in the form of law."

The cases in 3 and 16 Wallace concerned the interpretation of laws upon which depended the validity of bonds issued by municipal and political corporations.

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On the other hand, in the case of Suydam v. Williamson, 24 Howard, 427, the Supreme Court of the United States held that when any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by the supreme court that would be applied by the state tribunals.

In this case the supreme court, following a change in the decisions of the Supreme Court of New York, reversed its own decision in Williamson v. Berry and Howard, "although property had been bought and sold upon the faith of the opinion there delivered and the judgment pronounced by this court."

So in the earlier case of Jackson v. Chew, 12 Wheaton, 162, the court said: "The enquiry is very much narrowed by applying the rule which has uniformly governed this court, that when any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court as by the state tribunals."

So also in Beauregard v. New Orleans, 18 Howard, 497, the court says: "The constitution of this court requires it to follow the laws of the several states whenever they properly apply, and the habit, of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title to lands. Upon cases like the present, the relation of courts of the United States to a state is the same as that of her own tribunals. They administer the laws of the state, and to fulfill that duty they must find them as they exist in the habits of the people and in their exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the states and the Union would be productive of the greatest mischief and confusion."

In League v. Egery, 24 Howard, 264, the Supreme Court of the United States reversed its own decision made in Arquello v. United States, 18 Howard, 539, to the effect that the colonization regulations of Mexico of 1824 and 1828 did not prohibit the settlement of the littoral or coast leagues by natives under the authority of the governor of California, and without the consent of the central government of Mexico. This was done without re examining that opinion, or making any attempt to account for or reconcile the differences, because the supreme court had found that a contrary opinion had prevailed in the courts of Texas, and had become a rule of property there.

That the decisions of the state courts touching the title to lands are to be treated as binding authorities in the courts of the United States, is held in the following cases: Polk v. Wendell, 9 Cranch, 87; Rundle v. Canal Co., 14 Howard, 93; Thatcher v. Powell, 6 Wheat. 119; Elmendorf v. Taylor, 10 Wheat. 152; Ross v. Borland, 1 Peters, 655; The Society v. Wheeler, 2 Gall. 128; McKeen v. Delancy, 5 Cranch, 22.

The settled construction of a state statute is considered as a part of the statute. Massingill v. Downs, 7 How. 767; Nesmith v. Sheldon, 7 How. 812; Van Rensalear v. Kearney, 11 How. 297; Webster v. Cooper, 14 How. 504; Greene v. James, 2 Curt. C. C 189; Woolsey v. Dood, 6 McLean, 180; Thompson v. Phillips. Baldwin, 246.

In construing the statutes of a state infinite mischief would ensue should the federal courts observe a different rule from that which has been long established in a state. McKeen v. Delancy, *supra*.

In cases depending upon the statutes of a state, and more especially those respecting the titles to land, the federal courts observe the construction of the state when that construction is settled or can be ascertained. Polk v. Wendell, *supra*.

The supreme court uniformly acts under a desire to conform its decisions to the state courts upon local laws forming rules of property. Society v. Watts, *supra*.

The supreme court holds in the highest respect the decisions of state courts upon local laws forming rules of property. Shipp v. Miller, 2 Wheat. 316.

When the construction of the statute of the state relates to real property, and has been settled by any judicial decision of the state where the land lies, the supreme court, upon the principles uniformly adopted by it, will recognize the decision as a part of the local law. Gardner v. Collins, 2 Pet. 58.

In construing local statutes respecting real property the courts of the Union are governed by the decisions of state tribunals. Thatcher v. Powell, 6 Wheat. 119.

The question whether a mortgage of real estate is valid or not, is certainly a question touching real property. The case at bar, therefore, falls within the decision cited. This rule, established by the earlier decisions of the supreme court, is recognized in the case of Olcott v. The Supervisors, 16 Wall. 678, cited by the defendants, in which Mr. Justice STRONG, delivering the opinion of the court, says: "It is undoubtedly true, in general, that this court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves, or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state which the federal courts adopt as rules for their judgments."

Do not the adjudications of the Supreme Court of Alabama construing the statutes of the state regulating the rights of married women, and the validity of mortgages executed by them upon their real estate, fall within the class of cases mentioned by Judge STRONG, where the federal courts are bound to follow the state decisions? If the rule is ever to be applied to any case, it seems to me the construction of the "married woman's law" is a proper case for its application.

The conclusion must therefore be that the mortgage of the complainant was void, and the defendants ought to be restrained from proceeding under it to subject the mortgage to sale under it.

INJUNCTION MADE PERPETUAL.

The Certainty Required in Assessing Real Property for Taxation—Injunction to Restrain Collection of Illegal Tax—Cloud upon Title.

CHARLES E. TILTON v. THE OREGON CENTRAL MILITARY ROAD CO. AND T. T. McKENZIE.

United States Circuit Court, District of Oregon, April 25, 1874.

1. **Assessment of Real Property—Certainty Required.**—An assessment of real property should substantially comply with the requirements of the statute (Or. Code, 893) which requires each tract or parcel of land to be designated according to the U. S. surveys, if it be a subdivision of the same, or otherwise by specific metes and bounds or other certain description. Therefore an assessment to the O. C. M R. Co. of 196,008 99-100 of acres of land in Jackson county, in gross, without any other designation or description of the same, is void from uncertainty.

2 ——. ——. **Example of an Assessment Void for Uncertainty.**—An assessment of real property which contains no valuation of the same except this: "Total value of taxable property, 245,011," there being no mark or sign to indicate whether such figures were intended to represent eagles, dollars, cents or mills, or other thing capable of being numbered, is void from uncertainty.

3. **Cloud Upon Title—Injunction against Illegal Tax.**—A court of equity will restrain the collection of an illegal tax upon real property where the enforcement of the same will result in a cloud being cast upon the title thereof.

4 ——. **Tax Deed.**—Under the laws of Oregon (Sess. Laws 1865, p. 10), a tax deed is primary evidence of title and the regularity of the prior proceedings, which evidence can only be overcome by the proof of certain facts *dehors* the deed—therefore the same casts a cloud upon the title of the property.

Cyrus Dolph and *E C. Bronaugh*, for complainant.

DEADY, J.—This is a motion for a provisional injunction. It was argued and submitted on April 18, 1874, upon the bill—no one appearing for the defendants.

It appears from the bill that the complainant is a citizen of New York; that the defendant, the O. C. M. R. Co., is a corporation formed under the laws of Oregon, with a capital stock of $100,000 divided into 400 shares of $250 each, and the defendant, McKen-

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zie, is the sheriff of Jackson county, Oregon; that the O. C. M. R. Co. is the owner in fee of a large number of acres of land in said county, in 300 and odd distinct parcels, particularly described by township, section and range, and the plaintiff is the owner of thirty-one shares of the capital stock of said company; that said company is assessed upon the assessment roll of Jackson county for 1873, as the owner of 196,008 99 100 acres of land in said county, in gross, without any other designation or description thereof, and without any valuation of the same other than this—"Total value of taxable property 245,011;" that the taxes levied upon the lands so assessed to said county by the proper authorities of said county amount to $4.410.20, and the same will be collected by the defendant, McKenzie, by the sale of said lands, or so much thereof as may be necessary for that purpose, and a cloud be thereby cast upon the title of said company unless restrained by the order of this court; and that said assessment is illegal and void for want of certainty in the description and valuation of said lands.

That this assessment is illegal and void there is no room for doubt. The law prescribes that the assessor, in making an assessment of real property, shall set down in the assessment roll in separate columns the following:

1. A description of each tract or parcel of land to be taxed, specifying, under separate heads, the township, range and section in which the land lies; or, if divided into lots and blocks, then the number of the lot and block.

2. The number of acres and parts of an acre, as near as the same can be ascertained, unless the land be divided into blocks and lots.

3. The full cash value of each parcel of land taxed.

4. In case the land be other than a subdivision of the United States survey, or lots and blocks, it must be described by specific metes and bounds, or otherwise, so as *to make the description certain.* Or. Code, p. 898.

In the case under consideration the assessment roll contains no description of the land whatever, except that there is in all 196,008 99-100 acres, situate somewhere in Jackson county. Neither the township, range or section, or the metes and bounds of the tract, or any parcel or portion of it is given.

Neither is there any cash value given in this roll of the whole or any portion of this land.

It should have contained a valuation of each parcel and of the whole. The figures "245,011" entered in the column headed "Total valuation of taxable property," do not indicate any value. They are mere numerals signifying an abstract number.

In Hurlbutt v. Butenop, 27 Cal. 54, and People *v.* Savings Union, 31 Cal. 135, it was held that an assessment was void for want of a valuation of the property where the figures in the valuation column were entered without any mark or sign to indicate whether they were intended to represent eagles, dollars, cents, or mills. Say the court in the latter case: "In the assessment roll, in the column headed 'valuation,' there is nothing whatever to indicate what the figures are intended to represent, and, under the authorities cited, we are not authorized to say they mean dollars. They are simply numerals—'barren figures'—that are as often employed to indicate anything else that may be numbered, as dollars, or, if money is indicated, the denominations may be either eagles, dollars, cents or mills."

But this assessment is clearly void on account of the omission to describe the lands, and each separate parcel thereof, by legal subdivisions according to the United States survey, or by specific metes and bounds, or in such other manner as to make the description certain, as required by law.

The question has not been passed on by the supreme court of the state, but in Kelesy v. Abbott, 13 Cal. 616, an assessment was held void because the statute was not substantially complied with in the matter of the description of the property. This case has been followed by Lachman v. Clark, 14 Cal. 133; Moss v. Shear, 25 Cal. 44; People v. Sneath *et al.*, 28 Cal. 615; Smith v. Davis, 30 Cal. 537; People v. Savings Union, 31 Cal. 135; and Taylor v. Donner, ib. 481.

The ruling in these cases was recently followed in Huntington v. The Central Pacific R. R. Co. *et al.*, in the U. S. C. C., Dis. of Cal. (see Pacific L. R., vol. 7, No. 4), where an assessment of the defendant's railway in several counties of the state was held void and the collection of the tax thereon restrained, because the same was "not made in accordance with the provisions of the statute" in the matter of the description of the land or lands upon which the ties or rails were laid.

But although the assessment is illegal and void, that fact alone is not sufficient to authorize the interference of a court of equity to restrain the collection of the tax.

It must appear that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. Dows v. City of Chicago, 11 Wall. 110; Ewing v. St. Louis, 5 Wall. 418; Hannewinkle v. Georgetown, 15 Wall. 548; Coulson v. Portland, 1 Deady, 487; Movers v. Smedley, 6 John. Ch. 30.

According to the allegations of the bill and the course of proceedings prescribed by the law of this state, the defendant, McKenzie, if not restrained, will proceed to levy upon and sell the lands of the O. C. M. R. Co., or sufficient thereof to pay this tax and the costs of the proceedings, and in due time thereafter will make and deliver a deed therefor to the purchaser, which upon its face will pass the title and carry wtih it the presumption that all the proceedings preliminary thereto were done and had in accordance with law, which presumption can only be overcome by proof of either:

"1. Fraud in the assessment or collection of the tax;

"2. Payment of the tax before sale or redemption after sale;

"3. That the property was sold for taxes for which the owner of the property at the time of the sale was not liable, and that no part of the tax was levied or assessed upon the property sold." Sess. Laws, 1865, p. 10.

The deed must contain a description of the property *sold*, but of the preliminary proceedings it need only state the amount bid; the year in which the tax was levied; that it was unpaid at the time of sale, and that two years had since elapsed and no redemption had.

The description required to be inserted in the deed is of the property *sold;* and although the description on the assessment roll may be so insufficient as to render the assessment void, it does not follow that that fact will appear in the deed. The collector may levy upon any one or more of the 300 and odd distinct parcels of real property belonging to the O. C. M. R. Co., in Jackson county, and sell and convey the same by proper and sufficient description on account of the non-payment of this tax. A warrant for the collection of delinquent taxes is to be deemed an execution against property, and executed as such. Or. Code, 909.

It is not clear that the legal effect of such a deed could be avoided, unless it was held that the tax for which the land was sold was not "levied or assessed" thereon, because of the insufficiency of the description and valuation in the assessment roll. The assessment could not be held fraudulent because simply *insufficient or erroneous.* A mistake or omission is not necessarily a fraud.

But, however this may be, this deed would a least cast a cloud upon the title. As was said by the court in Huntington v. The Central Pacific R. R. Co. *et al.*, *supra*, "It would only be necessary for the plaintiff to produce his deed to show title. It would then devolve upon the defendant to show affirmatively, by evidence *dehors* the deed, such fatal defects in the assessment as it is admissible to show under the provisions cited, the deed itself being conclusive as to other particulars; and this brings it within

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the test by which the question is determined whether a deed would be a cloud upon a title established in this state by the decisions of the supreme court."

In Pixley v. Huggins, 15 Cal. 133, the rule by which to determine whether a deed would cast a cloud upon the title or not, was stated as follows: "Would the owner of the property in an action of ejectment brought by the adverse party, founded on the deed, be required to offer evidence to defeat the recovery? If such proof would be necessary, the cloud would exist; if no proof would be necessary, no shade would be cast by the presence of the deed."

It appearing, then, that the assessment and tax are invalid, and that if the collection of the tax is enforced, it will necessarily result in a deed being made to the property or some portion of it, which will cast a cloud upon the title thereof, the complainant is entitled to an injunction.

Let a writ of injunction issue according to the prayer of the bill until the further order of this court.

INJUNCTION GRANTED.

United States Supreme Court—Recent Decisions.

Infringement of Patent.—No. 259. Metropolitan Washing Company v. Providence Tool Company. Appeal from the Circuit Court for the District of Rhode Island. The appellants sought by their bill to enjoin an alleged infringement of a reissued patent for an improvement in clothes wringers. The court below found that there had been no infringement and dismissed the bill, and that decree is here affirmed, the conclusion being that while the tool company have used a portable support for a wringing machine which has some of the features of that claimed by complainants, it has not the yoke (formed like the letter U) which is essential to the patented combination. Mr. Justice STRONG delivered the opinion.

Lost Instrument—Deposition — Copy.—No. 284. Burton v. Hord. Error to the Circuit Court of Vermont. The main question in this case was whether a certain deposition, taken at instance of the plaintiff in the suit, having been lost, the court below erred in admitting in evidence a copy of such deposition under the rule as to other written instruments. It is said that the party entitled to the benefit of the contents of the lost instrument was not bound to supply its place with another and a different deposition which might or might not be the same in effect, and that there was no error in receiving the copy. Mr. Justice SWAYNE delivered the opinion.

Arkansas Treasury Certificates—Legal Tender to State Officer in Payment of Fees.

Our correspondent at Little Rock, Frank M. Parsons, Esq., sends us the following memorandum of a recent decision of the Supreme Court of Arkansas in the case of Ramsey v. Cox:

William K. Ramsey was indebted to Norval W. Cox, clerk of the supreme court, for fees accrued in a case lately pending in said court, and tendered treasury certificates of the state in payment of said debt. Cox refused to receive the certificates as payment, and thereupon Ramsey asked for a rule requiring Cox to accept the tender of the certificates.

The cause coming on upon a demurrer "in short" on the record, the court granted the rule.

In the opinion the court said that such certificates are *funds* within the meaning of the acts of the general assembly, which provide that the compensation of all officers "shall be payable in such funds as may by law be receivable in payment of taxes." Since the obvious intention of the legislature in the provision quoted was that "*whatever* should be receivable in payment of state taxes, whether technically denominated funds or not, *should also* be receivable for salary, fees, etc., of officers."

To the suggestion that these certificates were issued in violation of the constitution the court held that such certificates are not *bills of credit*, because they were not issued to circulate through the community for its ordinary purposes as money, but in every case were issued as evidences of indebtedness on the part of the state to those to whom they were issued" (citing 4 Kent's Com. 408; 2 Story Con. §§ 1358—70, and Craig v. Mo., 4 Peters, 410); the fact that their circulation has become general on account of their value in paying taxes not having the effect to give them that character; and that such certificates are not *legal tenders*, since "they are made receivable merely in satisfaction of salaries, fees, etc., of officers."

Book Notice.

THE 23D OHIO STATE REPORTS. Reports of Cases Argued and Determined in the Supreme Court of Ohio. By MOSES M. GRANGER. New Series. Vol. 23. Cincinnati: Robert Clarke & Co. 1874. pp. 696.

This volume of Reports, comprising in round numbers 700 pages of printed matter, printed in good style (much better than the average of the state reports) on good, substantial paper, and well bound, is furnished at the low price of $2 50. Compared with the Missouri Reports, which sell at $4 00 per volume, this is furnished at half the cost. We do not know under what contract with the state these reports are afforded at so low a price, but one thing is certain, the amount of money which the great mass of lawyers can afford to spend in the purchase of books is limited, and the *cheapness* alone of these Reports, did they possess no other merit, would have a tendency to diffuse them very widely throughout the Union, and to give the Supreme Court of Ohio a very large influence in shaping the growth of American jurisprudence. If we mistake not, the reports of the Court of Appeals of New York, and the *official* series of the reports of the Supreme Court of New York, are the only other American reports which are published at the same price per volume. We say at the same price per volume, for the series of New York Supreme Court reports edited by Messrs. Thompson & Cook, while much more ably reported than either of the other two, are perhaps cheaper when the actual amount of printed matter per volume is measured and the respective prices compared.

We believe the Ohio state reports have always stood well. We have always been accustomed to use them with confidence and to hear them quoted with respect. We have no means of knowing the manner in which the judges consult, and hence cannot conjecture the weight which is to be given to the *arguments* by which the conclusions of the court are supported—whether they represent the views of the whole court, or merely those of the judge who writes the opinion. We may, from another circumstance, presume, however, that the judges consult before the opinions are written, and in such consultation agree not only upon the *result*, but also upon the *grounds* upon which their conclusions are based. The circumstance to which we allude, and which indicates the painstaking habits of the court, will be explained by the following rule, which has been adhered to since 1858: "A syllabus of the points decided by the court in each case shall be stated in writing by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the *facts* of the case *that have been determined by the court*. And the syllabus shall be submitted to the judges concurring therein for revisal before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein." It is to be inferred from this rule that the judges determine upon the facts of the case in consultation, before the opinion is written. This is done by the Supreme Court of Iowa, as appears by an article in the May number of the Western Jurist, which we shall publish next week. If we are right in our conjectures, the full weight of the concurring judges is given, not only to the points adjudged as stated in the syllabus, but also to the grounds as stated in the opinion on which the judgment is based.

The reporter's work is exceedingly well done. A separate statement of the facts is made in each case, so far as it is necessary to an understanding of the opinion, and the arguments of counsel are given with adequate fullness. The making of statements of the facts of each case, and the condensing of the briefs of counsel, involve in the preparation of a volume of reports a very great amount of labor. Considering what human nature is, it is not surprising, then, that some reporters have fallen into the habit of omitting to make separate statements of the cases which they report, putting the reader off with the stereotyped statement, which is frequently not true, that "the case is stated in the opinion." There are cases in the late Illinois and Missouri Reports in which no one can state with certainty *what the case decides*, because the reporter has omitted to make a statement of the case.

We regret that our space will not permit us to notice any of the interesting decisions of this volume. We have already noticed some of them from advanced sheets sent us by the publishers.

Notes and Queries.

CAIRO, May 18, 1874.

EDITORS CENTRAL LAW JOURNAL:—There is a habit among the jailors in some of the counties of this state, whenever one is committed to

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their custody upon some criminal charge, of taking forcible possession of whatever moneys or valuables the accused may have about his person, and breaking open and examining all of his correspondence. Is there anything in the law, where there is no statutory provision on the subject, to warrant this course of procedure on the part of jailors?

ENQUIRER.

ANSWER.—The law holds a prison-keeper to a very strict accountability with reference to the custody of his prisoner. It is a felony at common law for the keeper of a prison voluntarily to suffer a prisoner, charged with felony, to escape, and a misdemeanor to suffer a person charged with a misdemeanor, to escape. 2 Whart. Crim. Law, § 2607, 7th ed. And so jealous is the law upon this subject that it is not necessary to prove negligence in the prison-keeper, for the law implies it from the fact of the escape. Ibid, 2608. And so severe is the policy of the law in this regard, that it has been held that nothing but the act of God, or of irresistible adverse force, will be an excuse. Ibid. If Dr. Wharton is accurate in these statements of doctrine, and if the rule is as stringent where the liability for an escape is regulated by statute, the law would clearly permit very stringent measures on the part of a jailer, compatible with the health and proper treatment of his prisoner, to protect himself against the consequences of an escape. We presume that he would have a right to deprive a prisoner, charged with an atrocious crime, of any money or other valuables by which he might purchase outside assistance; but we presume he would not ordinarily be justified in retaining possession of the prisoner's money and valuables, if he were properly directed by the prisoner to turn them over to his friends or to his counsel. For like reasons the jailer would ordinarily have the right to examine all letters passing to or from the prisoner. This might be necessary to prevent the formation of a conspiracy between the prisoner and outside persons for his rescue. There is, however, a class of communications which would clearly be excepted from this rule. We allude to the case of communications between the prisoner and his counsel. It is a rule of *public policy*, than which none is more familiar, or more rigidly enforced by the courts, that confidential communications between an attorney and his client are inviolable. So stringent is this principle in criminal cases that it has lately been held by a court of very high standing, that where it is doubtful in a criminal case whether a communication is privileged or not, it is the duty of the court, *of its own motion*, to exclude evidence of it. People v. Atkinson, 40 Cal. 284. The same rule of public policy would operate to preserve inviolable against the intermeddling of an officious jailer, the written communications between a prisoner and his counsel. Assuming, of course, that the counsel is an attorney in good standing of the court where the prisoner is to be tried, there would seem to be no principle which could tolerate such intermeddling. The attorney being a sworn officer of the court and of the law, there can be no presumption that any communication which might pass unexamined between him and his client would endanger the safe custody of the latter. There is no principle or policy of the law which makes a jailer a censor of communications which pass between a prisoner and his counsel; and we suppose any respectable judge would, on a proper application, put a stop to such an unwarranted interference. Imagine the case of a prisoner about to be tried for his life; his counsel residing at a distance, and unable to communicate with him orally; his confidential letters addressed to his client broken open by a prying jailer, and their contents perhaps communicated to the prosecuting witness. Could anything be a greater outrage upon the rights of the prisoner, or more prejudicial to that fair trial which the law endeavors by every safeguard to secure for him?

These, however, are simply the views of one lawyer answering another's question. We have been unable to find any decision in point.

Legal News and Notes.

—IN New Hampshire there are about 60 men who give character to the whole bar. They are hard thinkers and indefatigable workers. In preparing an opinion the court must convince the beaten counsel that he is wrong. If they do not, he "enlists for the war," and keeps getting the question up in one form or another until the court gets down to the bed-rock. It took 40 years to reverse an erroneous opinion of the late Chief Justice RICHARDSON, but it had to go.

—A MOVEMENT is on foot in Alabama looking to the holding of a convention of the lawyers throughout the state, its objects being to suggest changes in existing laws; to suggest the enactment of such laws as may afford better protection to person and property; to suggest rules of practice in the several courts better calculated to reduce the expenses of litigation and more speedily attain the ends of justice; to declare a code of legal ethics, and to adopt measures for the purpose of enforcing the same.—*Albany Law Journal.*

—THEY have in England some sort of a compulsory education law called the elementary education act. The following will give a vague idea of its workings: One Jennings, a costermonger, was summoned before Mr. Bushby (whoever he was) for not sending his child to school. He pleaded that his wife was dead, and that he was obliged to leave his child (twelve years old) at home to tend the baby, not being able to hire a nurse. This was not one of the excuses mentioned in the act, but Mr. Bushby dismissed the summons and granted a case to the Queen's Bench to determine whether the excuses mentioned in the act were alone to be considered as "reasonable" ones.

—HON. JOSHUA TRACY, judge of the first judicial district of Iowa, has resigned and returned to the practice of the law. Inadequacy of the salary is said to be the cause. It is a very great misfortune to the state to lose the valuable services of Judge Tracy upon the bench. He had large experience, and was universally recognized as one of the best district judges the state has ever had. Governor Carpenter has appointed the Hon. P. Henry Smythe to the vacancy. Judge Smythe has an enviable reputation as a lawyer, and will no doubt make an excellent judge. He received the cordial and unanimous endorsement for the position from the members of the bar of that district.—*Western Jurist.*

—APROPOS of the subject of judicial salaries, it appears that the London police magistrates get £1200 a year, and an effort is being made to have their salaries increased. In this country, Mr. Justice COOLEY, for instance, performs the drudgery incident to a seat on the supreme bench of Michigan, and gives the public the benefit of his great learning, for less than half that sum. We do not believe that high salaries comport with public policy in such a country as ours; but the miserable allowance doled out to our judges is a standing evidence of the ingratitude of republics. Here is a man who is doing as much for the cause of jurisprudence as any judge or chancellor on the English bench, working for less than half the salary of a London police magistrate. Is it matter of surprise that the standard of the judiciary is low in many of the United States, and that, as a rule, the most successful lawyers do not seek to become judges?

—CRIMINAL justice in Scotland is sometimes administered in a manner that would put to shame the farces enacted in some of the rudest districts of America. Recently an ex-member of parliament, named Alexander Stuart, indulged in the little pleasantry of discharging a loaded gun at a farm laborer. He missed the laborer, but killed a horse. Alternative charges of assault and malicious mischief in killing the horse were preferred against him. The case was heard at the Aberdeen Spring Circuit, before Lord DEAS. The defendant pleaded guilty to malicious mischief, and after some severe comments by his lordship, he was sentenced to *one month's imprisonment.* Shooting with intent to murder shuffled into malicious mischief, and punished by one month's imprisonment! This would have been worthy of that district of Arkansas where a lawyer the other day so far lost control of his temper as to kill a judge of one of the courts, and the bar, with owl-like gravity, voted his conduct unprofessional.

—WE learn from a correspondent that Mr. Justice DOE, of the Supreme Court of New Hampshire, is only about forty-four years of age, but has exhibited great ability in his present position. It is said that he works from thirteen to twenty hours a day. This must certainly be a mistake. Nobody but a shoemaker can work at that rate and hold out. Our correspondent regrets that Judge DOE could not have been appointed Chief Justice of the United States. We think it better for his fame that he is where he is. With the comparative leisure which the limited litigation of a small state affords, he will build for himself a much more solid and enduring monument than he could build on the over-worked bench of the Supreme Court of the United States. Besides, there is something strikingly invigorating in the mountain air of New Hampshire, when compared with the Goose Creek malaria of the national capital. It may well be doubted whether any of the present able justices of the Supreme Court of the United States will acquire a fame as solid and enduring as that of Judge REDFIELD, who laid the foundation of his greatness on the supreme bench of Vermont.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JUNE 4, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

☞ Those of our subscribers who have not already done so will please note that in our issue of May 7, by an omission, the date on the outside cover was not changed. This will obviate the mistake of sending that number back to us as a duplicate.

Negligence Causing Fires — Proximate and Remote Cause.

WE publish in this number a most interesting and important charge of Mr. Justice MILLER, in the U. S. Circuit Court for Iowa, respecting the liability of owners of steamboats on the Mississippi river for damages to property on the shore by fire caused by sparks emitted from smoke-stacks, and upon the question of remote and proximate cause.

Connected with the question what is the proximate and what the remote cause of losses which happen by the communication of fires, we note an interesting decision by the Queen's Bench of Lower Canada, sitting in review, in The Commercial Union Insurance Co. v. The Canada Iron Mining and Manufacturing Co., 18 L. C. Jurist, 80. The action was upon a policy of insurance on which was endorsed the following condition: "The company will not be answerable for any loss or damage by fire occasioned by earthquakes or hurricanes, *or by burning of forests;* and this policy shall remain *suspended and of no effect* in respect of any loss or damage (*however caused*) which shall happen or arise, *during the existence of any of the contingencies aforesaid.*" Under proper allegations it was proved that a forest or growth of trees ran down the sides of a creek directly on to the respondent's property; that it and all the other woods in the surrounding country were on fire, and that the fire was communicated from these fires to a group of 18 or 20 houses named Rafting Village, and thence through the lumber on Gilmour's piling ground to respondents' property. It was proved that the fire also came from Donnelly's woods, three-quarters of a mile distant, and perhaps from other woods, as the whole of the neighboring forests were on fire; the wind was high; sparks and ashes were flying about in all directions, and, as one witness said, "the fire seemed to be in all the air."

The line of argument adopted by respondent's counsel was, 1st, that by the word "forests" was meant primeval forests; 2nd, that there were no primeval forests in the neighborhood, and that the condition of the policy had no reference to this case.

But the court *held* that the facts proved brought the case within the exception of the policy; that the forest fires were the proximate cause of the loss, and that the plaintiffs could not recover.

BADGLEY, J., said: "As matter of fact, fires had been burning in the forests at some distance from the scene of this loss, but there was no forest fire for two or three days before the accident, although a day or two before, some timber trees on the banks at a mile distant had been burned. There were no trees or forest on the respondent's property, but the forest was more or less connected with it by trees on the bank, which in one part were near Messrs. Gilmour's lumber yard. And it is quite clearly proved that the respondents' property took fire from the lumber yard, which, in its turn, took fire, not from actual 'forest fires,' but from the fires from the forest fire, which reached the trees on the stream. It is a rule well established that, in the absence of all fraud, as in this case, the proximate cause of loss only is to be looked at. The rule is a just one, because otherwise the most remote and unconnected cause of the fire would govern the insurance. But in this case, tracing the cause of the fire from the appellants' buildings to their neighbors, the wooden ratting village, and from that to the Gilmours' immense lumber yard, which took fire from the burning of the trees on the stream, which trees could only have been ignited from the burning forest, it appears that the respondents' property was burnt from the cause excluded from the protection of the policy. The appellants must, therefore, be relieved from payment of the loss."

Railroad Taxation in Missouri.

We published in our issue for May 9 (*ante*, p. 228) the case of The Pacific Railroad Company v. Maguire, involving a question as to the right of the legislature of Missouri to levy a tax or contribution upon the gross earnings of this road, for the purpose of liquidating its indebtedness to the state, before the expiration of the time during which such road had by a previous legislative act been exempted from taxation. We also called attention editorially (p. 224) to the nature of the decision, and took occasion to correct a gross misstatement, which occurred in the St. Louis Democrat of May 5, as to the effect of the decision. In doing so we called attention to the case of The North Missouri R. R. Co. v. Maguire, determined in the Supreme Court of the United States (opinion by Mr. Justice CLIFFORD), which affirms the decision of the Supreme Court of Missouri, holding that the Missouri constitutional ordinance of 1865 imposing a tax of ten per cent. until the year 1868, and thereafter of fifteen per cent. upon the gross earnings of the North Missouri R. R. Co., was valid. We now publish the full text of this opinion. Being unable to procure, at the time, a complete copy of the case of The Pacific R. R. Co. v. Maguire, we published what purported to be the "substance" of it as given in two of the St. Louis papers. We now publish the omitted portion. By tacking the following words to the end of the opinion of Mr. Justice HUNT, as previously published by us (*ante*, p. 228), the reader will have the full opinion:

"A suggestion is made that the imposition in question is not a tax, for the reason that the ordinance imposing it provides that the same shall be appropriated by the general assembly in payment of the principal and interest due and to become due upon the bonds issued to the company by the state. The purpose to which the state shall apply the proceeds of a tax is not material so long as it is a public purpose, and that the payment of the debts of a state is a public purpose, does not admit of a doubt. It is called a tax both in the agreed statement of facts before us and in the ordinance imposing it. Thus, 'there shall be levied and collected an annual tax of ten

per cent. of all their gross receipts,' etc., 'which tax shall be assessed and collected in the county of St. Louis in the same manner as other state taxes are assessed and collected.' * * * 'The tax in this ordinance specified shall be collected from each company,' etc. * * * 'Should either of said companies refuse or neglect to pay said tax as herein required,' etc. *A tax upon receipts is one of the recognized modes of taxing corporations, as well under state laws as under the laws of the general government. The ordinance of 1865 was either the imposition of a tax or it was an act of high-handed violence, a forcible seizure of private property, without law or authority, an act which, if committed by an individual, would amount to robbery. The case before us will justify no such imputation upon the state of Missouri.* The result of these views is the reversal of the judgment below, and in accordance with the stipulation in the record, judgment is ordered in favor of the plaintiff in error for six cents damages and for costs, and the case is remanded, with directions that a judgment be entered accordingly.

"Judge STRONG did not sit in this case."

It will be seen that the portion which we have italicised puts a very different face upon the opinion, as it would strike the ordinary non-professional reader unacquainted with the decision in the North Missouri R. R. case, which the St. Louis papers have not published. Did both of the St. Louis papers which published the "substance" of the opinion in the Pacific R. R. case *accidentally* omit the same important paragraph? Another circumstance connected with this Pacific R. R. case is that it was argued and decided simultaneously with the North Missouri R. R. case reported in 49 Mo. 490, but it was not reported until a year afterward, when it appeared in 51 Mo. 142. Was this also accidental? Was it also accidental that in speaking of the effect of the final decision of the Pacific R. R. case by the Supreme Court of the United States, the St. Louis Democrat used in its issue of May 5th the following language, the very contrary of which is true: "*The supreme court now holds that the ordinance was void from the first, as being a violation of the contract of the state with the corporations?*" Instead of this being true, the power of the state of Missouri to tax the three leading railroads centering in St. Louis, namely, the St. Louis and Iron Mountain R. R., the Pacific R. R., and the North Missouri R. R., has been decisively affirmed by the Supreme Court of the United States in the Iron Mountain R. R. case (*ante*, p. 175); in the language of Mr. Justice HUNT in the Pacific R. R. case, as above quoted, and which two of the St. Louis papers suppressed, and also in the North Missouri R. R. case which we elsewhere publish. And the Supreme Court of the United States, instead of holding that the railroad tax provision of the constitutional ordinance of 1865 was "void from the first"—not only in the North Missouri R. R. case, which we elsewhere publish, but also in the above language of Mr. Justice HUNT, holds that it was a valid exercise of the taxing power. The supreme court, however, in the Pacific R. R. case made an exception as to the two years elapsing from the completion of that road, during which it was exempt from taxation by the act of 1852.

In view of the foregoing, we think we may fairly ask whether the omissions and misstatements we have noted above were simply the result of a concatenation of accidents, or whether they show a deliberate attempt to suppress from the people the true facts in regard to this Pacific R. R. litigation. If the latter hypothesis be true, every one is at liberty to suggest whatever reason for it he sees fit, in accordance with the spirit of the maxim, *contra spoliatorem omnia præsumuntur.*

The Brinkley Divorce Case.

The Brinkley divorce case, which has been on trial for some days in the Supreme Court at New York city, before Judge VAN BRUNT, has resulted in a verdict for the plaintiff on all the issues submitted to the jury. This verdict will no doubt satisfy the feelings of the better class of the people who have followed the testimony as it has appeared from day to day in the New York papers. It will be remembered that the substantial question in the case was whether there had been in fact a marriage. The plaintiff claimed that there had, although, to conceal the fact from the defendant's father, it was never publicly or formally solemnized. The defendant simply asserted that the plaintiff had been nothing more than his kept mistress. The evidence was that they "took up" with each other (to borrow a plantation phrase) at a boarding-house in New York city. But as there was no formal ceremony of marriage and no witnesses, the solution of the question whether they mutually agreed to be man and wife, or anything more than man and mistress, depended entirely upon the testimony of the parties. But so far as their relations to each other could be discerned from their external conduct it was in evidence that they cohabited together as man and wife, registering themselves as such at hotels and passing themselves off as such in public, and even in society, for the space of about five years, although their relation as such appears to have been frequently questioned.

A notable feature of the case consisted in an attempt on the part of the defendant to introduce evidence of the plaintiff's bad reputation for chastity. This Judge VAN BRUNT would have been prompted by his own views to admit, but he was obliged, in obedience to a decision of the court of appeals, to exclude it. Whatever may be thought of the rule of evidence thus followed (perhaps akin to the *exclusionary* rules denounced by Bentham), its application in this particular case will, no doubt, meet with general approval. With what eyes could the defendant face a court of justice and attempt to blacken *her* character by loose evidence of general reputation, when *his* whole defence consisted in an accusation against himself of a misdemeanor against public morals and decency, punished in some of the states by fine and imprisonment—the offence of lascivious cohabitation? (See State v. Cagle, 2 Humph. Tenn. 414; State v. Moore, 1 Swan, Tenn. 136; State v. Marion 12 Iowa, 499; Iowa Revision, 1860, § 4351; Ibid 1873 § 4012.) What chance would she have stood in a contest with his wealth and influence, if such evidence had been admitted? Was ever an instance known of perjury being successfully assigned on false testimony as to general reputation? But the difficulty of disproving or counteracting the effect of such evidence seems the chief objection to its admission. If a number of apparently credible witnesses swear that a woman's reputation for chastity is bad, you may pile rebutting proof as high as Pelion upon Ossa, and you cannot wholly efface the prejudice created in the minds of the jury. There would seem in this particular case to be no more sense or justice in allowing him to prove that her reputation for chastity was bad, in order to show that there had been no marriage, than to allow her to prove that his reputation for

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chastity was good, in order to show that there had been a marriage.

Recurring again to the general features of the case, we may note as a specimen of the stuff of which the defence was composed, that a witness—we forbear to mention his name, he may have honorable connections—who claimed to have been a broker, was not ashamed to testify that he had acted the part of a pimp in procuring the services of the plaintiff for the defendant; and in order to emphasize the character of the transaction, and to enhance the value of his own testimony, he swore that he himself had had immoral relations with the plaintiff. We think no right-minded man can read much of this testimony without heartily concurring in the result. There are perhaps few men who have not, at one time or another, yielded to temptation; but every high-minded man will pay sufficient respect to virtue to lament any dereliction from her precepts of which he may, in some weak hour, have been guilty; and his sense of decency will lead him to conceal from the public eye what he cannot banish from his own consciousness. But this defendant, when by a noble and self-sacrificing act he might have greatly raised himself in the estimation of good men and women, and done much toward effacing the stain brought upon his name by a course of folly, by recognizing the plaintiff, his equal in morals and his superior in intellect, as his honorable wife, preferred voluntarily to publish to the world his shame, and to write it upon the ineffaceable records of a court of justice. Her case, even though his defence were true, cannot fail to command sympathy in every honorable and generous breast. She was poor; and most of the avenues by which pinching poverty is avoided were closed against her sex. She therefore may have felt under some necessity to part with her honor, or at least to hazard her reputation, in order to promote her comfort. No such necessity lay upon him. He had wherewith to support a wife and rear a family in luxury. The policy of the law and the requirements of good morals demanded that he should marry and not substitute in its place lascivious cohabitation.

We could sincerely wish that this case may establish the precedent, where it has not already been established, that when a man cohabits with a woman and holds her out to the public as his wife, the law will not tolerate him in denying the existence of that relation; but as marriage is in the United States a subject of statutory regulation, this result cannot be expected.

The Right to Keep and Bear Arms for Private and Public Defence.

[CONTINUED.]

2. A second branch of the question relates to the *kind* of weapon, the carrying of which is within the constitutional guaranty. By far the most instructive case on this branch of the question is Aymette v. State, 2 Humph. 154. The constitution of Tennessee in force at that time provided that "the free white men of this state shall have a right to keep and bear arms *for their common defence.*" And the question considered by the court was whether this constitutional provision was violated by a statute which provided "that if any person shall wear any bowie-knife, or Arkansas tooth-pick, or other knife or weapon that shall in form, shape or size resemble a bowie-knife, or Arkansas tooth-pick, under his clothes, or keep the same concealed about his person, such person shall be guilty of a misdemeanor, and upon conviction thereof, shall be find," etc. GREEN, J., in an able opinion traces the constitutional provision to its origin in the English Bill of Rights, Stat. 1 W. & M., ch. st. 2, ch. 2, cl. and then makes the following observations upon its policy and scope: "As the object for which the right to keep and bear arms is secured, is of a *general* and *public* nature, to be exercised by the people in a body for their *common* defence, so the *arms*, the right to keep which is secured, are those which are usually employed in civilized warfare, and that constitute the ordinary military equipment. If the citizens have these arms in their hands, they are prepared in the best possible manner to repel any encroachments upon their rights by those in authority. They need not, for such a purpose, the use of those weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin. These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the constitution." It was accordingly held that the statute was not in derogation of the state constitution.

But by far the most elaborate discussion of the question will be found in Andrews v. The State, 3 Heiskell, 165, determined in the Supreme Court of Tennessee in 1871. The state was ably represented, and the synopsis of the argument of the attorney-general should not be overlooked. The court possessed the weight of being composed of six judges; but unfortunately they were by no means unanimous, either as to the result, or as to the reasoning by which the result was reached. The provision of the present constitution of Tennessee is that "the citizens of this state have a right to keep and bear arms *for their common defence;* but the legislature shall have power by law to regulate the *wearing* of arms with a view to prevent crime." Const. of Tenn., art. 1, § 26. The material provision of the statute whose validity was disputed was that "it shall not be lawful for any person to *publicly* or *privately* carry and dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver." Act of Tenn., June 11, 1870; 2 Tho. & S. Code, § 4756 *a.* It was held that this statute was not in derogation of the constitution of the state, except so far as it restrained the keeping of arms "in the ordinary mode known to the court." In this result four of the judges concurred. FREEMAN, J., delivered the opinion of the court, in which the question is discussed at great length. NICHOLSON, Ch. J., and DEADERICK, J., concurred in the general views expressed by him; but SNEED, J., dissented from so much of the opinion as questioned the right of the legislature to prohibit the wearing of arms of any description, or sought to limit the operation of the act of 1870. On the other hand, NELSON, J., dissented with much force, holding that the act was in derogation of the constitutional right to bear arms, and in derogation of the natural and inalienable right of self-defence. While it is difficult to say precisely what this long case does decide, it may be fairly said to be an affirmance of Aymette v. State, *supra;* and no doubt the following sentences represent the views of all of the four concurring judges, except SNEED, J., who goes further in support of the power of the legislature to regulate the wearing of arms: "What, then, is he [the citizen] protected in the right to keep and thus use? Not everything that may be useful for offence or defence; but what may

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properly be understood or included under the title of arms, taken in connection with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defence of his own liberties, as well as of the state. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should he trained, we would hold that the rifle of all descriptions, the shot-gun, the musket and repeater are such arms; and under the constitution, the right to *keep* such arms cannot be *infringed* or *forbidden* by the legislature. Their *use*, however, may be subordinated to such regulations and limitations as are or may be authorized by the laws of the land, passed to subserve the general good, so as not to infringe the right secured, and the necessary incidents to the exercise of such right." * * * "We hold, then, that the act of the legislature in question, so far as it prohibts the citizen, either publicly or privately, to carry a dirk, sword-cane, Spanish stilletto, belt or pocket pistol, is constitutional. As to the pistol designated as a *revolver*, we hold this may or may not be such a weapon as is adapted to the usual equipment of the soldier, or the use of which may render him more efficient as such; and therefore hold this to be a matter to be settled by evidence, as to what character of weapon is included in the designation 'revolver.'" * * * * "We know there is a pistol of that name [revolver] which is not adapted to the equipment of the soldier, yet we also know that the pistol known as the 'repeater' is a soldiers' weapon—skill in the use of which will add to the efficiency of the soldier. If such is the character of the weapon here designated, then the prohibition of the statute is too broad to be allowed to stand consistently with the views herein expressed. * * * As we have said, the statute amounts to a prohibition to keep and use such weapon for any and all purposes. It therefore, in this respect, violates the constitutional right to keep arms, and the incidental right to use them, in the ordinary mode of using such arms, and is inoperative."

We must not here overlook the early Tennessee case of Simpson v. The State, decided by the Supreme Court of Tennessee in 1833, and reported in 5 Yerger, 356. The only question in that case was the sufficiency of an indictment for an *affray* which charged that the defendant, "with force and arms, at, etc., being arrayed in a warlike manner, then and there, in a certain public street and highway situate, unlawfully, and to the great terror of divers good citizens of the state, then and there being, an affray did make," etc. It was held that this indictment did not sufficiently charge an affray. The court consisted of four judges, among them Judge GREEN, who delivered the opinion of the court in Aymette v. The State, *supra*, and also Judge CATRON, afterwards one of justices of the Supreme Court of the United States, who, two years before, had delivered the opinion of the court in the famous Grainger case (5 Yerg. 459) expounding the law of self-defence; and with these were associated Judges WHYTE and PECK. WHYTE, J., delivered the opinion of the court, PECK, J., dissenting. Two *reasons* were given for holding the indictment insufficient. The *first* was that in order to constitute an affray there must be, 1st, fighting; 2d, and between two or more persons; 3d, and in some public place so as to cause terror to the people. Now the indictment did not charge *fighting*, nor fighting *between two or more persons*. It was therefore held insufficient. It is difficult to conceive how there can be *fighting*, unless there be at least two persons, unless it be between a man and a beast; but we are stating accurately the reasoning of the court. The *second* reason, and the one with which we have to do, is embodied in the following language of Judge WHYTE: "But suppose it to be assumed on any ground that our ancestors adopted and brought over with them this English statute [2 Edw. III.] or portion of the common law, our constitution [of 1796] has completely abrogated it. It says 'that the freemen of this state have a right to keep and to bear arms for their common defence.' (Art 11, § 29.) It is submitted that this clause of our constitution fully meets and opposes the passage or clause in Hawkins of 'a man's arming himself with dangerous and unusual weapons,' as being an independent ground of affray, so as of itself to constitute the offense cognizable by indictment. By this clause of the constitution an express power is given and secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature; and it is conceived that it would be going much too far to impair by construction or abridgment a constitutional privilege which is so declared. Neither, after so solemn an instrument hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby. We must attribute to the framers of it the absence of such a view." In Aymette's case, *supra*, Judge GREEN characterized the above language as "only an incidental remark of the judge who delivered the opinion, and therefore entitled to no weight." To enable the reader to judge how far this declaration of law by Judge WHYTE was necessary to the determination of the question in the case, it should be remarked that it is an *argument* put forth to obviate the force of the following language of Sergeant Hawkins: "But granting that no bare words in the judgment of law carry with them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes." (Hawk. P. C. Book 1, ch. 28, § 4, Leach's ed.)

The latest case upon this branch of the subject appears to be English v. The State, 35 Tex. 473. The statute considered in that case (Act of 12 April, 1871, 2 Pasch. Dig. Laws, art. 6512) provides with certain exceptions that "any person carrying on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purpose of offence or defence, unless he has reasonable grounds for fearing an unlawful attack on his person, and that such grounds of attack shall be immediate and pressing; or unless having or carrying the same on or about his person for the lawful defence of the state, as a militia-man in actual service, or as a peace officer or policeman, shall be guilty of misdemeanor," etc. The second section provides that "any person charged under the first section of this act who may offer to prove by way of defence that he was in danger of an attack on his person, or un-

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lawful interference with his property, shall be required to show that such danger was immediate and pressing, and was of such a nature as to alarm a person of ordinary courage; and that the weapon so carried was borne openly and not concealed beneath his clothing; and if it shall appear that this danger had its origin in a difficulty first commenced by the accused, it shall not be considered a legal defence." Section 3 provides that the governor may, by proclamation, exempt the frontier counties from the operation of the act. The remaining sections contain provisions which it is not necessary to notice. It will be seen that this statute is much stronger than any which we have previously cited. With certain restricted exceptions, it effectually prohibits the bearing of all small arms, whether openly or concealed, on horseback or on foot. It is doubtful whether so sweeping a statute can be sustained in the light of any of the adjudications already quoted. But the late Supreme Court of Texas nevertheless did, in English v. The State, *supra*, declare that it is neither in conflict with the second amendment of the federal constitution, nor with the provision of the constitution of that state quoted at the beginning of this article. The court (WALKER, J.) say: "The word 'arms,' in the connection we find it in the constitution of the United States, refers to the arms of a militia-man or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster-pistol and carbine; of the artillery, the field-piece, siege gun and mortar, with side-arms. The terms dirks, daggers, slung-shots, sword-canes, brass-knuckles and bowie-knives belong to no military vocabulary. Were a soldier on duty found with one of these things about his person he would be punished for an offence against discipline. The act referred to makes all necessary exceptions, and points out the place, the time and manner in which certain deadly weapons may be carried as a means of self-defence; and these exceptional cases, in our judgment, fully cover all the wants of society. There is no abridgment of the *personal* rights, such as may be regarded as inherent and inalienable to man, nor do we think his *political* rights are the least infringed by any part of this law." The court also understand the word "arms" in the Texas constitution as having the same import and meaning which it has in the second amendment of the federal constitution; and they hold that the legislature may *regulate* the right to bear arms without taking it away, and that this has been done by the act under consideration.

[TO BE CONTINUED.]

Constitutional Law—Taxation of Railroads.

THE NORTH MISSOURI RAILROAD COMPANY AND MORRIS K. JESSUP, PLAINTIFFS IN ERROR, v. CONSTANTINE MAGUIRE.

Supreme Court of the United States, No. 281, *October Term*, 1873.

1. **Constitutional Law—Power to Tax Railroads.**—The first section of a constitutional ordinance adopted by the people of Missouri, in 1865, provides that "there shall be levied and collected from the Pacific Railroad, the North Missouri Railroad, and the St. Louis and Iron Mountain Railroad companies, an annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers (not including amounts received from and taxes paid to the United States), from the first of October, 1866, to the first of October, 1868, and fifteen per centum thereafter; which tax shall be assessed and collected in the county of St. Louis, in the same manner as other state taxes are assessed and collected, and shall be appropriated by the general assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the state, and the bonds guaranteed by the state issued to the aforesaid railroad companies." *Held*, that this ordinance does not impair the obligation of any contract between the state of Missouri and the North Missouri Railroad Company, and is constitutional and valid. [Affirming North Mo. R. R. Co. v. Maguire, 49 Mo. 490. Acc. Pacific R. R. Co. v. Maguire, 51 Mo. 142. And see Trask v. Maguire, *ante*, 175; Pacific R. R. Co. v. Maguire, *ante*, 228.]

2. ——. ——. **Effect of the Act of February 16, 1865.**—On the 16th day of February, 1865, prior to the adoption of the above ordinance, the legislature of Missouri passed "An act to provide for the completion of the North Missouri Railroad and its west branch, and for the construction of a bridge over the Missouri river," whereby the state, to enable said company to negotiate bonds for the purposes named, relinquished its *first* lien, which it previously had upon the said road and its appurtenances to secure the indebtedness of the said company to the state, and accepted a *second* lien in lieu thereof, and by which act a fund commissioner was appointed to receive all moneys belonging to the railroad company, and to disburse and distribute the same in a certain specified mode. *Held*, that there is nothing in this act creating a contract exempting the railroad company from taxation. [Affirming North Mo. R. R. Co. v. Maguire, 49 Mo. 490.]

3. **Power of Taxation.**—The nature and extent of the power of taxation discussed by Mr. Justice CLIFFORD.

In error to the Supreme Court of the state of Missouri.

Mr. Justice CLIFFORD delivered the opinion of the court.

Much discussion of the evidence in the case will be unnecessary, as the principal facts are embodied in an agreed statement, which is made a part of the record.

By the agreed statement it appears that the plaintiff company is a corporation established by the laws of the state, and that the other plaintiff claims to be the legal owner of all the property lately owned by the corporation. Said company was incorporated on the 3d of March, 1851, with a capital stock of six millions of dollars, divided into shares of one hundred dollars each.

Pecuniary aid in large amounts was furnished to the company by the state, as appears from several legislative acts. Such aid was granted by the act of the 23d of December, 1851, in terms as follows: that when evidence is produced satisfactory to the governor that the company has collected fifty thousand dollars on their capital stock, and that they have expended the same in the survey, location, and construction of the railroad, the governor shall cause to be issued and delivered to the company special bonds of the state to the same amount, as a loan of public credit, bearing interest and payable as therein provided. Provision is also made in the same section that, upon like proof that the company have expended the whole of the sum realized from these bonds, and that they have also expended a further sum of the same amount of their own moneys, the governor shall, in like manner, cause to be issued and delivered to the company further like bonds to the same amount, and so on in like manner as often as the company shall, from time to time, furnish like evidence that they have expended from their own moneys further sums, of not less than fifty thousand dollars, for the construction of the railroad, and that they have expended for the purpose the whole of the proceeds of the bonds previously issued by the state, the governor shall cause to be issued and delivered to the company further like bonds in installments of the same amount, not exceeding in all the sum of two millions of dollars.

Bonds of the kind were forbidden to be delivered until the acceptance thereof should be signified to the secretary of state by the filing in his office of a certificate of such acceptance under the corporate seal of the company with the signature of the president, and the provision was that the certificate of acceptance so executed and filed should be recorded in the office of the secretary of state, and that it shall become and be, to all intents and purposes, a mortgage of said road and every part and section thereof, and its appurtenances, to the people of the state, for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted.

Legislative aid was also furnished in like form to certain other railroad companies of the state to expedite their construction and the completion of the same, amounting in the whole to the sum

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of nine millions of dollars, including the amount furnished to the plaintiff company, all of which was secured as a first lien on the respective railroads in like manner.

None of the companies, however, were able to complete their railroads without further aid from the state, and on the 10th of December, 1855, the legislature, by an act entitled "An act to secure the completion of certain railroads in the state," enacted that it shall be the duty of the governor, upon the application of any of said companies, with the proof of the investment of any sum in the actual construction and equipment of the trunk line of the railroad, from sources other than the proceeds of the bonds of the state, and not secured upon the road by a lien prior to that of the state, and verified as therein required, to sign and deliver to such company an amount in the bonds of the state equal to twice the amount so proven to have been invested in the construction and equipment of the said railroad since the last application and issue of bonds to such company, and successively, from time to time, upon the application for bonds and proof of such investment, the governor shall issue and deliver, in like manner, bonds to such company until the aggregate amount to the plaintiff company shall be two millions of dollars, one million of which shall be exclusively applied to the construction of a portion of said road therein described; and it is made the duty of the governor to expend the other million of dollars for the purchase of the railroad iron necessary to lay the track of said road from one described point to another, and to purchase the rolling stock for the same, and the provision is that the said iron and rolling stock so purchased shall belong to the state until placed upon the track for use, after which time the state shall have a first lien on said iron and rolling stock, together with all the road and its equipments, constructed and to be constructed, for the security of the payment of the principal and interest of said bonds, and all bonds issued or that may be issued to said company, under this or any former act of the legislature granting the credit of the state to the company.

Power is also reserved to the state to enforce the lien on the railroad for the failure on its part to pay punctually principal and interest on the bonds issued for its benefit, as herein and heretofore provided for in such cases; and the company shall pay at the times herein specified, "to the treasurer of the state one and a quarter per cent., in addition, in each year, on each thirty-year bond, and two and a half per cent., in each year, on each twenty-year bond so sold or hypothecated, to be invested at not less than seven per cent. interest, in such securities as are provided in the act."

By the same section it is also provided that from the net profits arising from the road after the same shall be completed and in operation, a sum equal to not less than ten per cent. per annum upon the net earnings of the railroad shall be paid by the company to the treasurer of the state as a sinking fund, for the purpose of paying at maturity the bonds of the state so issued and to be issued to the company.

Special provision is also made that the treasurer of the company and the treasurer of the state shall be the commissioners of the sinking fund, and that it shall be the duty of the company to pay or remit the semi-yearly interest to the designated place, as therein provided, and in case the company shall fail to pay such interest or to remit the amount to the designated place, it is made the duty of the treasurer of the state to supply the amount and remit the same, in which event he is required to refund the amount from the sinking fund and charge the same to the defaulting company. In that event the provision is that the defaulting company shall not draw any further state bonds. Moneys, funds and securities, belonging to the sinking fund, are declared to be subject to the control, care, and management of the fund commissioners, and the provision is that from time to time they may invest the same in the bonds of the state under the conditions therein provided.

All funds derived from the sale of state bonds were expended, but still the railroad was not completed, and on the third of March, 1857, the legislature made a further loan of credit to the company of one and a half millions of dollars, to be issued in bonds and to be expended upon the railroad south of the junction therein described, which bonds were to be issued in installments of two hundred thousand dollars, upon proof furnished to the governor of the expenditure for the same purpose of a sum equal to their par value in the construction of the railroad, and the company was authorized by the same act to establish and keep a ferry across the Missouri river, where its road strikes the same, for all purposes connected with the company, and for general purposes, by paying the usual license-tax provided by law in such cases.

Bonds could not be lawfully issued under that act until the company accepted the act, and it was provided that the failure to pay any part of the principal or interest of the bonds should be a forfeiture of all right in such company to demand or receive any further issue of bonds, and in that event it was made the duty of the governor to foreclose the mortgage of the state and to enforce her lien on the property of the company.

Before the year expired, to-wit, on the 19th of November following, the legislature authorized the governor to issue to the plaintiff company a further amount of two hundred and fifty thousand dollars in the bonds of the state, to complete a described portion of the road, and the same act provided that the act should not be construed to release the railroad from any penalty or forfeiture to which the company may be liable under such prior laws.

Authority was conferred upon the company by the act of the 16th of February, 1865, to issue their own bonds to the amount of six millions of dollars, and to secure the same by a first mortgage of their railroad appurtenances, as more fully set forth in the act. Such bonds were to be issued in three classes, and were to be applied as therein provived, and to facilitate the sale of the bonds the state relinquished her first lien and mortgage upon the main line of the railroad, retaining only a second lien and mortgage thereon until the principal and interest of said bonds are paid in full. By the same act the legislature created a fund commissioner, and enacted that whenever any portion of said bonds shall be issued that they shall be placed in the hands of the fund commissioner to be negotiated, and the proceeds paid over to the corporation for the purposes and under the regulations and restrictions provided in the same act, but the act was not to be operative unless accepted by the company in the mode therein provided. Prior inconsistent provisions in relation to the plaintiff company were repealed by the twelfth section of the act, and the provision is that the work on the west branch should not be expedited to the exclusion of the construction of the main line of the railroad.

These several acts were duly accepted by the company and were in force on the 8th of April following. Interest was paid by the company on the bonds issued until the year 1860, when the company made default, and such interest has never been paid. On the said 8th of April [1865] the people of the state adopted an ordinance as a part of their constitution, which provides to the effect that an annual tax of ten per cent. of all their gross receipts, with an immaterial exception, shall be levied and collected of the company and two other companies therein named, for the period of two years, as therein described, and fifteen per cent. thereafter, which tax shall be assessed and collected in the county of St. Louis in the same manner as other state taxes are assessed and collected, and shall be appropriated by the legislature to the payment of the principal and interest now due or hereafter to become due upon the bonds of the state issued to the copany.

Such receipts for the transportation of freight and passengers for the first of the two years, not including any sum received from the expected source, amounted to six hundred and eighty-two thousand five hundred and seventy dollars, and the agreed statement shows that a tax of ten per cent., amounting to sixty-eight thousand two hundred and fifty-seven dollars, was assessed in the proper county on the gross receipts of the railroad for that year,

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under the provisions of the said ordinance. None of the principal of the bonds was due at the time the tax was assessed, but the interest on the same, to an amount greater than the amount of the tax, was due at that time.

Payment of the tax being refused, the defendant, as the collector, seized the property of the company to satisfy the same, and the plaintiffs here brought an action of trespass against the collector to test the validity of the tax, in the state circuit court for the county where the tax was assessed. Service was made and the defendant appeared, when the parties waived a jury and submitted the case to the court upon an agreed statement of facts. Hearing was had and the court rendered judgment for the plaintiffs' and the defendant excepted and appealed to the supreme court of the state, where the judgment of the state circuit court was reversed and a judgment rendered for the defendant. Whereupon the plaintiffs sued out a writ of error and removed the cause into this court.

Corporate powers were conferred upon the company by the act of the third of March, 1851, but the act of incorporation contains no provision whatever exempting the property of the company from taxation. Three years later the charter was amended, and the sixth section of the amendatory act provided that the capital stock, with all machines, wagons, carts, engines or carriages belonging to the company, with all their works or other property, and all profits which shall arise from the same, shall be vested in the shareholders in proportion to their shares, and that the same shall be deemed personal estate and shall be exempt from any public charge or tax whatsoever for the period of five years from and after the passage of the act, which period has long since elapsed.

Attempt is made in argument to show that an exemption from taxation may be implied from some of the provisions of the act to provide for the compleiion of the railroad and its west branch. Based solely on that theory the error assigned is that the ordinance of the state imposing the tax is in violation of that provision of the constitution which prohibits the states from passing any law impairing the obligation of contracts. Pursuant to that theory the plaintiffs contend that the legislative act to complete the railroad enacted a mode of making payments by the company to the state, which, when the act was accepted by the company, became a binding contract between the parties, within the protection of that provision of the constitution, and that as such it could not be rescinded by any subsequent legislation, and that the ordinance does not impair the obligation of that contract by providing another and a differentamode of enforcing the payments without the consent of the company.

Serious difficulty would arise in sustaining the judgment of the state court if the view assumed in the proposition was correct, that the ordinance was a mere change of the order of disbursing the receipts and earnings of the company, instead of being what it purports to be on its face, an expression of the sovereign will of the people of the state levying taxes to pay and discharge the indebtedness of the state.

Power to tax is granted for the benefit of the whole people, and none have any right to complain if the power is fairly exercised and the proceeds are properly applied to discharge the obligations for which the taxes were imposed. Such a power resides in the state government as a part of itself, and need not be reserved when property of any description is granted to individuals or corporate bodies. Cooley on Const. 127–280.

Unless exempted in terms which amount to a contract not to tax, the property, privileges and franchises of a corporation are as much the legitimate subjects of taxation as any other property of the citizens which is within the sovereign power of the state. Repeated decisions of this court have held, in respect to such corporations, that the taxing power of the state is never presumed to be relinquished, and consequently that it exists unless the intention to relinquish it is declared in clear and unambiguous terms. Society for Savings v. Coite, 6 Wall. 606; P. & W. R. R. Co. v. Maryland, 10 How. 393; Providence Bank v. Billings, 4 Pet. 561; Jefferson Bank v. Skelly, 1 Black, 36; Ohio L. I. & T. Co. v. Debolt, 16 How. 416.

Express exemption is not pretended, nor does the act to provide for the completion of the railroad contain any provision which, when properly construed, affords any support to the proposition that any such contract exists between the company and the state, either express or implied, even if it could be admitted that mere implication is sufficient, which may well be questioned, as the current of the decisions of this court warrant the conclusion that if such an exemption be claimed it must be made to appear in clear, explicit, and unequivocal terms.

Authorities from numerous sources are cited by the plaintiffs, but none of them show that a lawful tax on a new subject, or an increased tax on an old one, interferes with a contract or impairs its obligation, within the meaning of the constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens upon one class and release the burdens of another, still the tax must be paid unless prohibited by the constitution, nor can it be said that it impairs the obligation of any existing contract in its true legal sense. Blackwell on Tax Titles, (2d ed.) 408.

Properties of every kind over which the sovereign power of a state extends are objects of taxation outside of the means and instruments of the federal government. Hamilton Co. v. Mass., 6 Wall. 639.

Unrestricted by constitutional limitations, the only restraint upon the taxing power of the states is the responsibility of those in whom the power is lodged, and the power of appropriation of the proceeds, when not so restrained, is equally unlimited. Griffin v. The Mayor, 4 Comst. 419; Crowell v. Lawrence, 41 N. Y. 141.

Questions not involved in the assignment of errors will not be examined, nor is it necessary, as all agree that the main question in the case is whether the ordinance impairs the obligation of any contract made and concluded between the state and the company before the ordinance was adopted.

Unless the power of the state to tax the company was surrendered by the antecedent act to provide for the completion of the railroad, it must be conceded that the power exists, as it is plain that none of the other acts referred to afford any support whatever to such a proposition.

Five years before that act was passed the company made default in the payment of the interest falling due on the bonds which the state issued for their benefit, and by that act the legislature postponed and released the lien of the state, which was a first lien on all their property to the amount of four millions three hundred and fifty thousand dollars, and accepted in its stead a second lien upon the same property, in order that the company might issue six millions of dollars of bonds of their own and be able to secure their payment, principal and interest, by a first mortgage upon the same property, to complete the main line of the road and its west branch and the bridge therein described.

Moneys belonging to the company from that time were to be placed in the hands of the fund commissioner created by the act, and were to be disbursed by him as follows: (1) Amounts required for the actual current expenditures in operating the railroad and carrying on the ordinary business of the corporation, including all sums that may be necessary for keeping the same in a good state of repair, and for such additions to the rolling-stock, &c., as may be requtred to enable the company to transact the business of the railroad. (2) Amounts sufficient to pay the salary of the fund commissioner. (3) Amounts sufficient to pay the interest upon said first mortgage bonds, as the same shall fall due. (4) Amounts necessary to pay the cost of the construction and equipment of the

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railroad. (5) Amounts sufficient to pay accruing dividends on preferred stock, not exceeding six per cent. per annum thereon, as provided in the act. (6) Amounts sufficient to pay the interest due on the outstanding bonds of the state previously loaned to the company. (Lastly) He shall disburse the surplus to the payment of the principal of said first mortgage bonds until the same shall be fully paid off, or if none of such bonds shall have become due, then to the payment of the principal of the bonds of the state, if any are still outstanding, and the balance shall be paid over to the company.

Further examination of those provisions is certainly unnecessary, as it is too plain for argument that they do not afford the slightest support to the views of the plaintiffs. On the contrary they are entirely silent on the subject of taxation, and fully justify the remarks of the state court when they say that the subject of taxation forms no part of the contract contained in the act under consideration. Ins. Co. v. Trust Co., 47 Mo. 155.

Nothing is said about taxation, and it does not seem to have entered into the contract between the parties, but was obviously left where the law had placed it before the act was passed, nor was any provision made for the payment of taxes, unless it may be held that the disbursements for that purpose may fairly be included in such as are required to pay the current expenditures in carrying on the ordinary business of the corporation. Railroad v. Maguire, 49 Mo. 490; Pacific R. R. v. Maguire, 51 id. 142.

Reference is also made to some other sections of the act as supporting the proposition submitted by the plaintiffs, but it is so obvious that they cannot be so regarded without departing from the established rules of law applicable in such cases, that it is not necessary to pursue the discussion.

Like controversy exists between the state and another of the railroads mentioned in the ordinance, in which case it is contended that the ten per cent. charge imposed by that instrument is not a tax within any correct meaning of that word, that it is an appropriation of the property of the company without due process of law, or the taking of the property of the company without just compensation, but no such questions are open for examination in this case, and no such error are assigned in the record.

Dissenting, Mr. Chief Justice WAITE.

Mr. Justice STRONG did not sit.

JUDGMENT AFFIRMED.

Negligence Causing Fire—Remote and Proximate Cause—Construction of Steam Engine as Respects Damages Caused by Sparks—Duty of Steamboats as Respects Spark-Arresters—Duty of Guarding Elevators.

TIMOTHY KELLOGG v. MILWAUKEE & ST. PAUL RAILWAY COMPANY.

United States Circuit Court, District of Iowa, May Term, 1874.

Before MILLER and DILLON, JJ.

Negligence—Proximate and Remote Cause.—The defendant was the owner of an elevator built on the bank of the Mississippi river, and also of a steamboat used in transferring cars and barges to and from it. The steamboat had no spark-arrester, and the exhausted steam was allowed to escape through its chimney. The plaintiff was the owner of a mill and a lumber yard, the former 528 and the latter 388 feet from the elevator, and the space between these and the elevator was vacant; the elevator being unused, its spouts left open and without a watchman; the steamboat, being in the necessary course of its occupation, moved alongside the elevator; and the weather being very dry and the wind high and blowing in the direction of the plaintiff's mill and lumber, the elevator, by reason of sparks communicated from the chimney of the steamboat (as the evidence tends to show) caught fire, and from it fire was communicated to the defendant's mill and lumber, so that these latter were consumed. Upon these facts it is held.

(1.) That the defendant was not liable in any event, unless the fire was communicated to the elevator through the defendant's negligence or the negligence of its servants in the construction and use of the boat.

(2.) That the defendant would not be liable unless the burning of the elevator was the *proximate* and not merely the *remote* cause of the burning of the mill and lumber.

(3.) That whether the burning of the elevator was the proximate or the remote cause of the burning of the mill and lumber was a question of fact for the jury.

(4.) That the jury were therefore to determine whether the burning of the mill and lumber was the result *naturally and reasonably to be expected* from the burning of the elevator, and whether the burning of the elevator was the result of sparks communicated from the steamer.

(5.) That there was nothing in the fact of the steam being emitted through the chimney of the steamboat from which the jury should infer negligence.

(6.) That the leaving of the elevator unused, without a watchman and with its spouts open, did not constitute such negligence as would make the defendant responsible to the plaintiff.

(7.) That the question whether the defendant was guilty of negligence, in failing to make use of *spark-arresters* on his steamboat, was a question of fact for the jury.

(8.) That the true test of negligence in this and other cases is, what would an ordinaryly prudent man have done under the precise circumstances.

It appears from the pleadings and the undisputed evidence in the cause that the plaintiff, on the 3d day of October, 1871, was in the possession of a saw-mill on the bank of the Mississippi river, situate on certain lots in an addition to the town of McGregor, in Iowa, upon which there was a large quantity of lumber. At the same time the defendant was the owner of a large grain-elevator building, also situate on the bank of the river, 528 feet above the mill of the plaintiff. The intervening property was vacant or unoccupied. This elevator was built before the plaintiff's mill, and was constructed of pine, and was from 100 to 120 feet in height. It seems to have been built after the usual model of elevators, and had spouts or openings on the east or river side thereof for the purpose of discharging grain into boats or barges. The lumber on the plaintiff's premises was distant from the elevator 388 feet.

At the date above named the defendant was also the owner of a steamboat called the "Jennie Brown," which was employed by it in transferring cars and barges back and forth between the end of its road at North McGregor on the Iowa, and Prairie du Chien on the Wisconsin side of the river.

On this 3d day of October, 1871, the elevator caught fire and was entirely consumed, and the fire therefrom extended to and also entirely consumed the plaintiff's lumber and his mill building and machinery. There was at the time an unusually high wind blowing from the elevator in the direction of the plaintiff's lumber and mill. The evidence tended to show that sparks and burning brands were carried directly from the elevator to the lumber and mill, and that the trees on the bluffs, 600 feet distant from the elevator, were scorched and killed by the flames and heat from the elevator.

The plaintiff now brings this action against the railroad company to recover the value of the mill, machinery, lumber and property thus consumed. The ground of his action is the defendant's alleged negligence, which the plaintiff claims was the cause of his loss, and was so directly the cause of it as to involve an actionable liability on the part of the defendant. There are several specific grounds of complaint in the petition against the defendant, in connection with this fire.

1. It is claimed that the defendant is at fault because it negligently omitted to provide the Jennie Brown with spark-arresters.

2. Because the exhausted steam was admitted into the smoke-stack, thereby intensifying the force of the draught, and that by reason thereof, and by reason of the absence of spark-arresters, the boat emitted or threw off large quantities of sparks and coals.

3. That the spouts or openings in the elevator on the river side were carelessly left open; and

4. That the elevator at the time was unoccupied, and negligently left without a watchman or other person to look out for or prevent fire.

The substantial charge in the petition is that in one of her trips the defendant "negligently permitted the steamboat to approach and lie alongside of, or in close proximity to, said grain elevator, and negligently allowed and caused long and strong draughts of escaped or exhausted steam to pass and rush into the smoke-stack of the boat, whereby large quantities of cinders, sparks or coals of fire were forced up through and emitted from the smoke-stack

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against the elevator and openings in it, in consequence of which, and of the negligence of the defendant in not providing the proper and necessary spark-arresters, and of their negligence in not keeping some person in charge thereof, and of their negligence in not keeping the openings in said elevator closed, the same took fire from said sparks, and from thence the fire extended to and burned the plaintiff's mill and property.

The defendant asked the court to instruct the jury that if "they believed from the evidence that the sparks from the Jennie Brown set fire to the elevator through the negligence of the defendant, and the distance from the elevator to the nearest lumber pile was 388 feet, and to the mill 528, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury to the plaintiff is too remote from the negligence to afford a ground for recovery." This was refused.

Beach & Murdock, for the plaintiff; *Cary & Upedegraff*, for the defendant.

Mr. Justice MILLER orally charged the jury in substance as follows:

These three questions you are called upon to determine:

First. Whether the elevator was burned by sparks from the Jennie Brown?

Second. If it was so burned, was it in consequence of the negligence of the officers or men in charge of the Jennie Brown?

Thirdly. Whether the burning of the mill and lumber was the natural and probable result of the burning of the elevator?

As to the first—whether or not the elevator caught fire from the sparks of the Jennie Brown—you can determine as well as I can, and the decision of that question I leave with you without comment. In considering the other two propositions, I will commence with the last first. Supposing, for the present, that the elevator was burned down through the carelessness of the defendant, was the burning of the mill and lumber so connected with the burning of the elevator that the defendant would be responsible for it? On that point I have been asked by counsel to instruct, as a matter of law, that by reason of the space intervening between the elevator and the mill of plaintiff, the burning of the elevator would not make them responsible. The authorities are in conflict upon that subject—that is, upon what is called *remote* consequences. Now, in the case before us, it is said that while the burning of the elevator was the direct consequence of the sparks from the Jennie Brown, the burning of the mill and lumber was the remote consequence of the negligence of the defendant. I am not prepared to say this. I do not believe it is the duty of the court to take that question away from the jury, and I leave it with you, as was done at the former trial, to determine whether, under all the circumstances of the case—with the wind blowing; the inflammable character of the elevator; the combustible material of which it was composed; and on the other hand, the distance between the elevator and the mill and lumber, and from all the evidence and circumstances before you—whether the burning of the mill and the lumber by the fire from the elevator was a consequence usually and naturally to be expected; *whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator, and whether the burning of the elevator* was the result of the sparks from the Jennie Brown. If you find that the officers of the boat were not guilty of negligence or carelessness, then the defendant is not liable to the plaintiff; but if you find the contrary to be true, then it may be responsible for the loss of the mill and the lumber. The main point upon which this case turns, in my judgment, is whether the parties who had charge of that boat were guilty of such negligence within the meaning of the law as would make them liable for causing fire to the mill and lumber of the plaintiff. If you find that the elevator was set on fire by the sparks from the boat (and I will so suppose for the purpose of illustration), then was the conduct of the parties in charge of the boat at the time of the fire characterized by such want of care, or want of skill in her management, as to make the owners of the boat (this railroad company) liable for the burning? In the first place, I observe that the railroad company in this case stands precisely in the same position as if the boat was owned by an individual. There is no additional responsibility attaching because it was a railroad company, nor are they any less responsible because of that fact.

Two or three circumstances apart from the transactions of that day have been proved to you as showing, or tending to show, negligence or carelessness on the part of the officers in charge of the boat on the day in question. The first of these to which I call your attention is the fact of the steam of the boat being emitted through the *smoke-stack*. As Judge DILLON instructed the jury before, so I instruct you now. There is nothing to presume any negligence on the part of the railroad company in that regard. It is one of the usual, if not necessary, means for increasing the locomotive power of the vessel—for increasing the amount of steam. It is almost universal, and, I presume necessary, and no charge of negligence can be made against the owners of the boat because they permitted the steam to be emitted through the smoke-stack.

Another ground of carelessness alleged against the defendant not connected with the boat, is that the elevator (which was also their property) was not being used, and that it was a season of the year when it was uncommonly dry; that it was made of inflammable material, was left without a watchman, and that it was left with certain openings—places where the grain was taken in—called spouts; that these spouts for the discharge of grain were left open. Supposing this to be so, there is no negligence in this respect upon which the defendants are responsible to the plaintiff. Because they were not using the elevator at the time is no reason why they should be called upon to keep a watchman, nor is the fact that these spouts are left open a ground of negligence.

A more interesting question on the subject of negligence grows out of the question discussed here in regard to the use of the *spark-arrester*, which is an apparatus on the chimney to arrest the sparks. On that subject I hesitated a good while whether I should have to say to you that there was no negligence in that regard; that is to say, that the owners of the boat were not bound to use these spark-extinguishers or arresters. But upon further reflection I do not think upon the evidence I am authorized to declare, as a matter of law, that that is so; but I must leave you to say from the testimony whether in this respect the owners of the boat were guilty of negligence. Upon this subject it is proper for me to remark that the true test of care and diligence on one side and of negligence, which is the absence of diligence, on the other—a test which juries should apply, and which the law applies—is, what would an ordinarily prudent man have done under the precise circumstances which are here presented to you? The best test you can bring to bear is, what would an ordinarily prudent and careful man, who owned a boat like this, or any other boat like it, have done in regard to employing the use of a spark-arrester or spark-extinguisher? If prudent and careful men do not think it necessary, and have found it impracticable to use them, the defendants are not bound to use them. That is one test. Another consideration upon this subject is that in this day and time, with the elements of transportation used in commercial transactions and with the great bulk of material transported to and from this country, from the East to the West and from the West to the East, the use of steam power has become not only necessary but indispensable to the interests of the whole country. Steam is now used as the old Conestoga wagon, with six horses, used to be. The expense of using steam power is taxed upon the products of the country transported. Motive power, bringing it down to the last principle, is the generation of steam, which is the main item of expense in transportation. Therefore, you are to consider how far the interests of the public require those using this great power to be restricted, and how far the good of the people require those mak-

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ing use of it to adopt means of safety and protection. If steamboats must adopt various apparatus, thereby increasing their expenses, they must charge them upon the products of the country transported by them. On the other hand, if they can dispense with such things without too great danger, it is to the interest of the people for them to do it. But they should adopt such means as may be useful for the protection of property and persons. Under all the circumstances, you are to consider what has been found to be generally used by prudent and careful men, in the management of vessels and steam power; the general usage; the experiments made, and the opinions of those who have used the spark-extinguisher; and you are to say, under all the circumstances, whether there was any duty imposed upon the defendants to have a spark-extinguisher on their vessel at the time this fire occurred.

Now, gentlemen, you come to the main question, whether, in point of fact, in the management of that vessel on that day, and under the circumstances, there was any negligence on the part of the officers having charge of the boat? Upon that subject I do not know of any test better than that I have already given you. If you find the defendant was using such care as ordinarily prudent men would have used under like circumstances, then there would be no negligence on their part. You are to consider all the evidence upon the subject, and also the entire situation; the violence of the wind; the inflammable material of the elevator; the nearness of the vessel to the elevator. You are to remember that these men had a right to go there; that it was one of their landing places; that they could not go directly up to their other landing place because another vessel was there. You are then to consider whether, in their attempt to get away from there, they increased the fire in their engines so that the sparks were unusually dangerous; whether it was prudent in them to use as much power and force as they did, or whether they used any force; whether the steam was got up in such a way that prudent men would have said: "We will stop this rather than go on; the danger is too great." You can consider that, or you can consider, on the other hand, whether they were doing only what was necessary to get off their barge. All this is for your determination, and there is no other rule but this simple rule, that while they had a right to use their vessel to get the barge away, to get up to the proper landing place, or up to the island, yet they were bound to have a due regard to the risk, to the danger that they might possibly set fire to the elevator and burn it, and not only burn the elevator but other men's property. If the elevator was burned on account of their carelessness and negligence, then they are responsible for the burning of this man's property as well as of the elevator, if you believe they were so connected as I have already explained. If they used due diligence and due care, then they are not responsible, although the sparks from the boat may have set fire to the elevator, and from that fire the mill and lumber were burned. Steam is a dangerous element; fire is a dangerous element; but people must use steam, and although defendants had a right to use this vessel there, they were required to exercise due care and prudence, such as an ordinarily prudent and sensible man would have exercised. Was there anything to put them upon their guard? Did they exercise due care and prudence, such as a careful and prudent man would have done? This is the gist of your enquiry.

The jury found the following verdict:

1st. We, the jury, find that the elevator was burned from sparks emitted from the steamer Jennie Brown.

2d. That such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time.

3d. That the burning of the mill and lumber was the unavoidable consequence of burning of said elevator.

We, the jury, therefore find for the plaintiff, and assess the damages at twelve thousand five hundred and two dollars and fifty cents. ($12,502.50.)

And the court rendered

JUDGMENT UPON THE VERDICT.

Power of a Federal Court to Disbar an Attorney for Contempt—Disbarring without a Hearing—The Remedy.

EX-PARTE JAMES S. ROBINSON, PETITIONER.

Supreme Court of the United States, No. 14 (original), October Term, 1873.

1. **Inherent Power to Punish for Contempts.**—The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.

2. ——. **The Act of Congress of March 2d, 1831, entitled** "An act declaratory of the law concerning contempts of court," limits the power of the circuit and district courts of the United States to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and 3d, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of the courts.

3. ——. **The 17th Section of the Judiciary Act of 1789,** in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States for contempts, operates as a limitation upon the manner in which their power in this respect may be exercised, and is a negation of all other modes of punishment.

4. **Power to Disbar Attorney.**—The power to disbar an attorney is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the party complained of as shows him to be unfit to be a member of the profession, and before judgment disbarring him can be rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence.

5. ——. **The Remedy.**—Mandamus is the appropriate remedy to restore an attorney disbarred where the court below has exceeded its jurisdiction in the matter.

Petition for mandamus to the judge of the District Court of the United States for the Western District of Arkansas.

Mr. Justice FIELD delivered the opinion of the court.

On the 16th day of July, 1873, the grand jury of the western district of Arkansas reported to the district court of the United States for the district, then in session at Fort Smith, that they had made every effort in their power to have a witness by the name of Stephenson summoned to appear before them; that for this purpose a subpœna for the witness had been placed the day previous in the hands of a deputy marshal by the name of Sheldon, for service; that the deputy marshal, on the same day, went to the town of Van Buren, as he said, to make the service; that after he had left the witness was seen on the streets at Fort Smith, and the subpœna was, on that morning, returned unserved; that they had learned from evidence before them that the witness knew that a subpœna was issued for him, and had for that reason come to Fort Smith, "but," continues the report, "after seeing the attorney, J. S. Robinson, in the Nash case, very suddenly absented himself." The jury, therefore, prayed the court to issue an order that the witness, Stephenson, he brought before them.

Upon this report, without other complaint, the court ordered that Sheldon, the deputy marshal, Stephenson, the witness, and Robinson, the attorney, "show cause why they should not be punished as for a contempt."

Two days afterwards, on the 18th of July, the petitioner filed the response to the order of the deputy marshal. The judge than reminded the petitioner that there was also a rule against him, to which he replied; "Yes, sir; I know it and I am here to respond; I don't know what there is for me to answer. It," referring to the report of the grand jury, "says I saw Silas R. Stephenson. I do not know what the grand jury has to do with my private business in my law office," and was proceeding to reflect upon the action

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of the grand jury, when the judge said, "You must answer in writing, Mr. Robinson;" to which the petitioner replied, "The rule itself does not require me to respond in writing." Upon this the judge said, turning to the clerk, "It should have done so; you will amend the order if it does, Mr. Clerk." The petitioner declined to answer the rule until it was amended. The judge then said, Well, I will make the order for you to respond in writing now. Mr. Clerk, you will enter an order requiring Mr. Robinson to answer the rule in writing." Upon which the petitioner said, "I shall answer nothing;" and thereupon immediately, without time for another word, the judge ordered the clerk to strike the petitioner's name from the roll of attorneys, and the marshal to remove him from the bar.

This account of the language used by the petitioner and the judge is taken from the latter's response to the alternative writ issued by this court. The judge states at the same time that the tone and manner of the petitioner were angry, disrespectful,and defiant; and that, regarding the words "I shall answer nothing," and the tone in which they were uttered, as in themselves grossly and intentionally disrespectful, as an expression of an intention to disobey and treat with contempt an order of the court, and believing that the petitioner intended to intimidate him in the discharge of his duties, he felt it due to himself and his office to inflict summary and severe punishment upon the petitioner.

The order of the court disbarring the petition, made at the time and entered in the minutes of the court kept by the clerk, was declared by the judge to be erroneous in form, and afterwards, on the 28th of July, a more formal order was entered *nunc pro tunc*. This latter order recites the report of the grand jury mentioned above, the rule to show cause issued thereon why the parties should not be punished as for a contempt, amended from the original order by the insertion of the words "forthwith in writing and under oath;" and that the petitioner, having notice at the time that he was required to respond to the rule, "in a grossly contemptuous, contumacious, and defiant manner," in open court, refused to respond in writing; and then proceeds to decree that, for his contempt committed in open court, as well as for his contempt committed in refusing to respond to the rule, the license of the petitioner as an attorney and counsellor at law and solicitor in chancery be vacated; that the petitioner be disbarred from further practice in the court, and that his name be stricken from the roll of attorneys, counsellors, and solicitors of the court.

Before this amended order was entered, the petitioner, through counsel, filed a motion to vacate the judgment disbarring him upon various grounds, which were specified. After its entry a motion to set aside the order as amended was made, in which the petitioner adopted the grounds of the original motion and added others. The substance of the more important of these was, that no charges had been previously preferred in writing and filed against him; that he had had no notice of any charges; that the report of the grand jury contained no charge which he could be required to answer; that no rule had been served upon him to show cause why he should not be disbarred; that he had had no trial previous thereto, and had been denied the right of being heard in his defence, and that the court had no jurisdiction under the circumstances to render the judgment disbarring him.

The petitioner also set up, among the grounds upon which he would rely, that the sentence he uttered, "I shall answer nothing," was incomplete, and that he was prevented from finishing it by the action of the judge in interrupting him with the judgment disbarring him; that the sentence completed would have been, "I shall answer nothing until the order to answer the rule in writing shall be served upon me."

The petitioner also disclaimed any intention to commit a contempt of the court, or to act in defiance of its orders or authority at the time, and averred that he was not conscious of the conduct attributed to him towards the court. This statement was verified by his oath; but the motion was denied.

The petitioner now asks from this court for a mandamus upon the judge to vacate the order disbarring him, and to restore him to the roll of attorneys and counsellors. In his petition, which is verified, he refers to the proceedings of the court below, the record of which he produces, and states that in the interview which the grand jury mentioned there was no allusion made to the Nash case or to the grand jury, and that the consultation related to a totally different matter.

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of congress of March 2d, 1831, 4 Stat. at Large, 487. The act, in terms, applies to all courts; whether it can be held to limit the authority of the supreme court, which derives its existence and powers from the constitution, may, perhaps, be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by act of congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them, the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: first, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; second, where there has been misbehavior of any officer of the courts in his official transactions; and third, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes.

If we now test the report of the grand jury by this statute, we find nothing in it which justified any proceeding whatever as for a contempt on the part of the court below against Robinson. No act of his is mentioned which could constitute within the statute a contempt either of the court or of its judge. The allegation that the witness Stephenson, after seeing Robinson, had suddenly absented himself, amounted to nothing more than an insinuation that possibly he may have been advised to that course by Robinson. There was no averment of any fact which the court could notice or the attorney was bound to explain.

Whatever contempt was committed by the petitioner consisted in the tone and manner in which his language to the court was uttered. On this hearing we are bound to take the statements in that respect of the judge embodied in his order as true, for the question before us is not whether the court erred, but whether it had any jurisdiction to disbar the petitioner for the alleged contempt.

The law happily prescribes the punishment which the court can impose for contempts. The 17th section of the judiciary act of 1789 declares that the courts shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was, therefore, unauthorized and void.

The power to disbar an attorney proceeds upon very different grounds. This power is possessed by all courts which have authority to admit attorneys to practice. But the power can only be exercised where there has been such conduct on the part of the

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parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court, and, as said in *ex parte* Garland (4 Wallace, 378,), "they hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and is as applicable to proceedings taken to deprive an attorney of his right to practice his profession, as it is to proceedings taken to reach his property. And such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases, undoubtedly, of such gross and outrageous conduct in open court on the part of the attorney as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. (*Ex parte* Heyfron, 7 How. Miss Rep. 127; People v. Turner, 1 Cal., 148; Fletcher v. Dangerfield, 20 id. 230; Beene v. State, 22 Ark., 157; *Ex parte* Bradley, 7 Wallace, 364; Bradley v. Fisher, 13 Id.. 354. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged.

That mandamus is the appropriate remedy in a case like this to restore an attorney disbarred, where the court below has exceeded its jurisdiction in the matter, was descided in *ex parte* Bradley, reported in the 7th of Wallace. It would serve no useful purposes to repeat the reasons by which this conclusion was reached, as they are fully and clearly stated in that case, and are entirely satisfactory.

A peremptory mandamus must issue, requi ring the judge of the court below to vacate the order disbarring the petitioner, and to restore him to his office; and it is so ordered.

Mr. Justice MILLER dissented.

MANDAMUS AWARDED.

NOTE.—The federal statute of March 2, 1831, relating to contempts, was substantially re-enacted in Tennessee, and will be found, together with a long exposition by the supreme court of that state, in Thompson & Steger's Code vol. 2, § 4601.

Legal News and Notes.

—THE following statement is vouched for by a trustworthy correspondent: One of the circuit judges of Florida, while sojourning at a certain town in his circuit, became so inebriated that the authorities locked him up in the calaboose. Mindful of the high dignity of his official position, and with intent to support the same in a becoming manner, the learned judge issued a writ of *habeas corpus*, returnable before himself, directing the sheriff to take and produce his body, etc. The sheriff failed to execute the process, and the mayor having voluntarily released the prisoner, the judge imposed a fine upon the sheriff for failing to execute the writ.

—WHILE on this subject we may state that our valued Boston contributor, Mr. Sheldon, has just sent us the very interesting New Hampshire case of Gordon v. The Manchester and Lawrence Railroad. As the question is one of interest, involving the liability of railroad companies for failing to run trains according to their published time-table, Mr. Sheldon intended to make a somewhat exhaustive note to it; but he was agreeably disappointed in finding that the court (SMITH, J.) had so nearly exhausted the important cases on the question, as to leave him little to add. We may also state in this connection that we have received, through the courtesy of Mr. Shirley, the industrious and obliging New Hampshire reporter, advance sheets containing the head-notes of the great church case, which want of space obliges us to withhold until next week.

—APROPOS of the way the judges of the Supreme Court of New Hampshire write their opinions, we learn that in the great "partnership case," which will appear in volume 54 of the New Hampshire Reports, the opinion of Judge DOE alone was 284 pages in length; but that the learned judge, feeling that it is too long, is cutting it down. The pith of it is that as between partners themselves, sharing the profit and loss is no test of partnership; that as between themselves the partnership is merely a mutual agency, and the vital question is, what did they agree to do? We supposed that Judge EMMONS, of the 6th federal circuit, possessed more patience in exhausting important questions than any judge in the country; but since the advent of Judge DOE, we think he may fairly be said to be outdone. Perhaps it would be different if the immense business pressing upon the former allowed him equal leisure.

—WE learn with pleasure that Dr. Hammond, of the University of Iowa, is writing a work on the relation between the civil and the common law. We feel confident that no scholar in the United States is better fitted for the performance of such a task. The doctor has been "living wisdom with each studious year," until he has treasured up such a store-house of learning on this interesting subject that his book will be a rich treat to the scholar and lawyer when it appears. We hope the doctor will not think us guilty of an attempt to flatter, if we pronounce him one of the *civilist* lawyers in the country. He has diligently culled and gathered together one of the finest collections of works on the civil law to be found in the Union; and these he will no doubt diligently "press into service" in the preparation of his forthcoming book.

—THE following interesting question has come before the house of lords: "Whether, under the statute 20 and 21 Victoria, ch. 85, proceedings for the dissolution of a marriage can be instituted or proceeded with on behalf of or against a husband or wife who, before the proceedings were instituted, had become incurably lunatic?" The six law judges who sat as assessors to the lords were agreed that such a proceeding could be *instituted;* because, until inquiry and the verdict of a jury, the fact of insanity could not be judicially known; as to whether it could be *continued*, they were divided, four (one of whom has since resigned) being of opinion that it could, andthe remaining two taking the contrary view, and holding that while the insanity continued it operated a perpetual bar and stay of proceedings. The judgment of the lords will probably, though not necessarily, conform to the views of the majority of the judges.

—JUDGE WAGNER, of the Supreme Court of Missouri, is the fortunate possessor of a very remarkable memory. He never commences writing an opinion until he has entirely organized in his mind what he is going to write; and then the sentences crowd upon him in their appropriate order as rapidly as he can commit them to paper. He has been on the supreme bench of Missouri for ten years, and has never rewritten an opinion. So accurate are his mental operations that he seldom makes an interlineation, and those which he does make are generally slight verbal changes. Judge WAGNER'S mental characteristics afford a strong illustration of the fact that what is usually called breadth of intellect or comprehensiveness of thought consists simply in two things—first, ability to acquire a clear and well-defined mental image of any proposition, and secondly, the force of *memory* which enables one to grasp and hold in the mind's eye, at one and the same time, the united image of a number of distinct but connected and dependent propositions. This clearness of mental image and grasp of memory, favored by an abundant courage and an active temperament, have given to Judge WAGNER a *style* of judicial argument which has always reminded us strongly of that of Lord MANSFIELD. Right or wrong (and he is generally right), we never have any difficulty in seeing a thing clearly as he sees it. The boundaries of every question are distinctly drawn; the outlines of the image are clearly cut. The subject is not picked into fragments by attenuated doubts; and although he is no doubt sometimes wrong, as every man and every judge must sometimes be, yet his opinions possess this high merit—that they never can be twisted into the support of different doctrines or shades of doctrine. Whenever Judge WAGNER writes an opinion it means one thing, and that is clearly and unmistakably stated.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JUNE 11, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

For the case of N. A. Life Ins. Co. v. Wilson, which we publish in this number, and the interesting note appended thereto, we are indebted to our Boston contributor, Henry N. Sheldon, Esq.

The Prejudice against Lawyers.

The Albany Law Journal says: "The Milwaukee Journal of Commerce, having published a double-leaded editorial on the subject of 'too much lawyer' element in the government, in which the lawyer was represented as an embodiment of corruptibility, self-debasement and cupidity, Mr. J. A. Cartright, of Nashville, writes to that journal a very vigorous and straight forward letter, calling attention, among other things, to the fact that lawyers have occupied more positions of honor and emolument in our government than any other class of people, and, taking into consideration the advantage and opportunities for fraud and dishonesty, have, as a class, come out with clean hands and *less money*. It might be an interesting and profitable task for some of these editors, who are so fond of assailing the legal profession, to make a list of the embezzlers of public and private moneys and the defrauders of the government during the past few years, and note how many of them are lawyers."

Although the prejudice against lawyers has seized upon minds eminent in other walks of life, yet it is in truth a vulgar and ignorant prejudice; and the fact that learned men (we do not speak of the Wisconsin editor) have sometimes fallen into it, serves only to show that learning has its bigotry no less than ignorance. Those of the masses whom this prejudice possesses most intensely have generally the justest foundation for it; for, following the natural disposition of the human mind to generalize, they naturally judge *all* lawyers by those with whom necessity has generally thrown them in contact—by the pettifogger and police-court shyster who have generally represented them in the transaction of *their* legal business. On the other hand, it may be claimed, to the eternal honor of our profession, that it has never been held in as great abhorrence by any class of men as by the military tyrants who, by the wanton exercise of arbitrary power, have subdued at once the liberties and the laws of mankind. Gibbon has shown us two striking examples of this in the fate of those two great fathers of the civil law, Papinian and Ulpian. "During the last seven years of Severus," says the great historian, "he [Papinian] had exercised the most important offices of the state, and, by his salutary influence, guided the emperor's steps in the paths of justice and moderation. In full assurance of his virtues and abilities, Severus, on his death-bed, had conjured him to watch over the prosperity and unity of the imperial family. The honest labors of Papinian served only to inflame the hatred which Caracalla had already conceived against his father's minister. After the murder of Geta, the præfect was commanded to exert the powers of his skill and eloquence in a studious apology for that atrocious deed. The philosophic Seneca had condescended to compose a similar epistle to the senate, in the name of the son and assassin of Agrippina. 'That it was easier to commit than to justify parricide,' was the glorious reply of Papinian, who did not hesitate between the loss of life and that of honor. Such intrepid virtue, which had escaped pure and unsullied from the intrigues of courts, the habits of business, and the arts of his profession, reflects more lustre on the memory of Papinian than all his great employments, his numerous writings, and the superior reputation as a lawyer which he has preserved through every age of the Roman jurisprudence." The assassination by the the Prætorian rabble of the great Ulpian, whose only crime had been upholding the laws against the encroachments of a licentious soldiery, is thus related (though perhaps with some inaccuracy) by the same hand: "Their præfect, the wise Ulpian, was the friend of the laws and of the people; he was considered as the enemy of the soldiers, and to his pernicious counsel every scheme of reformation was imputed. Some trifling accident blew up their discontent into a furious mutiny; and a civil war raged during three days in Rome, whilst the life of that excellent minister was defended by the grateful people. Terrified at length by the sight of some houses in flames, and by the threats of a general conflagration, the people yielded with a sigh, and left the virtuous but unfortunate Ulpian to his fate. He was pursued into the imperial palace and massacred at the feet of his master, who vainly strove to cover him with the purple and to obtain his pardon from the inexorable soldiers."

Whilst the members of that other great profession, divinity, can claim no such honor; whilst the priest has been in every age the willing tool and coadjutor of the tyrant; whilst the terrors of superstition and the power of the sword have gone hand in hand in the enslavement and degradation of mankind; and whilst it must be confessed that lawyers have often been the subservient tools of tyrants, yet in the main the legal profession has exerted its great influence on the side of liberty and civil order. The judges of England have so hedged about with barriers and restrictions the prerogatives of the British crown, that the sovereign of those islands is a sovereign only in name. And in our own time and country, although there have been instances where the judiciary has been prostituted to base and partisan purposes, yet in the main the influence of the bar and the functions of the bench have been exerted to alleviate the miseries consequent upon a great civil war; to prevent any judicial massacres for treason; to allay an impending threat of wholesale confiscation; to arrest the operation of *ex post facto* laws passed by heated and partisan legislatures; to uphold the guaranties of the constitution, and to stay the encroachments of the military power.

It scarcely needs arguments to prove that neither civilization nor public order can exist without lawyers. The old saw about the jack of all trades being good in none, is familiar to every one. No science, no system of knowledge—not even the knowledge of a trade—can be perpetuated without the existence of a separate class of minds devoted exclusively to the study and cultivation of that science or trade. Law being necessary to society, lawyers are equally so; for without lawyers the law must perish, as the Roman jurisprudence perished during the night of the middle ages. The talk of dis-

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establishing lawyers, then, is the idlest gabble. If it were possible to turn all the lawyers out of the legislatures and send the last one down from the judgment-seat, and to install farmers, mechanics and merchants exclusively in their stead, the rights of life and property would become as uncertain as the whim of each ignorant legislature or magistrate, and society would be resolved into anarchy. We are in favor of disestablishing the kind of lawyers to which the Wisconsin editor may have referred—the shyster, the betrayer of clients, and the plunderer of the widow and orphan; but every member of society is interested in upholding the honest and diligent lawyer, for by doing so he upholds the law itself.

The Supreme Court of Iowa—Its "Inner Temple" Practice.

Subjoined we print the material part of a very interesting article under the above title in the Western Jurist for May, written, no doubt, by Chief Justice COLE. A Missouri correspondent, in calling our attention to this article, writes that it would seem that the judges of the Supreme Court of Missouri do not consult with reference to the causes heard by them until the opinions of the judges to whom causes have been assigned have been written. We have no means of knowing the manner in which the judges of the Supreme Court of Missouri prepare their opinions; and it would be obviously improper for us to make any suggestions to them, or to any other court, on the subject, unless it were to commend to their attention the manner pursued by the Supreme Court of Iowa. If we were called upon to name in the order of their importance the four causes which contribute most to give character and standing to the labors of a court of last resort, we should name first, the ability, learning and industry of the judges themselves; secondly, the manner in which they prepare their opinions; thirdly, the assistance afforded them by an able and upright bar; and lastly, the manner in which the decisions are reported. Next to the ability of the judges of that court themselves, we believe that the high character which the reports of the Supreme Court of Iowa have attained throughout the country is chiefly due to the severe and laborious habits of the judges in arguing and determining every cause in consultation before the opinion is written. The evil of the other mode is said to have been strikingly illustrated by the present Supreme Court of Tennessee. This court consists of six judges, and they are empowered by law, when their docket is crowded, to sit in two sections, but are required to consult together upon each case before determining it. This, it seems, they sometimes neglected to do; and the evil of the habit practiced by judges to whom causes were assigned, of writing their opinions before there had been a consultation, did not alarm the bar until one section began to overrule the other! And then the bar, instead of making a respectful and united representation to the court in regard to the matter, contented themselves with anonymous communications made by one or two of their members in the newspapers. Although we have been obliged to take the above statement from one of those anonymous communications, written over the signature of "REFORM," in the Memphis Avalanche of December 28, 1873, yet we happen to know that the writer stands exceptionally high, both as a lawyer and a gentleman; and besides, the charge is so specifically made, and fortified by a citation of the cases, that we do not doubt that there must have been substantial truth in it. The writer above alluded to also charged that the Supreme Court of Tennessee overrules itself from session to session. He says:

"There have been four decisions on the effect of the comptroller's statement upon the accounts of tax collectors, the question being a single one, to-wit, whether such statement was conclusive or *prima facie* against a collector when sued at the instance of the state. Now, one would suppose that there could hardly be a moment for hesitation on the subject. An abitrary rule, that the statement of the comptroller should be infallible, conclusive, and bind the collector against the truth, to a liability he has not incurred, would seem to be so monstrous that common sense would shrink from the supposition that such could be law.

"Nevertheless, in the archives of the supreme court of this state there are two decisions ruling the statement to be conclusive, and two ruling it to be *prima facie*. If these four decisions were converted into a team of horses, drawing the car of justice, two of them would appear to be jet black and two of them milk white, yet all foaled of the same ancestors. If this would be a curiosity in 'animated nature,' what must it be in the science of judicature? When like—that is, reason and law—is said to produce like, that is, justice and equity, here there is a case where the court has overruled itself three different times on one naked question of law, and with unanimity each time, within a few sessions. Now if a real 'lawyer,' following these decisions, were to undertake to practice the old and established rule, 'stare decisis,' he would have to stand on his head and heels at the same time—a curious posture for a well-balanced 'lawyer'—and even in that attitude he would not be sure of a lien, as the court at the next session might reverse the entire position."

As we suggested before, it would be obviously improper for a single writer to presume to make suggestious to a court of last resort upon so delicate a subject. But while this is so, we think there is little doubt that the bar in its united capacity, either through a bar association or otherwise, may without impropriety do so. There can be no department of practice in the appellate tribunals in which the bar have a deeper interest. What advocate can feel safe in submitting the rights of his client to such a court on a printed brief—and many causes must be so submitted from want of time to argue them orally—when he knows that his argument may never be read by more than a single judge? And has not every litigant a right to demand that before his rights shall be finally passed upon, the machinery which the law has provided shall be exerted in the most effective manner in order to attain justice and diminish the probabilities of error?

But to the article from the Western Jurist:

"Under the present rules of practice in the Supreme Court of Iowa, the printed abstracts of the records and the briefs of counsel are required to be filed a certain number of days before the term, and before the day the causes are set for hearing. This is for the purpose of enabling the judges to obtain the abstracts and briefs in advance of the argument of the cause at bar, in order to enable them the better to comprehend and understand the arguments of counsel when and as they are made. The effort is made to read the abstracts al-

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ways in advance of the argument; but by reason of the failure of counsel to file the abstracts in time, or by reason of the large records, or the large number of records filed, it is sometimes impracticable to have them read before the hearing.

"But however this may be in any particular case, the causes are always placed by the clerk upon the submission docket, of which each judge has a copy in the order of their submission. Each judge by himself reads every abstract and argument either before or after submission, and makes a memorandum upon his submission docket of the points involved in the case, and of his individual views thereon, and also of the result either of affirmance or reversal which, in his opinion, should follow. This reading is usually done before the meeting of the court in the morning, or after the adjournment of the consultation in the evening. After the records and arguments are thus read and examined by each judge, there is a meeting of all the judges for consultation upon them. These meetings are usually held every afternoon from two till six o'clock during the sessions of the court. The judges there in regular order state each a case as his reading has enabled him to understand it, and also states his views upon each point involved, and the ultimate determination, either to affirm or reverse, which he would make of the cause. Each of the other judges, in turn, then states his views and his opinion of the proper result. If all are agreed, that ends the consultation upon that case. If there is a difference of understanding respecting the facts, the abstracts and arguments are always at hand and are consulted to settle that difference. If there is a difference of views as to the law, the authorities are examined. Sometimes it happens that a day or two, or more, are taken by one or all of the judges to examine the law. But the case is fully settled by all before any opinion is written in any case.

"After the decision of the cause it is assigned to one of the judges to prepare the opinion in accordance with the result reached in the consultation, and it is an invariable rule that each judge shall take every fourth cause in the order it stands upon the submission docket. This rule is so uniformly and strictly adhered to that if one of the judges happens to differ with the majority as to the result of the cause, he must and does nevertheless write the opinion for the majority and also his dissent from it. This will account for several such opinions, which are really anomalous, to be found in the Iowa reports.

"If it happens that time is taken to examine the law in any case, and the consultation passes to the next case in order, nevertheless this case, in which time is thus taken, is then regularly assigned, but no opinion is to be written until the consultation is concluded and the result settled by a majority of the judges. So that no judge has any choice or knowledge of the cases in which he is to write opinions. It all depends upon the order of their submission. Ordinarily the causes submitted at a term are decided in consultation before adjournment. But if for any cause they are not, they are settled by correspondence or at the succeeding session.

"It will be seen from the order of the business during term time—the forenoon being occupied by the session of the court for the purpose of hearing arguments and receiving submission of causes; the afternoon in consultation, and the nights and mornings in reading abstracts—that all the time of the judges during the terms is fully occupied, and that it is therefore impracticable to prepare any opinions in the cases at the term of their submission. This work has to be done during the vacations; and it will be manifest, therefore, that the most laborious duty of the judges of the supreme court is to be discharged during what is called *vacation*.

"As the court convenes at the succeeding term, the opinions prepared in the causes submitted at the previous term are read to all the judges at their afternoon meetings for consultation. If the reasoning of the opinion is satisfactory it is approved, but if there are objections to it for its reasons, or because the language of it is too broad or is susceptible of misconstruction or misapplication, it is corrected or modified so as to harmonize the views of all if possible. When it is settled in its law and language, it is announced as the opinion of the court and becomes the law of the case. If a petition for a rehearing is filed by either party it is read separately by each of the four judges, and if serious doubts of the correctness of the opinion announced in the case is entertained by any two of the judges, a reply to the petition is ordered or a rehearing in full is granted. If another opinion becomes necessary, it is prepared by the judge to whom the case may fall in its regular order as entered again upon the submission docket.

"This method of disposing of the business of the court, while perhaps it is the most laborious for the judges, has been found the most satisfactory of any ever adopted by the court, because it secures the careful examination and actual individual approval of each case by each of the four judges."

The Right to Keep and Bear Arms for Private and Public Defence.

[CONTINUED.]

3. A third question is, whether the natural right of self-defence will under any circumstances justify the carrying of a particular weapon, and in a particular manner, when such carrying is forbidden by statute. "In reason," says Mr. Bishop, "there may be circumstances in which the right of self-defence will justify the carrying of a concealed weapon for the purpose; and should such a case arise (and it must be an extreme one, out of the ordinary course of things, or it could not arise), doubtless this should be held to be an exception, engrafted by the common law upon the general terms of the statute." Bish. Stat. Crimes, § 789. This view would seem to be entirely consistent with reason, and unavoidable. When we reflect on the question of what is termed the right of self-defence, we shall see that it is a most comprehensive right; that it is one and the same thing with the right to "life, liberty and the pursuit of happiness," which our fathers asserted in the Declaration of Independence. It would seem to follow from what has been said upon the subject by various writers that while society may *regulate* this right of self-defence so as to promote the safety and good of its members, yet any law which should attempt to take it away, or materially abridge it, would be the grossest and most odious form of tyranny. Thus, Sir Michael Foster says: "The right of self-defence in these cases [cases of felonious attacks upon person, habitation, or property] is founded in the law of nature, and is not, *nor can be*, superseded by any law of society; for, before societies were formed, * * * the right of self-defence resided in individuals; it could not reside elsewhere; and since, in cases of necessity, individuals incorporated into society cannot resort for protection to the law of society, that law with great propriety and

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strict justice, considereth them as still in that instance under the protection of the law of nature." (Foster Crown Law, 273-4. See also 2 Rutherforth's Institutes, ch. 16; Grotius' *De Jure Belli et Pacis*, lib. 2 cap. 1; Gray v. Coombs, 7 J. J. Marshall, 478; Isaacs v. State, 25 Tex. 174; Com. v. Riley, Thacher's Crim. Cas. 471; United States v. Holmes, 1 Wallace, Jr. 1.) It is within common experience that there are circumstances under which to disarm a citizen would be to leave his life at the mercy of a treacherous and plotting enemy. If such a state of facts were clearly proven, it is obvious that it would be contrary to all our notions of right and justice to punish the carrying of arms, although it may have infringed the letter of some statute. To do so would be to make the law what it never was intended to be, an instrument of cruelty and injustice. Such a case might clearly be said to fall within that class of cases in which the previously existing common law interpolates exceptions upon subsequently enacted statutes. See Bish. Stat. Crimes, §§ 7, 123, 131, 141, 351-359, 362, 789.

Turning to the adjudications, we find it declared in one case, under an Indiana statute, probably the same already cited (*ante*, 260), that if a person, not being a traveller, carry a concealed weapon, he is guilty of an indictable offense, and his *motive* for carrying the weapon is immaterial. Walls v. The State, 7 Black. 572. A similar ruling was made in Cutsinger v. Commonwealth. 7 Bush. Ky. 362. But these cases do not help our enquiries, because the defendants did not claim to have carried the weapons for the purpose of defence against any threatened or impending injury, but, in one case, for the purpose of exhibiting it as a curiosity, and in the other, for the purpose of conveying it to another person.

In Hopkins v. Commonwealth, 3 Bush, Ky. 480, there was sufficient proof that the defendant, on a certain day, carried a pistol concealed about his person, and the defendant attempted to excuse the act by proving that he had been shot at by strangers more than two years before, and that "for precautionary security of self-defence" against a like attack, he had carried a pistol ever since. The court (ROBERTSON, J.) said: "These facts were wholly *irrelevant*, as there was neither proof nor cause for apprehension of any such impending danger; and, therefore, there was no error in refusing to admit another witness to the same facts."

Another ground of error urged in the same case was that the court should not have given the following instruction.: "If the jury believe from the evidence that the defendant * * * carried a pistol concealed about his person, and that he had no *reasonable ground* to believe, and did not believe, that his person was in danger of great bodily harm, they should punish him by a fine," etc. To understand the force of this instruction, it should be observed that the Kentucky statute against carrying concealed weapons, in force at that time, made the carrying of such weapons lawful "where the person has *reasonable grounds* to believe that his person, or the person of some of his family, or his property, is in danger from violence or crime." Stanton's Code, p. 414. The defendant's counsel insisted that the defendant was rightfully the best judge of the necessity or prudence of carrying a concealed pistol for self-defence, and was the only person who could know whether he in fact apprehended danger; and hence objected to so much of the instruction as required *reasonable grounds* for apprehension. The court, however, did not see the instruction in this light. Judge ROBERTSON said: "Were this erroneous, the salutary law against the pestilent and alarmingly prevalent habit among all classes, and especially among young men and even boys, of wearing concealed arms, through false and cowardly pride, and through mock chivalry, might soon become practically a dead letter. A statute so beneficent, and so often and so easily evaded, should be vigilantly upheld and stringently enforced by the judiciary, for repressing a dishonorable and mischievous practice, which, licensed or unlicensed, leads almost daily to causeless homicides and disturbances, which would otherwise never be perpetrated; and to that end, the accused should always be required to prove that he carried a concealed weapon only for the purpose of defending himself or family or property against an impending attack, *reasonably apprehended*, and which, if attempted, would justify the use of some such means of defence. But the superfluous addition of the words, 'and did not believe that his person was in danger,' relieves the instruction from the counsel's criticism, and makes it more favorable to the appellant than he had a right to demand or expect." Although this ruling was necessary in view of the terms of the Kentucky statute, yet it is thought that it would be the same on general principles; for it is in strict analogy with that numerous class of cases which makes the fears of *a reasonable man*, and not the fears actually entertained, the test of the justification of the degree of force and kind of weapon employed in one's defence. (Selfridge's case, 1 Self-Defence Cases, 1; Sullivan's case, ib. 65; Shorter's case, ib. 258; and many others.)

In one of the cases in Tennessee, already quoted, Andrews v. The State, 3 Heiskell, 165, 188, there are considerable *dicta* on the question whether a man can defend himself against an indictment for carrying arms forbidden to be carried by law, by showing that he carried them in self-defence. While admitting the question to be one of "some little difficulty," the learned judge who delivered the opinion of the court says: "The real question in such case, however, is not the right of self-defence, as seems to be supposed (for that is conceded by our law to its fullest extent), but the right to use weapons or select weapons for such defence, which the law forbids him to keep or carry. If this plea could be allowed as to weapons thus forbidden, it would amount to a denial of the right of the legislature to prohibit the keeping of such weapons; for if he may lawfully use them in self-defence, he may certainly provide them and keep them for such purpose, and thus the plea of right of self-defence will draw with it, necessarily, the right to keep and use everything for such purpose, however pernicious to the general interest or peace or quiet of the community. Admitting the right of self-defence in its broadest sense, still, on sound principles, every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the prevention of crime—a great public end—no man can be permitted to disregard this general end, and demand of the community the right, in order to gratify his whim or wilful desire, to use a particular weapon in his particular self-defence. The law allows ample means of self-defence without the means which we have held may be right-

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fully proscribed by this statute. The object being to banish these weapons from the community by an absolute prohibition, for the prevention of crime, *no man's particular safety*, if such case could exist, ought to be allowed to defeat this end. Mutual sacrifice of individual rights is the bond of all social organizations, and prompt and willing obedience to all laws passed for the general good is not only the duty, but the highest interest of every man in the land. * * * We admit that extreme cases may be put where the rule may work harshly, but this is the result of all general rules—that they may work harshly sometimes in individual cases. By our system, however, allowing the attorney-general to enter a *nolle prosequi* with the assent of the court, there is but little danger of the law being enforced in any such cases to the detriment of any one; and if such case should occur, an application to executive clemency may fairly be presumed to be the remedy provided by the constitution to meet all such exigencies." The court, therefore, hold that the testimony tending to prove "that there was a set of men in the neighborhood of defendant during the time he carried his pistol and before, seeking the life of defendant," was properly rejected, *because it did not appear what the character of the weapon was*, and it may have been such a weapon as could not be properly carried at all, and if so, the testimony would be no defence to the indictment. Comparing the above with that part of this case which was quoted on page 274 of our last number, it is seen that it decides that a man may not, even in his necessary defence, carry, either publicly or privately, a *dirk, sword-cane, Spanish stiletto, belt or pocket-pistol*, but that he may carry such arms for his private defence as are adapted to the equipment of the soldier. Much as we respect the general views of the learned judge and the commendable desire to promote peace and public order which his opinion manifests, yet we do not think that either his reasoning or his conclusion on this particular branch of the question can be commended. It entirely confounds the right of arming one's self for private de fence against a threatened danger, with the policy of the constitution of Tennessee, which guarantees the right of bearing certain arms in order to educate the citizen for military duty. It a citizen is obliged to perform a journey where he is in danger of being attacked by highwaymen, or by assassins who seek his life, he may, if he have the arms used by a militiaman, arm himself with them;—we suppose he may even take a cannon along with him, if he have one. But if he have not, and cannot procure any of the weapons which are used in civilized warfare, he must go unarmed. Besides, in attempting to distinguish between the weapons which he may and may not use, the learned court descend into distinctions altogether too nice to be of any practical value. A belt or pocket-pistol may not be worn, but a "repeater" may. What is a large "repeater" but a belt-pistol, and what is a small "repeater" but a pocket-pistol? According to these distinctions, we suppose if the citizen have no other arms than an old-fashioned "pepper-box," he must needs leave it at home —to carry it to defend himself against the attack of a highwayman will be an indictable offence (and we don't know but it ought to be)—but he may lawfully carry a far more formidable and dangerous weapon—a cavalry-revolver, Colt or Remington. In short, before he may lawfully take with him any weapon for his personal defence, he must debate and settle in his mind whether such a weapon would be appropriate to the equipment of a soldier, and if it would, he may lawfully carry it for the purpose of defending himself; otherwise not. That such conclusions do not commend themselves to reason, need scarcely to be suggested. Nor do we perceive any ground for the distinction which the learned judge attempts to draw between the *right* of self-defence and the *means* by which that right may be secured. If the *means* are prohibited or withheld, can any one say that the right is of any substantial value? We think that upon this branch of the case the views of Judge NELSON, in his dissenting opinion, are much to be preferred. "I hold," said that learned judge, "that when a man is really and truly endangered by a lawless assault, and the fierceness of the attack is such as to require immediate resistance in order to save his own life, he may defend himself with *any weapon whatever*, whether seized in the heat of conflict, or carried for the purpose of self-defence."

In the principal Alabama case which we have already quoted, The State v. Reid, 1 Ala. 612, 619, the question, it will be remembered, arose on a constitutional provision which guaranteed the right to bear arms "in defence of *himself* and the state." The court thought that in view of that provision it would not be competent for the legislature to prohibit the wearing of arms *openly*, because "it is only when worn openly that they can be efficiently used for defence." And they also say: "We will not undertake to say that if in any case it should appear to be indispensable to the right of defence that arms should be carried concealed about the person, the act 'to suppress the evil practice of carrying weapons secretly' should be so construed as to operate a prohibition in such case." The right to bear arms *when threatened with, or having good reason to apprehend an attack, or travelling or setting out on a journey*, was subsequently recognized in Alabama by statute. Ala. Code, 1852, § 3274; Owen v. State, 31 Ala. 388.

In Texas, as we have already seen (*ante*, p. 274), it has been held within the power of the legislature to prohibit the carrying of all *small arms*, notwithstanding a constitutional provision similar to that of Alabama, guaranteeing the right to carry arms for the defence of *one's self*, as well as for the defence of the state.

Such appears to be the unsatisfactory state of the authorities on this branch of the question. On the one hand, as long as the machinery which society has afforded for the *prevention* of private injuries remains in its present ineffective state, society cannot justly require the individual to surrender and lay aside the means of self-protection in seasons of personal danger; and it will be in vain that the laws of society denounce penalties against the citizen for arming himself when his life is menaced by the attacks of wild beasts, of highwaymen, or of dangerous and persevering enemies. On the other hand, the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons, and the utmost that the law can hope to do is to strike some sort of balance between these apparently conflicting rights.

[TO BE CONTINUED.]

—IT is said that for the first time in the state of Tennessee there has been an escheat to the state. The case is that of an administrator of an estate in Weakley county, and the amount is $26.50. There have been a good many cheats against the state in Tennessee as well as elsewhere.

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Railway Regulation—Power to Compel the Union Pacific Railroad Company, by Mandamus, to Operate its Road as Required by Law.

UNITED STATES *ex rel.* HALL & MORSE v. DIRECTORS OF THE UNION PACIFIC RAILROAD COMPANY.

United States Circuit Court, District of Iowa, May Term, 1874.

1. Railway Regulation—Union Pacific Railroad.—The act of March 3, 1873 (17 Stats. at Large, 509), gives to the proper circuit court jurisdiction in mandamus to compel the Union Pacific Railroad Company to operate its road as required by law. There must be jurisdiction over the company by service upon it to enable the court to exercise the power conferred by the act.

2. ——. ——. ——. Jurisdiction.—Whether the Circuit Court for the District of Iowa can acquire jurisdiction over the company under this act, *quære*.

3. ——. ——. ——. Suits by Private Persons.—Private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law may institute proceedings under the act of March 3, 1873, *supra*, without the sanction of the attorney-general.

4. ——. ——. ——. ——. Cases in which the attorney-general must, and in which private citizens may, apply for the writ considered.

A petition or statement under oath is filed in the court by Samuel E. Hall and John W. Morse, citizens of the United States, and of the state of Iowa, asking for a writ of mandamus to be directed to the Union Pacific Railroad Company to compel it to operate its trains over the whole of its road as one continuous line, from Council Bluffs westward, and to desist from operating its bridge over the Missouri river between Council Bluffs and Omaha as an independent and separate line or portion of its road. The nature of the statements made by the prosecutors, and of their interests, and of the particular duty which it is sought hereby to compel the respondent to perform, appears more at large in 2 Dillon, C. C. 527. The decision then made settled the mode of procedure herein to be in accordance with the practice at common law, and the counsel for the prosecutors or relators now move for an alternative writ of mandamus to be directed to the Union Pacific Railroad Company, commanding it to operate the whole of its line of road to and from Council Bluffs, etc., as above stated. A notice of the application was served upon a general agent of the company at Council Bluffs. No appearance is made by the company, but counsel in its interest have been heard to make suggestions against the granting of the alternative writ.

John N. Rogers, Sapp, Lyman & Hanna and *A. V. Larimer* for the prosecutors; *James M. Woolworth* and *A. J. Poppleton, contra.*

DILLON, Circuit Judge.—On March 3, 1873, it was enacted by congress that the "proper circuit court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the Union Pacific Railroad Company to operate its road as required by law." 17 Stats. at Large, 509. This act is the basis of the present proceeding, and the proper practice under it has been already determined. United States *ex rel.* Hall *et al.* v. Union Pacific Railroad Co., 2 Dillon, C. C. 527. The question before us at this time is whether an alternative writ shall be ordered.

The relators' counsel have been heard in support of the motion for the writ; and in a matter of so much importance we willingly granted the application of counsel to be heard in opposition, although they do not enter an appearance for the respondent.

Two leading objections have been urged against awarding the writ. The one relates to the *jurisdiction* of the court over the company, the other to the *form* of the proceeding.

Whether the Circuit Court for the District of Iowa is the "proper circuit court" to hear and determine the case made by the relators need not, and perhaps cannot, now be determined. If the writ be awarded, but cannot be served on the respondent, so as to give the court jurisdiction over it, then, unless there is a voluntary appearance, the proceeding will necessarily fail. The petition or information sets out that the eastern terminus of the respondent's road is in this state; and we are not prepared now to say, as a matter of law arising from statutes of which we take judicial notice, that it appears that in no event can this court obtain jurisdiction under the act of 1873 over the company to compel it to operate its road as required by law. If it were admitted or appeared that no part of the road was in the district, and that the company had no principal place of business therein, we might have the data, perhaps, to decide whether in any event this court could acquire jurisdiction over it. Under the circumstances we reserve the question as to jurisdiction, until we see whether the company appears, or until the character of the service of the writ upon it is known to us.

Whether the facts stated by the relator show a failure by the company to operate the road according to law, is a question which may arise on demurrer to the alternative writ, or on the return thereto, in case the court shall acquire jurisdiction over the respondent, but which we do not consider at this stage of the proceeding.

This brings us to the objections which relate to the *form* of the proceeding. It is contended that the affidavits should be filed or the writ moved for by the public law officer of the United States—either the attorney-general or the district attorney. In other words, as the duty here sought to be enforced is one which the company owes to the public at large, is one in which the relators have no special interest distinct from other citizens, it is maintained that the law officers of the United States have the sole right to apply to the courts to enforce its performance; and that private persons can only have or move for the writ and mandamus when it is the appropriate remedy to enforce some individual or private right.

The affidavit or petition on which the writ is asked states that the failure of the company to operate its road according to law "causes great expense and delay to shippers and passengers, and great damage and inconvenience to the public at large, and especially to the petitioners, who are merchants doing business in Council Bluffs, and who are constantly obliged to ship and receive goods transported over said road." This is the only special interest set forth by the prosecutors; and it was conceded by their learned counsel that the duty here sought to be enforced was a public duty, or at least one in the perfomance of which the relators had no more interest than any citizen who had frequent occasion to ship and receive goods over the respondent's road.

There is no legislation of congress specifically making it either the duty of the attorney-general or the district attorney to institute proceedings like the present; and so the question whether they *must* be instituted by one of these officers, or *may* be instituted by private persons, and the writ moved for private counsel, must be determined on general principles having reference in their applications to the particular nature of the defendant corporation and the particular duty which it is here sought to make it discharge.

The act of March 3, 1873, gives to the proper circuit court jurisdiction in mandamus to compel the road to be operated according to law, but the act is silent as to who shall institute or set on foot the proceedings. This is the more significant because, as respects other duties and supposed liabilities of the company, the attorney-general is expressly directed to institute the necessary legal proceedings to protect the interests of the United States. Act March 3, 1873, 17 Stat. at Large, 509; Act of April 10, 1869, 16 ib. 56.

There is, therefore, as respects the duty of operating its road as one continous line (which is the particular duty the performance of which is here sought to be compelled) no declaration of the will of congress as to who shall or may commence the necessary proceedings in mandamus.

It will conduce to a proper solution of the question before us to advert briefly to the character of the Union Pacific Railroad Com-

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pany. It was chartered by Congress and aided by money and lands. It is a private corporation in the sense that its capital stock is owned by the stockholders, who are declared to constitute the corporate body. Both from the title of the incorporating statute and from express declaration in the body of the act (sec. 18), it appears that the object of Congress in chartering and aiding the company was to promote the public interest and welfare, and secure to the government the use of the road for postal, military and other purposes. The government has also a lien on the railroad and its property, to secure the bonds it issued to the company. By the act of July 2, 1864 (13 Stat. at Large, 356, § 15), "the several companies are required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far the *public and government are concerned*, as one continuous line."

Throughout the legislation of congress respecting this company, the fact is recognized that it sustains a special or peculiar relation to the United States in their political capacity, and also a relation to the people at large or the general public.

Now, so far as the company owes duties to the general government of a nature to be enforced by mandamus, it is clear that private persons cannot institute or set on foot the proceedings. This would be a duty devolved upon the attorney-general by express enactment or resulting from his station. Such is not this case.

And it may be admitted that where, as in the present instance, the duty charged to be neglected by the company is one which concerns the public at large as distinguished from the government, the attorney-general in his official capacity, alone, or on the relation of private persons, might file the necessary suggestion or affidavits and move for the writ.

But where the duty neglected is one which the company owes to the public, and where individuals who suffer from such neglect complain of it, must the court refuse the writ solely because the attorney-general does not move for it? Upon principle and authority this question must, in our opinion, be answered in the negative. By the practice at common law "the writ is ordinarily obtained on motion of counsel to the Court of King's Bench, at Westminster, during the term, supported by a suggestion, on the oath of the party injured (*prosecutor*), of his right, and of the denial of justice by the defendant, whereupon a rule *nisi* is made," etc. Tapping, 5. "The application to the Court of B. R., for a rule for a writ of mandamus in all matters affecting the public is *ex dibito justitiæ*. * * "Where, however, the right or power is of a private nature, as in the case of many officers, etc., in which the public are not primarily concerned, it is discretionary in the court, in the first instance, either to grant or refuse the application." * * "In general, all those who are legally capable of bringing an action are also equally capable of applying to the Court of B. R. for the writ of mandamus," etc. Tapping, 287,288.

It is clear that the affidavits upon which the writ is applied for may be made by any person cognizant of the facts, and those affidavits should not be entitled as of the cause, for none is yet pending, and the government only becomes a party in form when the writ issues. Tapping, 413; Haight v. Turner, 2 Johns, 372; People v. Tioga C. P., 1 Wend. 291.

So that the question is reduced to this: Must the writ be applied for by the attorney-general? and must it be refused in a case otherwise proper for it unless this officer makes or sanctions the application?

A thorough examination of the English books has satisfied us that it is the constant practice of the Queen's Bench to entertain applications by private persons, on the motion of private counsel, for writs of mandamus to public officers and companies to enforce the performance of public duties. This is well illustrated by the case of Rex. v. The Severn & Wye Ry. Co., 2 Barn. & Ald. 646, which, in principle, is analogous to the case at the bar. In the case just cited, upon the affidavit of a private prosecutor (Taunton) and on the motion of private counsel, without the presence or sanction of the attorney-general, the King's Bench granted a mandamus to compel the railway company to reinstate and lay down again the track which it had taken up; and the writ thus applied for was ordered on the distinct ground that the *public*, of which the prosecutor was one, and probably interested in the mines which the railway accommodated had a right to the use of the road. See also Rex v. Com'rs of Dean Inclosure, 2 Maule & Sel. 80; Rex. v. Bristol Dock Co., 6 Barn. & Cress. 181; Clarke v. L. & N. Canal Co., 6 Ad. & Ell. (N. S.) 898; Reg. v. Fall, etc., 1 Ad. & Ell. (N. S.) 636; Reg. v. Trustees, etc. of Turnpike Road, 12 Ad. & Ell. (N. S.) 448; Reg. v. Archbishop of Canterbury, 11 Ad. & Ell. (N. S.) 578. And on principle, where a statute enjoins a duty for the benefit of the entire public, why may not any one of the public injured by its non-performance complain of it to the proper court, and ask it to compel the observance of the duty? Why should such person be compelled to resort to the attorney-general, and what is the necessity or propriety for vesting in this officer, whose general duties, by reason of the peculiar structure of our government, are quite dissimilar to those of the officer of the same name in England, the sole power to determine whether a judicial inquiry shall be made concerning the discharge by a corporation of duties imposed upon it by law for the public advantage? What answer is it to the present relators to say, "Yes, you are required by the company's neglect to discharge its duty; but as your injury is the same as suffered by others, the court cannot hear or redress your complaint." But it may be objected to this view that if one person may apply and have the writ, so equally all may apply, and the result is that the defendant may be vexed with many applications, whereas if the attorney-general or some public officer can alone apply, one suit only of the same character will be brought, and the result will be conclusive, both as respects the public and the defendant. An answer to the objection is that the granting of a writ of mandamus is discretionary with the court, and if a case is pending which will test the right or question in controversy, the court may for this reason alone refuse to entertain similar applications by other persons.

Besides, it deserves consideration whether a judgment in a suit in which the attorney-general appears concludes the public to any greater extent than a similar judgment would in a mandamus proceeding instituted by a private relator, as in each case it is the writ which makes the government formally a party, and the form of the proceeding is the same.

There is some contrariety of opinion in this country whether private persons may be prosecutors or relators in a mandamus proceeding to enforce a public duty, but the decided weight of authority is in favor of the doctrine. The leading case asserting it is The People v. Collins, 19 Wend. 56, 1837, where the court, after an examination of the English decisions and practice, reaches the conclusion that in a matter of public right any citizen of the state may, where mandamus is the proper remedy, be a relator or enforce the execution of the common law, or an act of the legislature, though it was admitted to be otherwise in cases of private or corporate rights, where the title or right of the relator to relief must appear. To the same effect, see also Hamilton v. State, 3 Ind. 452; Ottawa v. People, 48 Ill. 233; State v. County Judge, 7 Iowa, 186, 202; ib. 390, 397; People v. Halsey, 37 N. Y. 344; s. c. 53 Barb. 547; State v. Rahway, 33 N. J. Law, 110; Watts v. Carroll Parish, 11 La. An. 141; Dillon Munic. Corp. § 695, and cases cited; State v. Turnpike Co., 16 Ohio St. 308. *Contra*, People v. University Regents, 4 Mich. 98, Sanger v. Comm'rs, 25 Maine, 291; Heffner v. Comm., 28 Pa. St. 108. Compare Comm. v. Meeser, 44 Pa. St. 341.

The right to institute mandamus proceedings by private prosecutors is likened, by Judge Cowen, to the right of private persons to become relators in informations in the nature of *quo warranto*,

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People v. Collins, *supra*. In substance there is often much resemblance, but in England an *information* proper, that is, the suggestion upon which the court acts, is filed by the attorney-general as the appropriate officer of the crown, and unlike the affidavits in mandamus the information, cannot be made by private persons, though it may be and often is made upon their relation. While it is usual to join relators, it is not necessary. The object of joining them is that the defendant may not be oppressed without remedy, by vexatious suits, since the relators are liable to costs, while the crown is not. 3 Black. Com., per Lord REDESDALE, in Attorney-General v. Dublin, 1 Bligh, N. R. 312.

Reserving, as we do, all questions which concern the merits of the controversy, and in order, indeed, that the merits may be better understood, we think our discretion will be more wisely exercised by awarding than by refusing the alternative writ, particularly as in this way the opinon of the supreme court may more certainly be obtained than if the writ were denied.

ALTERNATIVE WRIT ORDERED.

Homestead Exemption—Absconding Bankrupt.

In re CHARLES C. PRATT.

United States District Court, Western District of Michigan, Grand Rapids, June 1, 1874.

Before Hon. S. L. WITHEY, District Judge.

1. **Homestead—Absconding Debtor—Michigan Statute.**—Under the Michigan statute which protects a homestead against creditors "when owned and occupied by any resident of this state," the homestead of an absconding debtor cannot be taken possession of by his assignee in bankruptcy if the debtor's family continue to reside upon it. In such a case the residence of the bankrupt will be deemed to continue in the state where his family reside, unless there is clear proof that he has acquired a residence in another state.

Joslin & Kennedy, for the petitioner; *Norris, Blair & Kingsley*, for the assignee.

WITHEY, J.—Pratt, the bankrupt, absconded, and was subsequently proceeded against by petition of a creditor and adjudged a bankrupt. The wife of Pratt presents a petition to have the homestead, which by the laws of Michigan is exempt "*when owned and occupied by any resident of this state*," set off to the bankrupt or his family. The assignee, assuming that the wife and children are not entitled to the exemption, has put a person in possession of a part of the homestead, threatens to deprive them of their home, and refuses to set off the premises as exempt.

An order to show cause has been served on the assignee, and the only cause shown is the homestead exemption statute of Michigan. The laws of Michigan declare that a homestead consisting of any quantity of land not exceeding forty acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner, and not included in any recorded town-plat or village, or instead thereof, at the option of the owner, a quantity of land not exceeding one lot, being within a recorded town-plat or city or village, and the dwelling-house thereon and its appurtenances, owned and *occupied by any resident of this state*, not exceeding in value $1,500, shall not be subject to forced sale on execution, etc. Such homestead is exempt also during the time it shall be occupied by the widow, or minor child or children of any deceased person who was when living entitled to the benefit of the act. Every alienation of such land by the owner, if a married man, is declared invalid unless the wife joins in the conveyance.

The homestead in question was owned by Pratt and occupied by his family up to the time he absconded, and his wife and children have continued to occupy it since. The value of the premises is $2,000, on which there is a mortgage-lien amounting to something over $700. I have in another case (*In re* William F. Leavitt, a bankrupt, manuscript), held that when the owner's interest does not exceed $1,500 in the homestead it is exempt, subject to any encumbrance there may exist upon it. When the premises do not exceed in quantity the exemption, no selection is required by the statute to be made. Ownership and occupancy in such case are sufficient; the exemption attaches as a right unless waiver is affirmatively shown by operation of the statute. Such is, in substance, the ruling of the supreme court of the state. Beecher v. Baldy, 7 Mich. 488; see pp. 503, 508.

The object of the statute was as much to protect the wife and children as the husband. This is seen in the protection to the wife against alienation by the husband without her signing the conveyance, and in case of his death, the provision for the widow and children. This view is uniformly held by the courts.

There is nothing shown as to the intention of Pratt in reference to returning or not returning, nor do I think that fact at all controlling, but certainly nothing will be presumed in favor of a fixed intention not to return. He left his family in the occupancy of his home, and they have continued there. He may return. His residence is where his family reside, and where he and they have resided for years. He is the owner, and while his family occupies he may be truly said to occupy the premises. He is a resident of Michigan until he is shown to have gained a residence elsewhere, and while his family reside in Michigan his residence continues until the contrary is clearly established.

While the family remain in the state occupying the premises as a home, the exemption is secured by the statute, inasmuch as it continues to be owned and occupied by Pratt while his family reside on it; their occupancy is his occupancy. His claim of a homestead exemption will be presumed in the absence of a distinct disclaimer or some act amounting to that. Shepherd v. Cassidy, 20 Texas, 24; Goughenant v. Cockerell, ib. 96; Mills v. Boskirk, 32 Texas, 360; Lock v. Rowell, 47 N. H. 46.

The last case, 47 N. H., holds that where the wife and family continue to occupy, any presumption of intention to abandon from absence of the husband is rebutted. Other cases consulted, and aiding to illustrate and enforce the views expressed, are White v. Clark, 36 Ill. 285; Tilman v. Moore, 43 Ill. 169; Bonnell v. Smith, 53 Ill. 375; Booker v. Anderson, 35 Ill. 66; Pardee v. Lindley, 31 Ill. 174; Moore v. Dunning, 29 Ill. 130; Cox v. Wilder *et al.*, 2 Dillon, 45; Bartholomew v. West *et al.*, ib. 290; Taylor v. Hargous, 4 Cal. 268; Volger v. Montgomery *et al.*, 13 Am. Law Reg. April, 1874, 244.

Should Pratt return, I think there can be no doubt he could recover the property from any one holding through the bankruptcy proceedings, and if so, the assignee has no power to sell or convey the property. My opinion is that the property is exempt as a homestead, subject to the mortgage encumbrance of over $700.

Let an order be entered directing the assignee to set off the premises in question as exempt to the bankrupt, and that he yield possession of any part of the premises he now occupies, directly or indirectly, to the bankrupt or his family; and that he report to the court within twenty days his action in the premises under this order.

ORDERED ACCORDINGLY.

Action on Life Insurance Contracts—Who May Sue.

Supreme Judicial Court of Massachusetts, 1874.

NORTH AMERICA LIFE INSURANCE COMPANY IN REVIEW v. JOHN T. WILSON.

Life Insurance—Party.—One who is not party to the written contract of a policy of life insurance cannot maintain an action to rescind the contract as having been obtained by fraud, or recover back the money paid for premiums, although it was his life that was insured and he actually paid the premiums.

This was a review of an action originally brought by John T. Wilson against the North America Life Ins. Co. The evidence tended to show that in 1867 one Pierce, an agent of the plaintiff company, employed only to solicit and receive applications for

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insurance, solicited defendant's patronage for the plaintiff company, making certain representations about the company and about its policies which were claimed to be false and which are now immaterial. Defendant, by reason of these representations, took a policy in the plaintiff company purporting to be made to Wm. F. Wilson and Andrew Wilson, acknowledging the receipt of the premium from them, and payable to them in case of loss. All the premiums were paid by the plaintiff. Afterwards, the promises of the agent not having been observed, the defendant demanded of the plaintiff corporation a return of his premiums, and brought this action to recover them by reason of the false representations of Pierce. On these facts the court below ruled that defendant had no cause of action in his own name against the plaintiff in review upon the policy or for the premiums paid thereon, and ordered a verdict for the plaintiff in review. If this ruling was correct, judgment to be entered on the verdict, otherwise a new trial to be ordered.

GRAY, J.—The policy of insurance was made to William F. Wilson and Andrew Wilson, and payable to them. John T. Wilson, whose life was thereby insured, was not a party to the contract. Campbell v. New England Ins. Co., 98 Mass. 381, 400. He had, therefore, no right to avoid the policy on the ground of fraud, and even if the money paid by him for premiums was his own and not that of the assured, he cannot recover it back in this action.

JUDGMENT ON THE VERDICT.

NOTE.—In Campbell v. N. E. Ins. Co., 98 Mass. 381, referred to in the opinion, the policy was made payable to Andrew Campbell, the person whose life was insured, his executors, administrators and assigns, for the benefit of Margaret Campbell. After his death, suit was brought upon the policy by said Margaret, who was not his administratrix, in her own name. The case was tried twice on the merits, the verdict at each trial being set aside. Afterwards, defendants objected that the action could not be maintained in the name of this plaintiff. But the objection was overruled as coming too late. GRAY, J., said on this point (p. 400): "The conclusive reply to this objection is that the defendants, by their previous conduct of the case, have waived all right to take advantage of it. Whenever a defendant, without demanding judgment on a technical or formal defect apparent on the face of the writ, goes to trial on the merits, he is held to have waived such defect, and cannot afterwards revive it. This would apply to the want of such a seal, endorser, declaration, or service as is required by law, and even of the test prescribed by the constitution. Clark v. Montague, 1 Gray 448, 449, and cases cited. So where one of two joint creditors assigned his share to the other, vesting in him the whole beneficial interest in the debt, and an action at law was afterwards brought in the name of the latter only, and was referred to arbitration, under a rule of court, it was held that the non-joinder of the other was waived Austin v. Kimball, 12 Cush. 185. In the present case the plaintiff, though not the assured, was the person for whose benefit the policy was made, and was therefore the owner of the entire equitable interest, and might have maintained an action upon it in the name and without the consent of the administrator, or if the latter had collected the amount of the policy, might have sued him for the proceeds. Gen. Sts. c. 58, § 62; Grover v. Grover, 24 Pick. 261; Burroughs v. State Ins. Co., 97 Mass. 359; Gould v. Emerson, 99 Mass. 154. The plaintiff had the equitable interest in the policy, although not the title to support an action at law in her own name against the insurers. The objection now made goes to the foundation of the action, and if valid and seasonably taken would have rendered the other grounds of defence immaterial. Yet the defendants did not present it to the court on either of the first two trials, or upon the motion upon which the first verdict was set aside, or at the argument of the exceptions taken at the second trial. By thus repeatedly contesting the plaintiff's claim upon the merits, and putting her to great trouble and expense in proving her case, they must be held to have waived the right to suggest at the third trial, for the first time, a defect apparent upon the face of the writ and declaration, and touching only the name of the formal plaintiff." But if the rule has not (as in many states it has) been changed by legislation, and the objection is properly taken, there is no need of citing authorities to show that only the person who has the legal interest in a demand can maintain an action thereon. H. N. S.

—EUGENE L. GROSS, Esq., of the Springfield, Illinois, bar, and one of the editors of Gross' Illinois Statutes, a gentleman who stood high in his profession, died at his residence, at Springfield, of consumption, on the 4th instant, at the early age of thirty-eight.

The Great New Hampshire Church Case.

The following is the syllabus in the great New Hampshire Church case, which we have already alluded to, and which is no doubt destined to become one of the famous cases on the law of religious corporations. The title of the case is Hale v. Everett:—

1. Article VI, in the bill of rights of the New Hampshire constitution, while it empowers the legislature to authorize the several towns, parishes, bodies corporate, or religious societies within the state, to make adequate provision, at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality, does not directly, and was not intended to, and does not by implication, forbid the legislature to authorize such towns, etc., or religious societies, to make provisions for the support of any other religious teachers besides protestants.

2. Under Sec. V of part second of said constitution, the legislature is as fully empowered to authorize such towns, parishes, bodies corporate, or religious societies, to make provision for the support of any other religious teachers besides protestants, if they think it for the welfare or benefit of the state to do so, as it is by Art. VI of part first to make provision for the support of protestant teachers.

3. The third paragraph in Art. VI of the bill of rights, which declares that every denomination of Christians demeaning themselves quietly, etc., shall be equally under the protection of the law, and that no subordination of any one sect or denomination to another shall ever be established by law, was designed to show that, although the framers of the constitution had a preference for the protestant religion rather than the Roman catholic, and were willing to encourage the former as far as consistent, yet that they held the rights of conscience of both to be alike and the same. The same rights of conscience are quaranteed to all.

4. Articles XIV, XXIX, XLII, and LXI, of part second of the constitution, providing that the governor, councillors, senators, and representatives must be "of the protestant religion," were designed to require a positive and affirmative test, and not merely the negative qualification of not being a Roman catholic.

5. The right of holding these offices is a civil or political right, which may be surrendered to the government or to society in order to secure the protection of other rights (Art. III, bill of rights), or the government may abridge or take away such rights for sufficient cause; for though such rights may be considered as natural rights (Art. II, bill of rights), yet they are not of the class of natural rights which are held to be "unalienable," like the rights of conscience. Art. IV, bill of rights.

6. The rights of conscience, which are held to be not only natural, essential and inherent (Art. II, bill of rights), but also "unalienable," not capable of being surrendered voluntarily, or of being taken away or abridged by the government, "because no equivalent can be given or received for them" (Art. IV, bill of rights), are set forth and declared specifically in Art. V of the bill of rights; and nothing contained in Art. VI of the bill of rights, or in any other article of the constitution, was intended to conflict or interfere with, or to modify the declaration of the rights of conscience there made.

7. The term Christian in our constitution is used in its ordinary sense, to designate one who believes or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament.

8. The term protestant is used in the same instrument in its ordinary sense, meaning to include all Christians who deny the authority of the Pope of Rome—Christians in this country and in western Europe being divided into Roman catholic and protestant.

9. But neither the term Roman catholic nor protestant is broad enough to include any who do not, nominally at least, assent to the truth of Christianity as a distinct system of religion;—a Mahometan, a Jew, a pagan, or an infidel cannot properly be called either a catholic or a protestant, not being a Christian.

10. The political or conventional use of the word Christian, denoting one who assents to the truth of the doctrines of the religion of Christ, or who, being born of Christian parents or in a Christian country, does not profess any other religion or belong to any of the other religious divisions of men, is the sense in which the word is ordinarily used in constitutions and statutes and legal documents, and referring to those commonly known as nominally Christian, rather than to those who, professing the faith of some particular church, are termed Christians, in the theological or sacred sense of the term.

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11. But when the children of protestant parents, or those born in a protestant country, renounce that religion, and voluntarily elect and adopt and profess some other religion, they cannot any longer be reckoned or assumed to be of the protestant religion; and so of all the denominations of Christians, and all other systems of religion.

12. By the act of 1819 all power to build meeting-houses and to support religious teachers was taken from the towns where it had been placed by the law of 1791, and was conferred upon religious societies; and any religious sect, as well as any denomination of Christians, was authorized to form such a society.

13. Under the acts of 1819 and 1827, religious sects or denominations of Christians were alone authorized to form religious societies, and the limited corporate powers that were conferred upon them did not in any way take away or change their character as sectarian or denominational societies.

14. When a society of a particular religious sect or denomination is formed with a strictly sectarian or denominational name descriptive of the fundamental doctrines of the sect to which it belongs, it will be presumed that it was constituted for the purpose of promoting the vital and fundamental doctrines of such sect or denomination.

15. In such case, where a conveyance is made to, or a trust created for the benefit or use of such religious society, by its denominational name, with no other particular designation in the deed of the tenets or doctrines which it is to be used to advance and support, the denominational name may be a sufficient guide as to the nature of the trust, so far as respects doctrines which are admitted to be fundamental.

16. In such case, those having control of property held in trust for the benefit of such religious society may be restrained from applying the property or the use of it to the promotion of religious tenets and doctrines clearly opposed and adverse to the fundamental doctrines and faith of such sect or denomination, at the time, and immediately after, such trust was created.

17. Where the original trustees, appointed by the founder of a religious charity or trust, applied the fund to the support of certain religious doctrines, and that application had been long continued, and had always been acquiesced in by the founders of the charity or trust, a court of equity will not allow such application to be changed or interfered with unless such change is clearly required by the plainly expressed intention of the donor.

18. It is not the province of courts of justice to decide or to enquire what system of religious faith is most consistent, or what religious doctrines are true or what are false, in any case, and it seldom becomes necessary for courts to discuss or to examine the creeds, or confessions, or systems of faith of the different religious sects, in determining questions of law, except in cases where they are called upon to see that a trust or charity is administered according to the intention of the original founders.

19. A congregational society is usually made up of the church with which it is connected, and of those who worship with the church and assist in supporting the preaching and public worship of the church, and though the minister is settled by the society, he becomes the pastor of the church as well as of the society, and the society generally has no creed or published religious opinions distinct from the church; and to find what are the religions opinions of a congregational society, we must look at the creed or confession or doctrines of the church with which it is connected, which is the centre and foundation of the whole. This holds true of all who adopt the distinctive congregational polity, whether known as orthodox Congregationalists, Baptists, and others, or those known as liberal Congregationalists, such as Unitarians, Universalists and others.

20. In case of a division of a religious society or corporation where both parties still adhere to the tenets, doctrines and discipline of the organization, the property should be divided between them in proportion to their numbers at the time of separation.

21. Members who secede from a church organization or a religious society thereby forfeit all right to any part of the property, rights or privileges of such church or society.

22. Whether there has been a secession from a church or religious society is a question of fact to be settled upon evidence of the acts and intention of the parties.

23. Deists, theists, free religionists and other infidels, though they may be Unitarians in some sense, are not Unitarian Christians.

DOE, J., dissented.

Legal Education and the Present State of the Literature of the Law.

We take the liberty of reprinting from a report of the law departmen of the Iowa State University; understood to have been written by Dr. Hammond, the following observations upon legal education and the present condition of legal literature. It is somewhat long, but its perusal is worth the pains of every thoughtful lawyer. After showing by means of a statistical table the rapid growth of the law department of the university, the report proceeds as follows:

"The rapid and steady growth, shown by the figures above given, is certainly not to be attributed to any special effort on the part of the university authorities, since scarcely anything has been done for the school beyond what was necessary for its mere existence. Nor can the law faculty take to themselves any merit on this account, except that of a faithful discharge of their duties. The real cause of growth has been the widely felt need of better legal education than could be obtained in the older method, and the general conviction, among those best competent to judge, that the law school is as much of a public necessity as the schools which have long constituted the recognized means of entrance to the other professions.

"The grounds of this conviction are too many and too broad to be treated here. We refer to them, however, for two reasons: because they warrant the belief that the present popularity of the law-school system is not a mere popular caprice, a change of educational fashions, but is founded on and required by a great change in the law itself regarded as a science; and secondly, because they afford some valuable hints as to the course to be pursued in building up any institution of the kind.

"In the first place, law schools have become popular because the old method of study is felt to be no longer sufficient, owing to the change which has come over the law itself. When the custom of preparation for the bar by office study was first introduced, English law was a fixed and rather narrow system of rigid rules, contained in a few volumes of reports, the whole of which might, with moderate industry, be mastered by rote in a few years. Scientific methods and the study of first principles were needless practicing before courts whose only query was as to the points already decided by themselves or their predecessors. At the same time, the practice was so complicated and difficult as to require by far the larger share of the student's attention, and so technical and arbitrary that it could only be learned by practicing. The result was that the ancient schools of English law were neglected as no longer necessary; the student entered an office to learn by mere rote the technical part of the law, the hardest part of his task, and picked up its scanty doctrines and principles almost unconsciously while engaged upon the forms in which they were administered. If a deeper mind craved more insight into the science of jurisprudence than this course furnished, he must wait to evolve it for himself from his later experience, or else look to the civilians and writers on the law of nature.

"It should be observed, however, that there were exceptional cases, where the instructor collected a number of students and devoted a considerable portion of his time to teaching them. These, in fact, were the forerunners of the modern law schools, though the education given by them is often credited to the old system to prove its superiority over these very schools. Thus Sir Fitzroy Kelly, advocating the old system before the Inns of Court Commission, gave the following account of his experience of it. Any one can judge whether such education as he had in view would now most likely be found in a law office or in a law school: 'There were constant debatings, there were constant investigations and looking up of cases; and then the students, each giving his own opinion upon the case, and saying why he formed that opinion by referring to authorities; and then the barrister saying, my opinion is so and so, upon such grounds, correcting the errors of one student and approving of the course resorted to by the other. This was coupled with the copying of precedents and preparing pleadings, reading elementary books, and reading cases.' We know, too, that some of the best English treatises were prepared for the instruction of students, *e. g.*, Mitford's Equity Pleading, Preston on Abstracts, Preston on Conveyancing. Possibly law schools might have been dispensed with if such teaching as this could ever have become common in offices.

"But now the student who enters an office to prepare himself for the bar finds himself left to his own resources as much as he was in the old-fashioned way, while he has an utterly different task before him, both in refer-

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ence to the object to be attained and the means of attaining it. We will say nothing here of the practical difficulties of such a course as compared with what it might be in theory; of the temptations to idleness and mental dissipation; of the lack of companions and the stimulus of companionship; of the danger to his moral sense, of learning merely the arts of the profession without its lofty principles. We will suppose it possible for him to find an instructor fully competent to guide his steps, and yet without business enough to engross all his time and prevent him from being of the least assistance to a beginner when he most needs careful direction. Still, under the most favorable circumstances, the student will find himself in the same situation with any other man who should attempt to prepare himself for a trade, or business, or profession, to-day, with the means that sufficed for the same calling a century ago. This will be the case even in England or in the Eastern states; and here in the West the solitary student's difficulties increase while his means of overcoming them are still fewer and weaker. The books that are given him to read describe neither the law that he is to practice, nor its historical development, nor the elementary principles of all law, but the positive law that happened to exist when the author wrote, twenty, fifty, or a hundred years ago. Some of them treat only of English law, differing in countless particulars from that of America; but, singular as it may seem, these do not confuse or mislead the beginner so badly as most American treatises, which present no system that now exists or ever could exist in any particular state, but a vague and imperfect statement of the doctrines in which all or most of the states of the Union agree, mingled with exceptions, qualifications, and differences of opinion, beyond the utmost powers of his memory if not of his comprehension. All of them have been written to serve a purpose entirely different from his, and inconsistent with it, and they presuppose in their reader the very knowledge which he is set to learn from their pages. Instead of fixing his attention firmly on leading principles until these are mastered, they pass the settled law with the briefest possible mention, and elaborate only those doubtful points or questions as to the application of the law, upon which the practitioner is expected to consult them. Instead of discriminating between authorities, and guiding the student in their use, the most popular treatises rake indiscriminately into their net everything that has ever been reported, and are of no more use in the formation of a sound legal judgment than a dictionary would be in the formation of a pure literary style. Indeed, it is now generally understood in the profession (and too often accepted as inevitable) that the proper office of a text-book is to serve as a mere dictionary or digest to the reports. To the student they are often of more harm than service, and as a means of learning the law are not to be compared with a judicious selection and arrangement of the cases from which they are made up. But the cases can be so used only under the guidance of an instructor, and with access to an ample library. To the solitary student, in a busy office, the usual choice is to read text-books or do nothing. He must take their statements of the general doctrine and then learn for himself, as best he may, how it has been affected by the legislation and decisions of his own state. It is probably within bounds to say that every other rule he finds in a general treatise must have some qualification of this kind before he can rely on it in practice. When the fact is considered, in addition to the other defects of the method, it no longer is a matter of surprise that the learning of even well-read lawyers is too often loose, inaccurate, and not to be depended on without fresh study on every new point. The wonder would be if they learned anything accurately in such a method.

"But even with the best treatises and the most careful office instruction, it is doubtful if the old system could be kept up much longer, since the change in it has been chiefly caused by a change in the law itself. Even in England, where they have but a single *line* of decisions, and where a very learned bench and thoroughly trained reporters do all that they can to keep the law in manageable shape, the vast extent and variety of modern litigation have made it impossible to learn the law as a mere collection of decided points, and have set the whole bar to devising schemes of systematic study and the introduction of scientific jurisprudence. In this country the change is still more necessary. In the first place the American lawyer has to refer to all the English reports, and to two thousand volumes of our own besides; and when reports are counted by the thousand and cases by the hundred thousand, it is useless to think of learning them or relying on them as our fathers did. Not only the old system of learning law, but the old system of discussing and deciding law, is actually breaking down under the weight of its accumulated material. Nor is this the only difficulty, or the worst. We have nearly forty different courts of the last resort, each independent of all the rest in most cases, and yet all administering the same system, and making decisions that may be quoted to each other. To preserve the venerable theory of our law, that each case is to be determined in view of all the previous decisions on the same point, so that a single uniform or uniformly developed doctrine may be found in them all, is simply impossible among such a number of courts, especially when an equal number of legislatures are annually making statutory changes that affect the questions. It would be vain to think of harmonizing all the cases if every American judge were a Mansfield or an Eldon, and with the average legal attainments of our two hundred or more opinion-writers, it is scarcely less than absurd. Every lawyer knows that he can find a case in point for either side of almost every question, and what is still worse for the system, that even the cases which seem to harmonize present such an infinite variety of distinctions, such imperceptible sliding and slipping from one point to another, that it is fast becoming useless to rely on any authority whatever, unless it be on that vague and treacherous 'current of authorities,' or 'general result of the cases,' which commonly resolves itself into a kind of primitive equity, allowing the author of the opinion to decide in any way that his sense of abstract justice or his prejudicies may lead, and which seems fated yet to work as much mischief in our law as the analogous *communis doctorum opinio* did among the civilians under strikingly similar circumstances three or four centuries ago.

"It is to be noticed that there never has been a period when the common law was so devoid of system and order as now. Its founders and their immediate successors treated it, if not as a science, yet as an art of great technical refinement, and brought two departments of it into very complete system. One was the doctrine of real property, and the other that of the forms of action and pleading. As time went on, these served as frames to retain the increasing mass in some kind of regular form. Every new edition was tacked on in some way to one or the other, and the value of even such an imperfect classification as was thus constructed, is best shown by the permanence of both feudal doctrines and the common-law practice long after both had become very inconvenient. But of late the law of property has altogether outgrown the mediæval system, and in America, especially in the West, even its terms and categories have disappeared. At the same time, the common-law forms of action have been abolished, or so changed and simplified as to be practically new, with all the nice rules and distinctions as to personal property and obligations which depended on them. Both changes are doubtless for the better, but both have the temporary disadvantage of destroying at once nearly all the system and order that existed in any part of the common law.

"The only permanent and effectual remedy for this chaotic condition of our law, it seems to us, must be found in a thorough reconstruction, not of its substance, but of its forms and methods of classification, etc., upon scientific principles. We are aware that there is an old, deep-seated dislike, or rather distrust of 'scientific' jurisprudence among the English and American bars; we are conscious of it ourselves, and we still believe that it has been a great blessing to English common law, or, rather, to the peoples living under it, that it has been able to postpone so long a reduction to logical form. But no national law can postpone it forever and itself continue to exist. By almost the common consent of those best qualified to judge, the time has come when American law, at least, must be thoroughly sifted, analyzed, its terms defined, its principles established and classified. Some would accomplish the task at once by legislative codification; others, who, as we think, better appreciate its difficulty, would have it constructed into a science before it takes the rigid form of statute. Such a task cannot be executed by one man or a few; it will require the labors of a generation of thoroughly-trained lawyers, competent to to commence the work from the highest vantage-ground that has been gained by all that has heretofore been done in the science of law. And this we believe to be the work which law schools have been raised up to do.

"It is a common error, and one which shows itself within the profession as well as without it, to think of legal education as consisting entirely in a set of rules which are to be learned, and learned only, in the course of preparation for the bar, and practiced upon or applied afterward. Consequently the law school is regarded simply as a means of committing to

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memory, with the greatest ease and expedition, such a set of rules. (We have even had letters from persons describing themselves as law students, asking us to send them through the post-office all the questions necessary to be answered to make a thorough lawyer, with the answers, promising at the same time to come to us for examination and graduation when they had thoroughly 'memorized' the same!) There was some foundation for this mistaken notion when the law itself was regarded as existing only in such rules, 'prescribed by the supreme power in the state' to a mass of obedient subjects, but the two should be allowed to grow obsolete together. Such an idea of the law school and its course is as great a mistake as it would be to think of a medical school as a place where students are to learn by rote the names of different diseases and the contents of the dispensary. Such knowledge is necessary in both cases, but a professional education, both in medicine and in law, implies a great deal more than this. It must train and discipline the student for the peculiar kind of work to which the rest of his life is to be devoted. As the medical student is taught carefully to observe and distinguish different forms of disease, and to apply remedies with judgment and discrimination, so there are analogous precesses in the practice of law, in which the student should be educated before he is allowed to experiment on the fortunes and happiness of his clients. The diagnosis and therapeutics of the law are no more within the reach of untaught common sense than those of physic. The law school is a place where the student may learn to analyze a complicated statement of facts, and distinguish those that have legal significance from those that have not —to discriminate authorities and tell why one applies and another does not, or why one has more weight than another; to put a client's demand or defence in such a shape that he may be sure of having the benefit of all the law that is really on his side. In short, it is a place to learn the theory and the reason of all those processes which he is to employ in actual cases, that he may employ them intelligently and not by rote, as is too often the case with one who has learned them merely by copying or looking on in an office. Above all, the law school is the place to learn *how to learn* law during all the remainder of his professional life, since that is acknowledged now by all to be a task that can never be regarded as at an end. The actual amount of law acquired before admission is a matter of secondary importance, since, at the best, it can only be a very small fraction of all that is to be learned. The main point is to master thoroughly the art of learning it, as well as that of applying it to the facts. And these objects, in the condition of our law at present, as already described, can only be attained by strictly scientific methods."

Book Notices.

REPORTS OF CASES IN THE DISTRICT COURTS OF THE UNITED STATES WITHIN THE SECOND CIRCUIT. By ROBERT D. BENEDICT. Vol. 5. New York: Baker, Voorhis & Co. 1874.

This is the fifth volume of the series known as "Benedict's District Court Reports," and is of the same general character as its predecessors. The volume contains nearly 100 cases, mostly in Admiralty, Bankruptcy and Revenue. The opinions reported are mainly those of Judges BLATCHFORD and BENEDICT and the late Judge N. K. HALL. Some of the points decided are new, and most of them of interest to all lawyers who practice in the federal district courts. It is needless to speak of the ability of the judges named, and it only remains to add that we think the reporter's work excellently done.

FIFTY-SIXTH ANNUAL REPORT OF THE TRUSTEES OF THE NEW YORK STATE LIBRARY. For the Year 1873. Transmitted to the Legislature January 28, 1874.

From this report, which we have received through the courtesy of Stephen B. Griswold, Esq., the law librarian, we learn that the total number of volumes in the New York State Library, at the close of the year 1873, was 90,887. Of these, 66,253 were in the general library, and 24,634 in the law library. The increase of volumes during the year was—in the general library 1,767; in the law library 1,120. If we might judge of the value of the law library by the number of its volumes, we should say that Albany must be a paradise for lawyers and law-book makers.

BOSTON UNIVERSITY SCHOOL OF LAW. Catalogue and Circular for the year 1873–74. Boston: University Offices, 20 Beacon street. Printed at the Riverside Press. 1874.

Among the professors and lecturers of this rising law school are no less than ten LL. D.'s, among whom we notice the eminent names of Dr. Francis Wharton, Dr. Edmund H. Bennett, Dr. George S. Hilliard, Dr. Henry W. Paine, Dr. Benjamin R. Curtis, and Dr. William Beach Lawrence. Among the rising men connected with the school we notice the names of Melvin M. Bigelow, A. M., author of "The Law of Estoppel," etc., and N. St. John Green, LL. B. (Acting Dean), who is now engaged in editing a series of criminal reports to be published by Messrs. Hurd & Houghton, of New York.

ABSTRACTS OF DECISIONS OF THE SUPREME COURT OF MICHIGAN, at the April term, 1874. Prepared by HENRY A. CHANEY, Esq., for and originally published in the Detroit Daily Tribune. Published by E. B. Smith & Co., Detroit, Mich.

This pamphlet, which the publishers have printed for gratuitous distribution, resembles somewhat Mr. Chaney's Quarterly Digest, except that the reasoning of the judges is given at greater length. It contains in a condensed form several important decisions.

Legal News and Notes.

—AN exchange says that Dr. Kenealy, of Tichborne trial notoriety, is in Ottawa, Canada, where he was the guest of Lord Dufferin on Saturday. He is there on business connected with the development of the mining interests of Nova Scotia. We do not see how Dr. Kenealy can edit his new paper, "The Englishman," and develop mining interests in Nova Scotia at the same time, but his is a great genius.

—TRINITY term of the English courts of common law opened at Westminster on the 22d ult., for the last time under the present legal system. Those American lawyers, and even authors (*vide* Powell on Appellate Proceedings), who have failed to keep pace with the changes which from time to time take place in the English judiciary system, will need to revise their knowledge of that subject again by the second of November next, when the new judicature act, with its sweeping changes, goes into operation.

—IN view of the approaching termination of the jurisdiction of the house of lords as the British court of final resort, in consequence of the supreme court of judicature act, which goes into operation in November next, Lord Redesdale is making strenuous efforts to have its appellate jurisdiction continued. To the objection that there might come a time when the house of lords would not contain a sufficient number of qualfied peers to administer the law in appeal cases, Lord Redesdale answers that certain judicial persons might be brought in to represent the law in the house of lords, the same as the bishops represent the church. Upon this the Pall Mall Gazette irreverently suggests that a tribunal which cannot discharge its judicial duties without the assistance of "judicial personages" from outside its own body, is no tribunal at all.

—HON. WM. A. RICHARDSON resigned the office of secretary of the treasury on the 1st instant, and was immediately appointed a justice of the Court of Claims, vice Justice MILLIGAN, deceased. After the damaging disclosures against him in the Sanborn investigation, affecting either his competency or his integrity, the country cannot tell which, the propriety and good taste of his immediate appointment to a judicial position will no doubt be questioned. His successor, Col. B. H. Bristow, of Kentucky, is a distinguished lawyer. He was the first solictor-general under the present organization of the department of justice. He left public life because it was more profitable to accept the attorneyship of the Texas Pacific Railroad, but finding the routine of a railroad attorney unsuited to his tastes, he withdrew to private practice. It is said that Col. Bristow always desired to be appointed attorney-general, because of the prestige as lawyers acquired by all who have filled that office for any considerable length of time, but the office of secretary of the treasury was unsolicited by him and accepted with diffidence. His nomination calls to mind the fact that another distinguished lawyer of Kentucky, Mr. Guthrie, occupied the post of secretary of the treasury under President Pierce. Col. Bristow seems to possess the same strong integrity and resolute cast of character which distinguished Mr. Guthrie. The latter is known on one occasion to have "put his foot down" and refused to approve a voucher, although directed to do so by the president; and the former is already making a rattling among the dry bones of sinecure clerks and incumbents of greater dignity who were mixed up in the Sanborn disgrace. We accordingly learn that some eighteen sinecure clerks have been dismissed, and that Assistant-Secretary Sawyer and Solicitor Banfield have resigned.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JUNE 18, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

WE desire to call attention to the letter of "PELHAM," from London, which we elsewhere print. "PELHAM" is an able and veteran lawyer of Boston, who is travelling in England and on the continent. He travels with his eyes open—sees things through the spectacles of an American lawyer, and relates with force and grace what he sees. His observations upon the confiscation of monasteries in Italy are calculated to impress us with a profound sense of the advantages of constitutional guaranties like those we enjoy, and to reconcile us to the rule in the Dartmouth College case. We expect the pleasure of laying before our readers other letters from the same pen.

WE are indebted to Mr. Justice COOLEY, of the Supreme Court of Michigan, for an abridgment of a very able and important opinion of his, which we elsewhere print, on the power of the supreme court to award a mandamus against the governor of the state. We should gladly have published the opinion in full, but Mr. Justice COOLEY modestly cut it down, sending only that part which relates more immediately to the question in judgment. It will be seen that it places the question on the broad ground that the governor of a state is the best and final judge of the duties which attach to his official position, and that any attempt on the part of the judiciary to control his action contrary to his judgment, with reference to those duties, would not only be an invasion by one co-ordinate department of the government of the functions of another, but that it would also involve the court in the position of rendering a judgment which it would be without power to enforce.

The Right to Keep and Bear Arms for Private and Public Defence.

[CONCLUDED.]

4. We shall take leave of this subject by briefly considering whether the second amendment of the constitution of the United States is restrictive upon the states. This amendment provides that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Mr. Bishop suggests that, "though most of the amendments are restrictions on the general government alone, this one seems to be of a nature to bind both the state and the national legislatures; and doubtless it does." Of the same view was the Supreme Court of Georgia in Nunn v. The State, 1 Kelly, 243, where the question was discussed at considerable length, and where a statute of that state was held in part invalid because in conflict with this amendment. In the three Louisiana cases already quoted, the subject was discussed solely with reference to this amendment to the federal constitution, and it seems to have been taken for granted that it is restrictive upon the states. State v. Chandler, 5 La. An. 489; State v. Smith, 11 La. An. 633; State v. Jumel, 13 La. An. 399. So in the Arkansas case, The State v. Buzzard, 4 Ark. 18, all the judges appear to have understood this amendment as applicable to the states; and Judge DICKINSON supposes it to pertain to the power possessed by the general government of organizing, arming and disciplining the militia. He says this provision of the federal constitution "is but an assertion of that general right of sovereignty belonging to independent nations, to regulate their military force."

This view of Judge DICKINSON contains the only plausible reason we have met with for supposing that this amendment is binding upon the states. The decisions of the Supreme Court of the United States, expounding the early amendments of the federal constitution, leave little room to doubt that none of the first ten amendments apply to the states, but that all of them are merely restrictive upon the federal power. Thus, in Barron v. The City of Baltimore, 7 Pet. 243, 247, it was held that an act of the Maryland legislature, which it was alleged deprived the plaintiff in error of his property without just compensation, was not void as being in conflict with the *fifth* amendment of the federal constitution. Chief Justice MARSHALL, delivering the unanimous judgment of the court, said: "The question presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The power they conferred on this government was to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes." This language would be equally decisive if applied to any of the first ten amendments. Again, in Fox v. The State of Ohio, 5 How. 410, 434, it is declared that the prohibitions contained in the amendments to the federal constitution "were not designed as limits upon the state governments in reference to their own citizens. They are exclusively restrictions upon federal power, intended to prevent interference with the rights of the states and of their citizens." "Such, indeed," said Mr. Justice DANIEL, in delivering the opinion of the court, "is the only rational and intelligible interpretation which these amendments can bear, since it is neither probable nor credible that the states should have anxiously insisted to engraft upon the federal constitution restrictions upon their own authority—restrictions which some of the states regarded as the *sine qua non* of its adoption by them." So, also, it was held in Smith v. The State of Maryland, 18 How. 71, 76, that the provision of the *fourth* amendment of the federal constitution which prohibits the issuing of a warrant, "but upon probable cause, supported by oath or affirmation," had no application to the process of the state courts. Language equally decisive will be found in Withers v. Buckley, 20 How. 84, 90; Twichell v. The Commonwealth, 7 Wall. 321, and in other cases decided by the same court.

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In view of these decisions of the only court whose interpretations of the federal constitution are binding and decisive, there would seem to remain no doubt that if the question should ever arise in that court it would be held that the second amendment of the federal constitution is restrictive upon the general government merely, and not upon the states, and that every state has power to regulate the bearing of arms in such manner as it may see fit, or to restrain it altogether.

The Right of Trial by Jury.

It will be remembered that at the last presidential election Miss Susan B. Anthony and some other women had the courage to offer their ballots at an election precinct in New York, and that they were accepted. It will also be recollected that Miss Anthony was prosecuted criminally, under some federal statute, for voting thus illegally, before the United States Circuit Court at Utica, New York, Mr. Justice HUNT presiding, and was convicted and sentenced to pay a fine. This fine she has petitioned congress to remit, and the judiciary committee of the house have made a report recommending that the petition be granted. They say that the presiding judge admitted evidence on both sides on the question of fact whether Miss Anthony did or did not vote, knowing that she had no right to do so, but that he afterwards withdrew from the jury altogether this question of fact, and ordered a verdict to be entered up upon his own decision, without allowing the question either to be argued or submitted to the jury, or the jury to pass upon it. The committee argue that "there certainly can be no graver question affecting the rights of citizens than this;" that the whole theory of trial by jury at common law consists in the fundamental maxim that no conviction can be had until passed upon by a jury of twelve peers of the accused; and that there can be no advantage in this jury system if a judge can order a verdict of guilty without any reference to the jury at all. They say that as a matter of law the judge cannot even order a verdict of acquittal, but can only direct the jury that in his opinion the case cannot be maintained upon the evidence presented, leaving to the jury to say whether they will accept his opinion. Therefore, "because the fine has been imposed by a court of the United States for an offence triable by jury, without the same being submitted to the jury, and because the court assumed to itself the right to enter a verdict without submitting the case to the jury, and in order that the judgment of the committee may, in the most signal and impressive form, mark its determination to sustain in its integrity the common-law right of trial by jury," the committee conclude their report by recommending a bill granting the prayer of the petitioner.

Referring to this report, one of our legal contemporaries suggests that "the committee seem to imagine that they have succeeded to the appellate jurisdiction of the house of lords." We do not concur in the spirit of this suggestion. Without expressing any opinion as to the propriety of the ruling of Mr. Justice HUNT (for we have no knowledge on which to base an opinion), yet we believe that if any judge has denied a person criminally accused the right of the verdict of a jury on the main issue of guilty or not guilty, it is the right and duty of the representatives of the people to express their disapprobation in a marked and decisive manner. Whatever may be said of the value of the verdicts of juries, the right of trial by jury is one which the people will not, and ought not, to surrender without resistance. Whilst we have no sympathy with that extravagant view of the right of juries to judge of the law as well as of the facts, which places juries above the judge, and advises them that they may make law to suit each particular case, yet we think that the final right of juries in criminal cases to resolve by their verdict the issues of law as well as of fact, ought not to be infringed. We lately saw an instance in a New York court of a judge falsifying his record by entering thereon a verdict as the verdict of a jury, they, at the same time, shouting "no! no!" That, however, was a civil case. If it had been a criminal case, the judge would have deserved impeachment.

We cannot part with this subject without quoting some admirable observations of Mr. Justice CAMPBELL, of the Supreme Court of Michigan, in the case of T. W. Hamilton v. The People, determined at the last (April) term of that court. Since the time of Judge GASTON there has been no American judge whose opinions in criminal cases better deserve reading than those of Judge CAMPBELL. In the case we are now adverting to, he is reported to have said:

"The power of juries in civil and criminal cases is the same in kind though different in degree. The practice of disregarding or relieving against wrong verdicts is largely of modern growth. Though they may be set aside, they cannot be reviewed or altered. And setting them aside as against law is a matter of discretion and not of right. An appellate court can only review the action of the judge, not that of the jury, and this, too, not by virtue of the old law, but by force of statutes which, though ancient, are yet later in origin than jury trials. The jury system is generally regarded as deriving one of its chief advantages from having the law applied to the facts by persons having no permanent offices as magistrates, and who are not likely to get into the habit of disregarding any circumstances of fact, or of forcing cases into rigid forms and arbitrary classes. It is especially important, where guilt depends on a wrong intent, to give full weight to every circumstance that can possibly affect it, and professional persons are constantly tempted to make the law symmetrical by disregarding small things. But it is necessary for public and private safety that the law shall be known and certain, and shall not depend on each jury that tries a cause. And the interpretation of the law can have no permanency or uniformity, and cannot become generally known, except through the action of courts. It may be fairly regarded as one of the best features of the jury system that the law, though interpreted by professional interpreters, can only be applied to facts through the understanding of ordinary men of average capacity, and usually including in this number some of very simple minds. By this process it is divested of all that would not be readily comprehended by all men. In this way over-nicety and technicality become less dangerous, if not absolutely harmless, and an apparent deviation in the verdict from the rules laid down is often no departure from the rules as supposed to be laid down.

"But if the court is to have no voice in laying down these rules, there can be no security whatever either that the innocent may not be condemned, or that society will have any defence against the guilty. A jury may disregard a statute as freely as any other rule, and a fair trial in time of excitement

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would be almost impossible. All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the protection of the law against unjust convictions quite as often as the public need it against groundless acquittals. Neither can be safe without having the rules of the law defined and preserved, and beyond the mere discretion of any one. We must construe the jury system like all other parts of our legal fabric, in the light of history and usage. It came into this country as a part of the common law, and it has been fixed by our constitution as a known and regular common-law institution. Like many of our best heritages from that source, we know what it is better than how it was devised, or (which is more probable) came into use without devising. We must look to the use as evidence of the law, and looking to that we find that the judge has always assumed to give the jury instructions upon the law. While there have been severe complaints and stern measures to secure them from his control on the facts, there has never been any attempt to abolish the practice of charging on the law. All the improvements in mitigation of the old system have gone upon the ground that the jury were expected to follow the instructions of the court. The introduction of reversed cases and criminal exceptions would be little short of an absurdity on any other theory. If there were any ground of complaint it would not be for wrong instructions, but for giving any charge at all. It is hard to deal with arguments which assume to qualify a system, and yet are not consistent with its uniform history. A jury system without a presiding judge who is something more than a mere puppet is not the jury system which we have inherited. If the charge is proper it can only be so because it is to be respected. If juries disregard it they may be free from personal risks, and in cases of acquittal their verdict is conclusive. But the power to do wrong with impunity does not make wrong right. The uniform practice and the decided weight of opinion is to require that the judge give his views of the law to the jury as authority, and not as a matter to be submitted to their review. And while we recognize the power of the jury to give wrong verdicts or disregard the law, usage and authority, warrant us in holding that such conduct would be an abuse of their discretion, which could only be palliated by such tyrannical and perverse instructions as their good sense should teach them could not possibly be true or just."

Railway Negligence—Consequential Damages.

SNEESBY v. THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Court of Queen's Bench, Westminster Hall, Hilary Term, 38 Victoriæ (February 3, 1874).

Negligence—Proximate and Remote Cause.—A herd of plaintiff's beasts were being driven at 11 o'clock P. M. along an occupation road to some fields. The road crossed a siding (side-track) of the defendants' railway on a level, and while the cattle were crossing the siding the defendants' servants negligently sent some trucks down an incline into the siding, which divided the cattle into two lots and frightened them, and they rushed away with the drovers after them. The drovers succeeded in recovering most of the cattle, but they were unable to recover six of them, which were ultimately found at between three and four A. M., lying dead or dying on another part of the railway; and it appeared they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level-crossing, had got into the garden through a defect of the fences, and so on to the line. There was no evidence as to when the rain had passed which ran over the cattle. *Held*, that, it being admitted that the defendants had been guilty of negligence which caused the drovers to lose control over the cattle, and it being also admitted that the plaintiff's men had done all they could to recover control over the beasts, and had not been able to do so before they were killed, their death was the consequence of the defendants' negligence, and the damage was not too remote.

Declaration that defendants were possessed of a railway and sidings, and of trucks for the conveyance of goods on the railway; that the sidings crossed an occupation road or level, and the defendants so carelessly and negligently managed their railway sidings and trucks that the trucks were suddenly driven down upon and against certain cattle of the plaintiff while they were lawfully passing over the crossing along the occupation road, without any warning having been given by the defendants' servants to the persons in charge of the cattle, whereby some of the cattle were divided from the persons in charge of them and were frightened and escaped to another part of the railway, and were killed by a passing train; and others of the cattle, being so frightened and divided from the persons in charge, ran along the occupation road to a place where the fences dividing the road from the railway were imperfect, and escaped through another fence on to the railway and were killed by a passing train.

Second count: That defendants were possessed of a railway, and were subject to the provisions of the railway clauses consolidation act, and certain cattle of the plaintiff were lawfully passing along an occupation road adjoining certain land taken for the use of the railway, and it was the duty of the defendants to maintain a good and sufficient fence between the roads and the land so taken, yet defendants, neglecting their duty, maintained so insufficient a fence that plaintiff's cattle escaped on to the railway through said fence and were killed by a passing train.

Pleas: 1. Not guilty. 2. That the cattle were not plaintiff's as alleged. 3. To second count; that the cattle were not lawfully passing over the said crossing. 4. To second count; that the cattle were not lawfully passing along said occupation road as alleged. 5. To second count; that the defendants were not subject, as to the said railway, to the railway clauses consolidation act as alleged.

Issue joined.

At the trial before the late Chief Justice BOVILL, at the Leeds Spring assizes, the following facts were admitted: The plaintiff, a cattle dealer, had sent a drove of twenty-nine fat beasts by railway for the Wakefield Wednesday market; on their arrival at Wakefield the night before, they were driven, about eleven, P. M., along an occupation road to a field where they were to be kept ready for market. The road crosses some sidings of the defendants' railway on a level, and while the cattle were crossing the sidings, the defendants' servants negligently, and without any warning to the persons in charge of the cattle, let some trucks run violently down an incline into the sidings. This separated the cattle into two divisions, and so frightened them that they escaped from the control of the drovers and rushed away. The drover went after them and succeeded in recovering most of the cattle, but six or seven of them were not found till between three and four A. M., when they were found lying dead or dying, on another part of defendants' railway having been run over by a train. Their tracks were traced from the sidings; and it appeared that they had gone along the occupation road about a quarter of a mile and had there got into an orchard and garden belonging to the defendants, the fences of which were in a defective state, and thence into the railway, where they were found. There was no evidence as to what time the train, which had run over the cattle, had passed.

On these facts the learned judge directed a non-suit, with leave to move to enter a verdict, the court to draw inferences of fact. A rule was obtained accordingly, on the grounds that the defendants were guilty of negligence, and also of a breach of duty in respect of the fences, and were liable for the death and injury to the cattle.

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Price, Q. C., and *Beasley* showed cause. First, the death of the cattle was attributable to the defect of the fences. But the defendants were not bound to keep up the fences as against the plaintiff's cattle; first, because the railway clauses consolidation act was passed after the defendants' special act; secondly, because, if § 68 does apply, they were not occupiers of the garden and orchard, and, moreover, the defendants were not bound to keep up the fences as against the public. Manchester, Sheffield etc., Ry. Co. v. Wallis, 14 C. B. 213; Dawson v. Midland Ry. Co., Law Rep. 8 Exch. 8.

[QUAIN, J., referred to Booth v. Wilson, 1 Barn. & Ald. 59, and Ellis v. London and Southwestern Ry. Co., 2 H. & N. 424; 26 L. L. (Ex.) 349.]

Secondly, the defect of the fences was the proximate cause of the damage, and the damage was too remote from the defendants' negligence. There was a considerable lapse of time between the time when the cattle were frightened and when they were run over.

[BLACKBURN, J.—There was no evidence as to when the train passed which did the mischief. However, on the facts presented to us, we must take it that there was no negligence on the part of the drovers in looking after and endeavoring to recover the cattle. This is the case of a tort, but it is somewhat analogous to the case of insurance; and when a ship is taken out of control of the crew by a peril insured against, and is afterwards destroyed by another cause, still there is a total loss for which the underwriter is liable. The loss here is the same as if the cattle had fallen into an unfenced quarry.]

Lawrence v. Jenkins, Law Rep. 8 Q. B. 274, will no doubt be relied upon by the plaintiff; but in that case and the cases cited in it, the death of the cattle was directly attributable to the negligence in not keeping up the fence.

Field, Q. C. (*J. W. Mellor* with him), in support of the rule. If it be admitted that the plaintiff's drovers used due diligence in endeavoring to recover the cattle, and could not do so before the accident happened to them, the case is really not arguable; for then the negligence of the defendants' servants was the proximate cause, and the damage the natural result of the cattle being frightened. In addition to Lawrence v. Jenkins, Law Rep. 8 Q. B. 274, and the other cases already referred to—Anonymous, 1 Vent. 264; Powell v. Salisbury, 2 Y. & J. 391; Lee v. Riley, 18 C. B., N. S., 722; 34 L. J. (C. P.) 212, and Hill v. River Co., 9 B. & S. 303, may be cited. The last case is directly in point. There the defendants negligently allowed the escape of water which frightened the plaintiff's horses, so that they started on one side and upset the plaintiff's carriage into a ditch which had been negligently left unfenced by a third person; and it was held that the defendants' negligence was the proximate cause of the damage. But, secondly, the defendants were liable under § 68 of 8 Vict. chap. 20, for not keeping up the fence of the orchard and garden. [He was then stopped by the court.]

BLACKBURN, J.—I am of opinion that the rule must be made absolute. The facts seem to be that, by what is admitted to have been negligence on the part of the servants of the company, the cattle of the plaintiff, as they were crossing the railway on the level, were frightened and scattered, so that for a time the plaintiff's drovers lost control of all of them; they recovered the chief part of the cattle, but some were found killed on another railway. It happens that this was also the defendants' railway; and it appears that the cattle got on to the railway through a defect in the fence of a garden or orchard belonging to the defendants; but, from the nature of the accident, it seems to me that we may treat the case as if it had been the railway of some other company, or as if the cattle had fallen down an unguarded quarry. The question is, are the defendants, whose negligence drove the cattle out of the custody of the plaintiff, liable for their death, or is the damage too remote?

No doubt the rule of our law is that the immediate cause, the *proximate cause*, and not the remote cause, is to be looked at; for, as Lord Bacon says, "it were infinite for the law to judge the causes of causes and their compulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bac. Max. Reg. 1. The rule is sometimes difficult to apply; but in a case like the present this much is clear, that so long as the want of control of the cattle remains without any fault of the owner, the *causa proxima* is that which caused the escape, for the consequences of which he who caused it is responsible. Suppose, for instance, in former times a reclaimed falcon were frightened, the natural consequence would be that it would be lost altogether, and the person who negligently frightened it would be liable. The natural and proximate consequence was that it could not be got back at all. So, if you have lost control of cattle and cannot get them back under your control till they have run into danger and are killed, the death is a natural consequence of the negligence which caused you to lose control of them. It is the most natural consequence of cattle being frightened, that they should go galloping about and get into a dangerous position, and, being in the neighborhood of railways, should get on the line and be run over by a passing train, whether that of the defendants or not is immaterial. When once it is established that the cattle were driven out of the control of the plaintiff by the defendants' negligence, and that the control could not be recovered till they were killed, which was the natural consequence of their being uncontrolled, the liability of the defendants is beyond dispute. Lawrence v. Jenkins, Law Rep. 8 Q. B. 274, seems directly in point. The other cases, when looked into, do not go quite so far; but on principle there can be no doubt that the defendants are liable.

QUAIN, J.—It is well established that a person is liable for all the consequences of his wrongful act; of which the well-known case of Scott v. Shepherd, 2 W. Bl. 892, 1 Smith, L. C. 417, is an instance, where a squib, having been thrown into a crowd, and having been hastily thrown away by two other persons and ultimately injured the plaintiff, the wrong-doer, the original thrower, was held liable. So, when the plaintiff's cattle got through a defective hedge, which the defendant was bound to keep in repair, and were killed, in one case by falling into a pit, and in another by the falling of a haystack upon them, the defendant was held liable. Here the defendants' porters, who were responsible for the proper management of the sidings and level-crossings, are the persons doing the illegal act, the consequence of which was the escape and death of the cattle. In a case of contract the question is very different. In tort the defendant is liable for all the consequences of his illegal act where they are not so remote as to have no connection with the act, as by the lapse of time, for instance. Applying that to the present case, I think the damage to the cattle was not so remote from the injurious act as not to be the natural consequence of the act. The injurious act was the negligence of the defendants' servants in allowing trucks to be suddenly shunted across a level-crossing at eleven o'clock at night, without any warning, so that the plaintiff's cattle were frightened. The place was very dangerous from the numerous branch railways, and they having escaped from the plaintiff's control, got on to one of the railways and were killed on the same night. These circumstances, I think, bring the case within the rule, and the death of the cattle was not so remote from the negligence of the defendants as to render the damages not recoverable.

ARCHIBALD, J.—When the facts are understood there can be no doubt as to the application of the rule that a wrong-doer is liable for all the consequences of his wrongful act. The defendants had been guilty of a wrongful act, and the important fact (which it appears at the trial was conceded) is that, although all was done that could be done, it was impossible for the drovers to regain control of some of the cattle before they were killed. The natural conse-

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quence of the cattle being frightened was that they should stray, and, so straying in the neighborhood of a railway, should get on to it, and, so lying down or remaining on it, should be run over by a passing train. Therefore, all is referable, as the proximate cause, to the original negligence of the defendants' servants.

RULE ABSOLUTE.

Mandamus against the Governor of a State.

THE PEOPLE *ex rel.* SUTHERLAND v. JOHN J. BAGLEY, GOVERNOR OF MICHIGAN.

Supreme Court of Michigan, April Term, 1874.

Hon. B. F. GRAVES, Chief Justice.
" J. P. CHUSTIANCY, } Judges.
" J. V. CAMPBELL, }
" T. M. COOLEY, }

1. **Mandamus against Governor of State.**—The governor cannot be compelled by mandamus to perform an official act, even though private rights of property may depend upon it. And this is so whe her the duty to perform the act is imposed by the constitution or by statute.

This was a petition for an order to show cause why a mandamus should not issue to compel the governor to issue his certificate that the contractors for the construction of the Portage Lake and Lake Superior canal had completed the same according to contract, and were consequently entitled to the land donated to the state by the general government for its construction. The governor appeared by the attorney-general, and raised the question of the jurisdiction of the court.

Judge COOLEY delivered the opinion of the court. After examining the particular case, and showing that it was doubtful under the law if the act to be done was not confided exclusively to the judgment and discretion of the executive, the court proceed to say that they are not disposed to decide the case on any narrow ground, if a broad general principle underlies all cases in which a remedy of this nature is brought against the governor, and would require the same decision in all. That such a principle is to be found in the apportionment of the powers of government between three distinct, co-ordinate and independent departments of government, is held to be clear. Each is independent in its constitutional action, except as the checks and balances estab lished for the protection of liberty make each a restraint upon the others. Having presented and illustrated this at some length, the court say:

But it is said that the act required of the governor is not to be done in the performance of an executive duty which the constitution imposed upon him, but is in its nature a ministerial act, provided for by statute, and which might with equal propriety have been required of an inferior officer, who beyond question could have been compelled by mandamus to take the necessary and proper action in the premises. And the question is put with some emphasis whether, where individual interests depend upon the performance of ministerial action to which the party is entitled of right, the question whether there shall be a remedy or not can depend upon the circumstances that in the particular case the ministerial action is required of a superior officer, when there is no reason in its nature why it might not have been required of an inferior.

A view similar to this has been taken in some cases, and the courts have undertaken to decide what are and what are not properly executive duties, and to assert a right to control the governor's action in some cases, while admitting their want of jurisdiction to do so in others. The State v. The Governor, 5 Ohio St. 528; Bonner v. Pitts, 7 Geo. 473; Cotton v. The Governor, 7 Jones, N. C. 545; Chamberlain v. The Governor, 4 Minn. 309; Pacific R. R. v. The Governor, 23 Mo. 353; Magruder v. The Governor, 25 Md. 173. These cases, for the most part, are rested upon the *dictum* of Chief Justice MARSHALL in Marbury v. Madison, 1 Cranch, 137, that one of the heads of departments in the federal government might be compelled by mandamus to perform a mere ministerial duty; a *dictum* which cannot be understood as expressive of the opinion of that eminent judge that the president was subject to the like process, but which is wholly inapplicable to a case like the present unless it goes to that extent, for it cannot justly be claimed, where federal and state governments have been formed, so far as distribution of power is concerned on the same general plan, that the executive of the Union can claim immunity from judicial process any more than the governor of one of the states. In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction, and as regards such an officer we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance. When the head of a department acts as the mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the courts than the chief executive himself; but where a ministerial act is required to be done by him independently of the executive, though in a certain sense he is an executive officer, it would be as idle to dispute his responsibility to legal process as it would be to make the same claim to exemption on behalf of an officer entrusted with similar duties of a lower grade. This is emphatically the case under the constitution of this state, which provides for the election of state and inferior officers alike by the people, and makes the chief officers of state below the governor as independent of his control in the performance of their duties as are the officers of the counties or of the townships.

But when duties are imposed upon the governor, whatever be their grade, importance or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of state, or a sheriff of a county, or other inferior officer, and that inasmuch as in case it had been so imposed there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority and duty to the governor is made either by the people in the constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior officer, and consequently, for the purpose of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government.

There is, as to all the authority specially confided to the governor, whether by the constitution or the laws, no safe or logical doctrine but this: that reasons of a conclusive nature must be presumed to have been found requiring the particular authority to be confided to the chief executive as one properly and peculiarly, if not exclusively, pertaining to the department which he represents.

It is not attempted to be disguised on the part of the relators that any other course than that which leaves the head of the executive department to act independently in the discharge of his duties

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might possibly lead to unseemly conflicts, if not to something worse, should the courts undertake to enforce their mandates and the executive refuse to obey; but it is insisted that no such considerations are admissible in the present case, in which the governor, though questioning our jurisdiction, professes a willingness to be governed by our decision upon it. The decision of this question, however, is to be a precedent in the state, and no voluntary appearance and no concession which may be made is to be allowed force to induce us to assert a jurisdiction which, though it may be useful in this case, would threaten conflict and danger in future controversies. Orders in these cases can only be enforced by process for the punishment of contempts of court, and it is conceded that the governor might submit or not, at his option, so that our decision in effect could be only advisory. And while we should concede, if jurisdiction were plainly vested in us, the inability to enforce our judgment would be no sufficient reason for failing to pronounce it, especially against an officer who would be presumed ready and anxious in all cases to render obedience to the law, yet in a case where jurisdiction is involved in doubt, it is not consistent with the dignity of the court to pronounce judgments which may be disregarded with impunity, nor with that of the executive to place him in position where, in a matter within his own province, he must act contrary to his judgment or stand convicted of a disregard of the laws.

But it is said that this conclusion will leave parties who have rights, in many cases, without remedy. Practically there are a great many such cases, but theoretically there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the state may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and where that decision has been made it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action which under the constitution and the laws depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision.

The cases of Hawkins v. The Governor, 1 Ark. 570; State v. The Governor, 25 N. J. 331; People v. Bissell, 19 Ill. 229; Dennett, Petitioner, 32 Me. 510, and Mauran v. Smith, 8 R. I. 192 which reach the same conclusion, are so full and satisfactory in their reasoning that we might have deemed it proper to dismiss the case with a simple reference to them if there had not been opposing decisions which are supposed to detract from the weight of their authority. Those opposing decisions, as we think, have not been sufficiently observant of the distinction between the governor as being himself a distinct and independent department of the government, and those administrative officers which, though clothed with important powers, must be subject in the performance of their duties to the regulation, direction and control of the legislature, executive and judiciary, according as the intervention of one or the other in a particular case shall become proper or necessary.

For the reasons stated we must decline to make any order to show cause.

MANDAMUS REFUSED.

Removal of Causes from State to Federal Court.

VERNON K. STEVENSON, PLAINTIFF IN ERROR, v. MARY McDOUGALL WILLIAMS, WIFE OF WILLIAM VON PHUL, AND WILLIAM VON PHUL.

Supreme Court of the United States, No. 212, October Term, 1873.

1. **Removal of Causes from State to Federal Court—Final Judgment.**—Under the act of March 2, 1867 (14 Stats. at Large, p. 558), the application for the removal of a cause from a state court to the federal court must be made before the *final judgment* in the state court of *original jurisdiction*; it cannot be made in the state appellate court.

In error to the Supreme Court of the State of Louisiana.

Mr. Justice FIELD delivered the opinion of the court.

The application of the appellant for the removal of the suit from the Supreme Court of Louisiana to the Circuit Court of the United States was made too late, and was properly refused on that ground.

The act of congress of March 2d, 1867 (14 Stat. at Large, 558), under which the removal was asked, only authorizes a removal where an application is made "before the final hearing or trial of the suit, and this clearly means before final judgment in the court of original jurisdiction where the suit is brought. Whether it does not mean still more—before the hearing or trial of the suit has commenced, which is followed by such judgment—may be questioned; but it is unnecessary to determine that question in this case.

After a final judgment has been rendered in the state court the case cannot be removed to the Circuit Court of the United States, and "there proceed," as the statute provides, "in the same manner as if brought there by original process," without setting aside the trial and judgment of the state court as of no validity. No such proceeding is contemplated by the act, and since the decision of Murray v. The Justices of New York, reported in 9th Wallace, legislation directed to that end where, at least, the trial has been by jury, would be of doubtful validity.

The judgment recovered by Stevenson against the succession of Williams appears to have been annulled on two grounds: 1st, that the notes on which the judgment was rendered were given for a loan of confederate money; and 2d, that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the president forbidding commercial intercourse with the enemy.

The first ground would not be deemed, in a federal court, sufficient to set aside a judgment rendered for the cash value, in national currency, of the confederate money, especially when, as in this case, the judgment was entered upon a stipulation with the executor of the estate for an extended credit. And the evidence in the record leads us to doubt whether the transactions detailed properly fall within the rule of public law or the proclamation of the president forbidding commercial intercourse with the enemy.

But the ruling of the state court in these particulars, however erroneous, is not the subject of review by us. It presents no federal question for our examination. It conflicts with no part of the constitution, laws or treaties of the United States.

Had the state court refused to uphold the judgment because of the provision in the constitution of the state, subsequently adopted, prohibiting the enforcement of contracts founded upon confederate money, a federal question would have been presented. That provision, however, although referred to, does not appear to have caused the ruling. The court only followed its previous adjudications that contracts of the character mentioned were invalid. West Tennessee Bank v. Citizens' Bank, 13 Wall. 432; Bethell v. Demaret, 10 id. 537.

JUDGMENT AFFIRMED.

—GOVERNOR DIX, of New York, has vetoed "an act to simplify and abridge the practice, pleadings and proceedings of the courts of this state."

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Federal Court Practice—Taxation of Costs where the Cause has been Removed from a State Court.

HELENA WOLF v. THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

United States Circuit Court, Eastern District of Michigan, April Term, 1874.

Before Hon. JOHN W. LONGYEAR, District Judge.

1. Federal Court Practice—Taxation of Costs.—A suit removed from a state court comes into the federal impressed with all the rights and liabilities of the parties as to costs which accrued or attached by the laws of the state while the suit remained in the state court. Acts of congress prescribing what costs may or not be taxed apply only to such costs as may accrue after the removal has become complete and the federal court is invested with jurisdiction. In taxing costs in such cases, the federal court will therefore administer the state laws as to all costs which accrued while the suit remained in the state court.

On the mutual application of the parties for directions to the clerk as to taxation of costs.

This cause was commenced in the circuit court for the county of Wayne, in this state, and after issue and one continuance in that court, the cause was removed to this court by the defendant, under and in pursuance of the acts of congress in such cases made and provided. After sundry proceedings had in the case in this court, unnecessary to mention here, the plaintiff discontinued her suit, and judgment was entered against her for costs to be taxed. The defendant now brings its bill of costs for taxation, in which are included items of costs accrued in the state court before removal to this court, amounting in the aggregate to $15, and $7.50 paid to the clerk of the state court for transcripts in making the removal. These items are objected to on behalf of plaintiff on the ground that there is no act of congress allowing such costs to be taxed in this court.

Mr. *D. C. Holbrook*, for plaintiff; Mr. *C. J. Walker*, for defendant.

LONGYEAR, J.—A suit removed from a state court comes into this court impressed with all the rights and liabilities of parties as to costs which accrued or attached by the laws of the state while the suit remained in the state court. Acts of congress prescribing what costs may or may not be taxed apply only to such costs as accrue after the removal has become complete and this court is invested with jurisdiction.

In the state court, in case of discontinuance, the defendant would be entitled by the state laws to all his costs made up to that time, and I think this court is bound, in case of removal to this court before discontinuance, to administer those laws as to all such costs which accrued while the suit remained in the state court.

No adjudicated case involving this exact question has fallen under my notice, but the cases cited below involve principles applicable to this question, and so far as they go, fully sustain the foregoing propositions. I am also informed by my brother Judge, WITHEY, of the western district, that such has always been the uniform practice there. (See Ellis v. Jarvis, 3 Mason, 457; Field v. Schell, 4 Blatchf. C. C. 435; Gier v. Gregg, 4 McLean, 202; Ackley v. Vilas, 3 Ch. L. News, 73.)

The clerk is therefore directed in this, and all like cases, to tax to the party recovering costs, all costs to which he would have been entitled under the state laws, accrued while the suit remained in the state court, and up to the time the suit was duly entered in this court.

ORDERED ACCORDINGLY.

—THE judgment of the New York Supreme Court in one of the suits that are known as the "ring case," The People v. Ingersoll, has been affirmed by the court of appeals. The court held that the county may maintain such suits, and not the state.

Correspondence—The Confiscation of Monasteries by Victor Emanuel as Viewed by an American Lawyer.

LONDON, May, 1874.

EDITORS CENTRAL LAW JOURNAL:—I am pleased with the administration of law in England. But perhaps before I tell you how and why, I ought to say I came here disposed to be pleased. I came from Italy, where with the law, at least such as it is, and so little of it as there is, I was not pleased; where the government seizes private property, sells it as its own, appropriates the proceeds to its own use, making no compensation to the owner; and where, when the owner seeks redress at law, he finds sitting in the judgment-seat only the subordinate of the wrongful taker, already committed and commanded to determine that his master has only taken his own, and that no compensation is due.

It was in 1861, I believe, that Victor Emanuel assumed the title of King of Italy. Since then, at different times, he has suppressed all the monasteries, except only the Armenian which is in the bay of Venice near the Adriatic shore, and is under the patronage of Turkey. The pretext for this suppression is that nothing was taught in these institutions but religion; that the mass of the people was kept in ignorance, and purposely so kept by the priests; that the demand was for a better and more general education, and that the only way to get it was by suppressing the monasteries. I do not believe the pretext to be true in point of fact, in the first place; in the second place, the conclusion does not follow, if it were true, and in the third place, if the facts of the pretext were true, and the conclusion did follow, they furnish no excuse for the conduct of Victor Emanuel.

Every American lawyer knows, of course, the claim and the argument under which, a dozen or so years ago, the property of the people of the Southern states was taken from them. It is true I never for a moment believed in that argument, but it was at least a claim in respect of which, as Mr. Justice MELLEN, of Massachusetts, used to say, "a noise can be made on the other side." And a noise, it will be remembered, was made; and they who blew the loudest and the longest horn prevailed. It was said there was precedent for it among states civilized. At any rate, the country, tired of noise and fighting, acquiesced, and the matter is now settled. But for the conduct of Victor Emanuel in respect to these monasteries, not now to speak of his acts in other respects, no such apology can be made. If, as the pretext admits, religion was taught in these monasteries, then to teach it they must have taught letters, and the connection between A B C and moral conduct I hold to be necessary and inseparable. I spend no time on this. Second, if it was competent to suppress these institutions, then it was competent to control and regulate them, and therefore it was not needful to destroy them, much less to rob them—which is what suppression means. Third, if, as predicated, the public good required that these institutions should be discontinued, then there was no excuse for taking the property belonging to them without compensation. It is said these monasteries had been, to some extent, publicly endowed. Suppose that were true, how does it affect the title? Must not that depend upon the terms of the grant? It was thus in great part that the foundation of Harvard College was laid. Thus in part it has been supported. But the money granted by the state, and the buildings that have been built on the college-grounds by individuals, are equally the property of the president and fellows. And what would be said if, under the pretext that the public good required that the college should be suppressed and the lands and buildings should be taken for public use, the lands and buildings belonging to the college were taken and sold by the state and the proceeds applied to support the governor's household, and an army miscalled a peace establishment, and no compensation made to the college? The American constitution shows how well it has always been understood in our country that every individual is to be protected in the enjoyment of his property, not only against his fellows, but against the thing called government. The constitutions of Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Kentucky, Tennessee, Ohio, Indiana, Illinois and Missouri, not to speak of others, respectively provide in terms that private property shall not be taken for public use without just compensation. And the constitution of the United States has a like provision. If it is said there is no such provision in the constitution of Italy, I may answer it is quite time so plain a principle was recognized there.

Thus, you see, I was disgusted with what passes for law in Italy, and happy to find a contrast here. But I must add, I like the English system

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and practice better than our own; how, and in what respects, I will tell you in another letter. PELHAM.

The Married Woman's Law of Alabama—When the Federal Courts will Follow the State Courts.

GREENSBORO, ALA., June 9, 1874.

EDITORS CENTRAL LAW JOURNAL:—In the number of CENTRAL LAW JOURNAL issued May 28, 1874, you publish an interesting opinion of Judge WM. B. WOODS, rendered at Mobile, Alabama, in the case of Nannie C. Mitchell v. J. B. Lippincott & Co. The question raised was the validity of a certain mortgage executed by Mrs. Mitchell and her husband on the 17th February, 1869; and it was contended by the attorneys for the mortgagees that, at the date of the execution of the mortgage, the language used in the deed, by which the lands mortgaged were conveyed to Mrs. Mitchell, created in her "a contract separate estate," and that she could mortgage them according to all the decisions of the Supreme Court of Alabama prior to that time. The case of Bibb v. Pope, 43 Ala. 190, decided in January, 1869, was referred to as the earliest decision reversing the former rulings, and holding that all conveyances made directly to a married woman in Alabama conveyed to her a "statutory separate estate" irrespective of the language used. But that question was not raised or decided in Bibb v. Pope. The sole question decided in Bibb v. Pope was that a married woman in Alabama, owning a statutory separate estate here, could not mortgage it. No question was made as to the character of Mrs. Pope's estate; it being conceded to be a "statutory separate estate," as the deed to her contained no words which would have excluded her husband's marital rights by the common law. The earliest decision by the Supreme Court of Alabama holding that all property conveyed directly to a married woman became her statutory separate estate, regardless of whatever words of exclusion the grantor used in the deed, was that of Glenn v. Glenn, decided January term, 1872, and reported in 47 Ala. 208–209.

In Alabama a married woman, owning a separate estate secured to her by contract, may mortgage it. Such has been settled by our supreme court in Warfield v. Ravesies and Wife, 38 Ala. 521, and other cases. Then if, as decided by the Supreme Court of the United States in Gelpke v. Dubuque, 1 Wall. 206, and Olcott v. Supervisors, 16 Wall. 690, the construction placed by the Supreme Court of Alabama upon this Alabama statute (creating in married women a statutory separate estate), at the date of the mortgage, declaring the land to be Mrs. Mitchell's "contract separate separate estate," or, to speak more accurately, that such language as that used in the deed to her conveyed to her a contract separate estate, became a part of her contract which no subsequent reversal of those decisions could affect; then why, in a suit brought to enforce that mortgage, would not both the state and federal courts be bound to give it that construction, irrespective of subsequent decisions overruling the former ones? It was emphatically so asserted as a correct proposition of law in Gelpke v. Dubuque, and reaffirmed in Olcott v. Supervisors, *supra*, that the rule of construction at date of the contract must govern in ascertaining its validity; and if that is a correct announcement of the law, it is as binding upon a state court as on a federal court. And if the case of Mitchell v. Lippincott had been pending in a court of the state of Alabama, its decision therein, under the influence of the principle so declared in 1 and 16 Wallace, would have been controlled by the construction of the statute at the date of the mortgage, and not by those made since. But whilst it is true that the United States courts follow the decisions of state courts in the construction of their own constitutions and laws, yet "*where those decisions are in conflict*, this court must determine between them," is the language of Judge TANEY, delivering the opinion of the court in the case of Ohio Life Ins. Co. v. Debolt, 16 How. 431. This law applies with equal force to contracts respecting real estate as it does to personal property.

The authorities cited and the reasoning of Judge WOODS fail to draw our minds to the conclusion he reached. His conclusion and judgment is the same as that which would have been the legitimate conclusion arrived at by following the dissenting opinion of Judge MILLER in the case of Gelpke v. Dubuque in 1 Wallace. SUBSCRIBER.

The Obligation of a Bailee for Hire.

An interesting and important judgment has been delivered in the Court of Queen's Bench in England, by BLACKBURN, J., in Searle v. Laverick, L. R. 9 Q. B. 122, which throws a considerable amount of light on the celebrated judgment of Chief Justice HOLT in the leading case of Coggs v. Bernard. In that case bailments are divided into classes, in each of which different degrees of liability are attached to the bailee. The fifth of these classes, *locatio operis faciendi*, or where there is "a delivery to carry or otherwise manage for a reward to be paid by the bailee," is again subdivided into two divisions—the first, where there is a delivery to one who exercises a public employment, in which case a bailee is bound to answer for the goods at all events; and the second, where the delivery is to a private person, who is only bound to take reasonable care. A question arose in Searle v. Laverick, as to under which of the subdivisions of the class of bailment, *locatio operis faciendi*, the case fell. The defendant was a livery stable keeper; he entered into a contract with a builder, who was not his servant, to erect in his yard a building, of which the lower part was to be a shed for the reception of carriages, and the upper part was to be used for other purposes. Before the upper portion of the building was completed, the plaintiff brought to the defendant two carriages to keep for him, a charge being made for so keeping the carriages. While the contractor's workmen were still in the upper portion of the building, it was blown down by a high wind, and the carriages were damaged. The contractor employed for the purpose of building was not denied to be one whom a careful and prudent person might trust, and there was nothing to show that the defendan had any knowledge of negligence on his part. The plaintiff, at the trial, offered evidence that owing to the neglect of the contractor and his workmen, the fall of the building took place; but this was refused by the learned judge who tried the case, on the ground that the defendant's liability was that of an ordinary bailee for hire, and that he was only bound to use ordinary care in keeping the carriages, and if in employing the builder he made use of such care as an ordinary careful man would use, he was protected. The plaintiff was, in consequence, non-suited on a motion for a new trial; the full court, after a careful review of the authorities, upheld this decision. The court held it to be established law, by the custom of England, that the extreme liability making the bailee an insurer is confined to carriers and inn-keepers. It would seem, by analogy to the Roman law, from which the English law on the subject is avowedly taken, that the case of stable keepers should be placed on a footing with inn-keepers and carriers. The language of Lord HOLT is general, and applies to all who exercise a public employment. The Prætor's Edict (Dig. lib. iv. tit. ix.), *nautæ caupones stabularii ut recepta restituant*, expressly mentions stablemen. The reason given by Lord HOLT for the division tells, in our opinion, rather against the interpretation now put on it by the court: "The true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases (*i.e.* the carrier and inn-keeper, but *not* the livery stable keeper, according to the present decision), by reason of the necessity of the thing." We confess we are at a loss to perceive the necessity existing in the case of the carrier and inn-keeper, which does not exist with equal force in the case of the livery stable keeper. At any rate there did not appear to exist any distinction between the cases, in the opinion of Ulpian, who, in the clearest and most express manner, mentions livery stable-men. The Prætor's Edict declared that if shipmasters, innkeepers and stable keepers did not restore what they had received to keep safe, he would give judgment against them. The reason assigned for this by Ulpian is that "it is necessary to place confidence in such persons, and to commit the custody of things to them; that no person ought to complain of the severity of the rule, for it is in his own choice to receive the goods of other persons or not, and unless the rule was thus established, an opportunity would be afforded them to combine with thieves against those who trusted them; whereas they have now an inducement to abstain from such combinations." These reasons, if read in connection with the general principle on which warranties are to be assumed, laid down in Redhead v. Midland Railway Co., L. R. 4 Q. B. 392, "that they are, for the most part, founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as of the party to whom it is supposed to be given," would strongly point to the conclusion that stable keepers should be classed in the same catagory with inn-keepers and carriers.

We presume there could be no doubt of this extreme liability being applicable in the case of an inn-keeper, who also kept a stable, and took

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charge of the animals and vehicles of those who frequented his house. This is distinctly stated to be the law by Pothier (*Du Contrat de Depot*, 80), where he states "that stable servants must be judged to be appointed by inn-keepers to take charge of horses and vehicles of travellers," by which the inn-keeper is rendered liable. What difference can there be between such a case and a case where the stable keeper does not provide lodgment for "man and beast," but for "beast" alone? All the cases quoted—both those decided in this country and the *dicta* of foreign jurists—would seem to indicate that a tolerably wide margin should be allowed by a judge in deciding in the case of what trades a warranty is to be presumed. The case quoted in the judgment from Pothier (*Du Contrat de Louage*, Nos. 118, 119, 120) is a strong authority on this point. After laying down that where a person, who lets a thing for hire, knows of a defect in the thing which makes it unfit for the purpose for which it is let, he is responsible for damages. And although he does not actually know it, that if the circumstances are such that he ought to have had a suspicion of it, and make an enquiry about it, and he does not either enquire, or inform the hirer, so that he may enquire for himself, he is liable; but if the latter follows a trade which makes it his duty to know whether the thing has faults or not, he is liable, without proof that he did not know. He puts as an example the case of a cooper who supplies wine casks made of bad wood, so that they leak. Surely, if "the profession of the cooper binds him to know the quality of the goods he used, and to supply none but of a good quality," it cannot be contended that the profession of a livery stable keeper, where a person holds himself out to the public as willing to undertake the charge of property of a nature requiring the utmost care, does not bind the bailee to know of the quality of shelter which he is bound to provide to his property. The plaintiff's counsel relied mainly on Redhead v. Midland Railway Co., L. R. 4, Q. B. 392, and Francis v. Cockrell, L. R. 5, Q. B. 184, which establishes that a person who lets sittings in a temporary stand, built for the reception of spectators at a race, is under an obligation as to the sufficiency of the stand. But the court, while intimating a desire not to draw too fine distinctions between the cases, held that that case was clearly distinguishable from the present, and that there was no authority to establish that a warranty must be applied in the present case. It seems to us that the court being, in its own language, at liberty, so far as authority goes, to apply the principles to the case, and see if any warranty or obligation should be implied, in deciding as it did, rather overlooked the true principles, as laid down by the most eminent of foreign jurists, fortified by the direct *dictum* of so great an authority as Ulpian.—*Irish Law Times.*

Bona Fide Purchasers Without Notice.

The case of Caballero v. Hentz, which came up on appeal on the 11th March, from the master of the rolls, before the lords justices, seems to establish a new principle in relation to the rights of that well protected person, the *bona fide* purchaser without notice. A brewer sent his agent to bid for property, described as in the possession of certain tenants, and producing £30 a year. At the sale, however, it appears that these tenants were under-tenants of a lessee of the vendor, who held the whole property for a lease, of which nine years were unexpired, at a rent of £20. The lease was read at the sale, but it was not referred to in the abstract sent to the purchaser. A bill was filed for specific performance, but it was held by the master of the rolls, and his decision was affirmed, that the purchaser was not bound by the unauthorized act of his agent, and that he had not received constructive notice of the lease. The two cases most relied on by the plaintiff's counsel were those of Daniels v. Davidson (16 Vesey, 249) and James v. Litchfield (L. Rep. 9 Eq. 51; 21 L. T. Rep N. S. 526); the former of which may be looked upon as much shaken in authority, and the latter overruled. The point decided in Daniels v. Davidson was, that the possession of a tenant is notice to a purchaser of the tenant's interest, created by an agreement to purchase from his landlord; and it was intimated in the judgment of Lord Eldon that generally notice of occupation was notice of the terms of occupation. And the case of James v. Litchfield lays down that rule to its full extent. It is true that in the present case complications existed which were absent from the earlier ones. The question of principal and agent was involved, and the statement in the particulars of sale that the property brought in a certain annual rental, whereas it produced, in fact, considerably less, had great influence upon the decision. But there are statements in the judgment of Lord Justice James which go much further; so that, whereas under the older decision the usual rule was that notice of possession was notice of the terms under which the possession was held, the law may now be taken as settled, if the decision of the lords justices is maintained, that a purchaser may safely assume the tenantcy of an occupant to be from year to year or at will, unless he is distinctly informed of the contrary. After stating his indisposition to follow the *dicta* in James v. Litchfield (*ubi sup.*) the lord justice said: "If there is anything in the nature of the tenancies which affects the property sold, it is the vendor's duty to inform the purchaser of it, and he is not afterwards entitled to say, 'Oh, yes, but you ought to have gone and enquired.'" This decision seems to place the law upon a satisfactory basis, and while justly relaxing the stringency of the rule of *caveat emptor*, to discourage the fraudulent concealment of facts material to the property on the part of vendors.—*Irish Law Times.*

Negligence—Carriers—Passenger's Baggage.—We learn from the New York papers that in the suit of Thomas E. Fairfax v. The N. J. Central and Hudson R. R. Company, which was tried in the Superior Court of that city. plaintiff purchased in Montreal tickets of the Grand Trunk R. R. to New York, He left for New York October 8, on the route of the Rensselaer and Saratoga line to Albany, and thence by the People's line of steamers to New York. The tickets were for that route. He had seven pieces of luggage checked by the same route. The Rensselaer and Saratoga baggage check-master delivered them to the Hudson River R. R. at Troy, and the baggage arrived at the depot in New York October 9. Plaintiff got to New York October 11 by steamer, and next day demanded his baggage at the Hudson River R. R. depot, when it was found one piece, a valise, had been stolen. He brought suit for damage, and the jury decided in his favor on the ground that there was an arrangement by which defendant conveyed his luggage, and he called for it within a reasonable time, but the general term, through Judge SPIER, reversed the judgment, on the ground that the relations of carrier and passenger, which is the basis of liability for baggage, did not exist, and that the Grand Trunk Road, by its agent the Rensselaer, must be held responsible for the deviation of route by the baggage, and that the railroad which carried it were not insurers and had exercised ordinary care, and that the plaintiff ought to have called for the baggage earlier, notwithstanding that his ticket gave him a month to delay *en route*.

Book Notice.

THE CASE OF THE VIRGINIUS CONSIDERED WITH REFERENCE TO THE LAW OF SELF-DEFENCE. By GEORGE TICKNOR CURTIS. New York: Baker, Voorhis & Co., 66 Nassau street. London: Trubner & Co., 57 and 59 Ludgate Hill. 1874.

On the first appearance of this interesting pamphlet we were attracted by its title, and have read it in connection with a well-written article on "The Virginius Case" in the January number of the Law Magazine and Review, and also in connection with an extremely acute and forcible article on the same subject in the April number of the American Law Review. The English writer argues the American side of the case with much vigor and considerable learning, and although we detect in it some slight errors, such as an allusion to *Chief* Justice STORY and to Dr. *Woolsely*, yet when we recollect that all that the best writer can hope to do is to reduce such errors to a decent minimum, they do not, on the whole, diminish our respect for the writer. It is proper to note, however, that the argument of this writer is almost exclusively devoted to an attempt to show that the enterprises in which the Virginius was engaged were not *piratical*. But this argument assumes that the Virginius was a regularly documented American ship, entitled to fly the American flag, and these premises having been destroyed by subsequent evidence, the whole argument falls to the ground. The only trouble with it is that it was written a few days too soon. Whilst this and other English lawyers have taken up the cudgel in our behalf, the more just but less pleasing task has devolved upon our own jurists of showing that in that memorable controversy, so far as the right of the Spanish admiral to seize the Virginius on the high seas was questioned, Spain was right and we were wrong.

Starting with the question of the ownership and national character of the Virginius, it now appears beyond all controversy or shadow of doubt—

1. That she was not, at the time of her seizure, owned, in whole or in part, by any American citizen, but that she was wholly owned and controlled by citizens of Spain, and was used by them for the unlawful purpose of promoting a domestic insurrection in the island of Cuba, a portion of the territory of Spain.

2. That her American register was void for two reasons: (1) because it had been obtained by an American citizen through fraud and perjury; and (2) be-

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cause the bond required by law to entitle her to a registration had not been perfected.

3. That her general character and status were well known, not only to the Spanish military and naval authorities in and about Cuba, but also to our own naval officers cruising in those waters, and to our commercial agents in those and adjacent ports. The evidence that her character and status were thus generally and well known, consists in the notorious fact that previously to her capture she had succeeded in landing two hostile cargoes on the shores of Cuba. The second of these successful expeditions is remarkable from the fact that, wholly and notoriously controlled as she was by Spanish subjects, and loaded with arms and munitions of war designed to assist certain Spanish citizens to make war upon the Spanish government and other Spanish citizens, and notified by a Spanish naval officer of her real character, who earnestly solicited that she might be taken to an American port to have her true character adjudicated, the commander of an American gunboat was, nevertheless, not ashamed to convoy her out to sea from a Central American port, thus fairly rescuing her from the clutches of a Spanish cruiser, and sending her out under the sanction and protection of our flag, *to land her second hostile expedition upon Spanish territory*, which she immediately did. Such a dishonest breach of comity towards a friendly nation is calculated to make every American hang his head in shame, and goes far towards justifying the assertion of the Cuban journals that the final loss of that vessel involved another instance of Punic faith on our part—that instead of succumbing off Cape Hatteras to her own weak condition and the perils of a stormy sea, she was scuttled and sunk to avoid the inevitable consequence which would have followed the determination by an American court of her real character, namely, her re-delivery to Spain.

The Cuban insurgents not being recognized by any respectable power as belligerents, the Virginius, though owned by Spanish citizens, was without any national character. She was not entitled to fly the flag of any nation, but was a sort of *nullius filia* upon the high seas. She was, to all intents and purposes a Spanish vessel, engaged in unlawful enterprises against the Spanish government, and as clearly liable to seizure by a Spanish cruiser on the high seas as any American merchantman at sea is liable to be overhauled by an American gunboat. In reason and common sense, her fraudulent register and the device of hoisting an American flag, her real character and ownership being known, could no more confer upon her immunity against seizure by a Spanish gunboat than the same devices could confer immunity upon a pirate cruising *animo furandi* against the commerce of all nations. The utmost obligation which Spain owed us was, her American character having been asserted by our government, to have that character adjudicated by an American court.

We cannot, of course, enter into an extended argument to enforce these views. They are amply enforced by Mr. Curtis and by the writer in the American Law Review. The question, then, being one which concerns simply the right of a Spanish man-of-war to seize upon the high seas a vessel owned and controlled by Spanish citizens, and engaged in treasonable and felonious enterprises against the Spanish government and people, it would seem that the right of self-defence does not become an important question in the case. The governing principle of the case relates rather to the right which every sovereign power possesses over its own subjects, whether within its own territories or upon its vessels on the high seas. And it would seem to be only upon the supposition that her fraudulent American register made her, *prima facie*, an American vessel, that the doctrine of self-defence has any relevancy to the case. Mr. Curtis, however, discusses the question at considerable length with reference to the law of self-defence. After fully explaining the character and ownership of the Virginius, and the *personal* jurisdiction of a nation over its subjects on the high seas, he says: "If it is true that national jurisdiction over the persons and property of subjects exists, for some purposes, wherever they are—and this is the real basis of the relations between a national vessel at sea and the nation to which it belongs—it follows that a nation which has subjects cruising at sea in a vessel that is wholly under their control, which has no national character, and which those subjects are using to make incipient war upon their sovereign, may have rights of prevention which depend not upon territorial but upon personal jurisdiction. Whether those rights can be exercised on the ocean, or only within the territory of the nation that needs to exercise them, depends upon the character of the ocean, upon the practicability of exercising upon it a right of self-defence without interference with the rights of others, and upon the solid reasons why such a right of self-defence should be admitted rather than denied." Mr. Curtis then proceeds to show that the exercise of the right of self-defence has been conceded by civilized states to each other in the case of pirates, the extirpation of whom is referred by him solely to this right. He then cites the somewhat analogous case of slave traders, who may be said in a qualified sense to be enemies of all mankind. And finally, to show the "very great prominence which the law of nations assigns to the right of self-defence," he calls attention to the offence against that law denominated "piratical aggression," which consists in private war by one vessel against another upon the high seas; and in illustration of this he cites the memorable case of the Marianna Flora. He then calls attention to the case of the Caroline, which is within the memory of many of our readers. It is not a little singular that both Mr. Curtis and the writer in the Law Magazine and Review, while discussing at length the diplomatic controversy which grew out of the destruction of the Caroline, should have overlooked or omitted to cite the important case of The People v. McLeod, (1 Hill, N. Y. 377), which grew out of that affair. This case was determined in the Supreme Court of New York in 1841, before Chief Justice NELSON and Justices BRONSON and COWEN, all able and distinguished judges. It is noteworthy in this connection from the fact that Mr. Justice COWEN, who delivered the opinion of the court, attempted to answer the assertion of the British government that the destruction of the Caroline was a necessary act of self-defence.

The facts of the Caroline case were substantially as follows: In the winter of 1837–8, during McKenzie's rebellion in Canada, and while the United States and Great Britain were at peace with each other, a body of armed men, mostly Americans, took possession of Navy Island, in the Niagara river, an island belonging to Great Britain, and, having fortified their position, kept up for several weeks a frequent bombardment against the position occupied by British forces on the Canadian shore. An American steamer, the Caroline, plied regularly between Navy Island and Schlosser, on the American side of the river, furnishing the armed force on the island with supplies and stores, and keeping up a communication between them and the American shore. About midnight of the night of December 29–30, a party of British troops, under command of Colonel Allen McNabb, proceeded in small boats in search of the Caroline, found her fastened to the dock at Schlosser, in the state of New York, made a hostile attack upon her, expelled her crew, set fire to her, and she floated in full blaze over the great falls. In the skirmish, one Amos Durfee, a person employed on the Caroline, was killed, and for his murder, nearly two years afterward, one Alexander McLeod a British subject, was indicted by a grand jury in Niagara county, New York. McLeod having been arrested and confined in jail, the British minister, Mr. Fox, in a note to Mr. Webster, the American secretary of state (March 12, 1841), demanded his immediate release on the ground that the act in which he was engaged was one of a public character, "planned and executed by persons duly empowered by her majesty's colonial authorities to take any steps or to do any acts which might be deemed necessary for the defence of her majesty's territories and for the protection of her majesty's subjects, and that consequently those subjects of her majesty who engaged in that transaction were performing an act of public duty, for which they cannot be made personally and individually answerable to the tribunals of any foreign country."

In the meantime McLeod was brought before the Supreme Court of New York, under a writ of *habeas corpus*. Here the prisoner brought to the notice of the court, by affidavits and exhibits, the character of the Caroline, and of the expedition which destroyed her, as well as the demand of the British government for his release.

The case was argued with great ability by counsel, and many precedents and authorities were cited. The judgment of the court was finally pronounced by Mr. Justice COWEN, who argued the question involved at great length, displaying throughout his opinion the clearness of intellect for which he was distinguished, and the exhaustive research which was his habit. Referring to the demand of the British government for the surrender of the prisoner, he said:

"She puts herself, as we have seen, on the law of *defence* and *necessity*; and nothing is better defined, nor more familiar in any system of jurisprudence, than the juncture of circumstances which alone can tolerate the action of that law. A force which the defendant has a right to resist, must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance which he opposes. The right of self-defence and the defence of others, standing in certain relations to the defender, depend upon the same ground; at least they are limited by the same principle. It will be sufficient, therefore, to enquire of the right so far as it is strictly personal. All writers concur in the language of Blackstone (3 Black. Com. 4), that to warrant its exertion at all, the defender must be forcibly assaulted. He may then repel force by force, because he cannot say to what length of rapine or cruelty the outrage may be carried, unless it were admissible to oppose one violence with another. 'But,' he adds, 'care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for then the *defender* would himself become the *aggressor*.' The condition upon which this right is thus placed, and the limits to which its exercise is confined by this eminent writer, are enough of themselves, when compared with McLeod's affidavit, to destroy all color for saying the case is within that condition or those limits. The Caroline was not in the act of making an

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assault upon the Canadian shore; she was not in a condition to make one; she had returned from her visit to Navy Island, and was moored in our own waters for the night. Instead of meeting her at the line and repelling force by force, the prisoner and his associates came out under orders to seek her wherever he could find her, and were, in fact, obliged to sail half the width of the Niagara river, after they had entered our territory, in order to reach the boat. They were the assailants; and their attack might have been legally repelled by Durfee, even to the destruction of their lives."

Further on Mr. Justice COWEN quotes from Puffendorf the rule applicable to cases of private or mixed war, as follows: "If the adversary be a foreigner we may resist him and repel him any way, at the instant he comes violently upon us; but we cannot, without the sovereign's command, either assault him while his mischief is only *in machination*, or revenge ourselves upon him after he hath performed the injury against us." Puff. b. 2, chap. 5, § 7. "The sovereign's command must," adds the learned justice, "in order to warrant such conduct in his subject, be a denunciation of war."

McLeod was accordingly remanded to take his trial in the ordinary course of law, and was tried and acquitted, having proved an *alibi*.

Nothwithstanding the deference which is to be paid to the opinion of so eminent a judge, it is believed that the grounds taken by him, in the language above quoted, are to a great extent fallacious.

1. In the first place it is to be observed that the juncture of circumstances which can alone tolerate the action of the law of self-defence, is by no means as clearly defined—at least in the United States—as the learned justice states it to be. It is true that, on the one hand, we find the rule stated in many cases, that the danger which alone will warrant a person in striking in his defence must be *impending* and about to fall *at the time* the act of defence is resorted to, or, at least, this must be apparent to the comprehension of a reasonable man. (People v. Sullivan, 3 Selden, 396; Harrison v. State, 24 Ala. 67; Creek v. State, 24 Ind. 151; Shorter v. People, 2 Comst. 193; Logue v. Com., 2 Wright, 265; State v. Scott, 4 Ired. 409; Dyson v. State, 26 Miss. 362; Cotton v. State, 31 Miss. 504; Wesley v. State, 37 Miss. 327; Evans v. State, 44 Miss. 762; Head v. State, 44 Miss. 731; Rippy v. State, 2 Head, 217; Williams v. State, 3 Heiskell, 376; Lander v. State, 12 Tex. 462.) These cases state the general rule, and the application of it is, of course, in criminal trials, left to the jury. So, it has been said that the *right of attack for the purpose of defence* does not arise until the person defending has done everything in his power to avoid its necessity. (People v. Sullivan, *supra*; State v. Shippey, 10 Minn. 223.) On the other hand, the doctrine of these last two cases is distinctly repudiated in three cases in Kentucky, where it is held that a person who has once escaped from assassination at the hands of a desperate and persevering enemy, may kill such enemy whenever and wherever he may chance to meet him, so long as such enemy gives evidence that his murderous purpose continues. (Philips v. Com., 2 Duvall, 328; Carico v. Com., 7 Bush, 124; Bohannon v. Com., 8 Bush, 481.) And in three other well-considered judgments, it has been declared that no general rule on the subject applicable to all cases can be laid down, but that each case must depend to a great extent upon its own exigencies. Cotton v. State, *supra*; Patterson v People, 18 Mich. 330, 334; Jackson v. State, Supreme Court Term, 1873.

2. If no settled rule can be laid down in advance which shall determine the exigencies in which a person will be permitted to strike in his private defence, the attempt to apply to a state of private or mixed war, the rules which are supposed to be settled in regard to private defence, must be entirely fallacious. Thus, in a state of civil society, we say, as was said by Mr. Justice COWEN in the case we are considering, that the right to strike in one's defence does not arise while the threatened danger exists *in machination* only; because, at this stage of the danger, it is always possible to appeal to the preventive arm of the law. But a state of war, be it public, private or mixed, brings with it an accumulation of mischief which the civil law is utterly powerless to prevent; and hence, in such cases the defender must be supposed to be remitted to a state of nature in respect of his right of defence; and in a state of nature, where there is no law to which the defender can appeal for prevention, it cannot be possible that he is obliged to sit passively and watch his enemy while he compasses his destruction, instead of attacking that enemy during his work of preparation. The principle laid down by Dr. RUTHERFORTH, as applicable to *defence of life* in a state of nature, would seem to be the reasonable and consistent rule to apply to such cases. He says: "This law [*i. e.*, the law of nature] cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against, and to wait till the danger is just coming upon him, before it allows him to secure himself." But he shows that in state of civil society he is obliged first to appeal to the civil magistrate before he can lawfully strike in defence against a mischief which is only in preparation. Ruth. Inst. b. 1, chap. 16, § 5.

The principles insisted on by Mr. Justice COWEN would have required Col. McNabb to attack the Caroline in his open boats in the middle of the Niagara river, or while moored under the guns of Navy Island, and to capture her, if at all, at a useless expenditure of the lives of his men; and this to satisfy a punctilious rule of supposed law, devised by some casuist in his library!

Applying these views to the case of the Virginius, if the Spanish admiral, though aware of her hostile character, could not, because of her American flag and register, seize her on the high seas, he could not, of course, pursue her into a friendly port and blockade her there; but would be obliged to allow her to steam quietly away, to run into some creek or bay under cover of night, and land her hostile expedition on the territory he was cruising to defend. Such a conclusion is opposed to all our ideas of the right of self-defence.

But if it were practicable to draw any illustrations from the principles of the common law applicable to defence by private persons which would be applicable to public defence against such an expedition as that of the Virginius, we should suppose that Americans would be content to rest the case upon that celebrated declaration of law by Sir MICHAEL FOSTER, which has always been a favorite rule with our jurists. That eminent judge thus laid down the principle of law applicable to defence against *felonious assaults and attempts:* "In the case of justifiable self-defence the injured party may repel force with force, in defence of his person, habitation or property, against one who manifestly intendeth and endeavoreth with violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger; and if, in a conflict between them, he happeneth to kill, such killing is justifiable." Foster Crown Law, 273. This declaration of law has been frequently recognized by English and American jurists, and we believe has never been questioned. (See 1 East P. C. 271-2; Whart. Crim. Law, 7th ed. § 1019; 1 Bish. Crim. Law, 5th ed. § 853; Carroll v. The State, 23 Ala. 28; United States v. Mingo, 2 Curt. C. C. 1; Com. v. Selfridge, 1 Self-Defence Cases, 1; The State v. Thompson, 9 Iowa, 188; The State v. Kennedy, 20 Iowa, 569; The State v. Collins, 32 Iowa, 36; Com. v. Riley & Stewart, Thacher's Crim. Cases, 471; Bohannon v. Com. 8 Bush, Ky. 481; United States v. Wiltberger, 3 Wash. C. C. 515; Pond v. The People, 8 Mich. 150.) Now, applying this rule and the nomenclature of the common law to the case of the Virginius, it cannot be, and never has been, doubted that the persons on board that vessel at the time of her capture "manifestly intended and endeavored with violence or surprise to commit a known felony" against the government and citizens of Spain. At the moment of their being sighted by the Spanish admiral they were "manifestly intending and endeavoring" to land with a cargo of warlike material on the coast of Cuba for the purpose of engaging in private war against the government of Spain and those adhering to it. Viewed according to the common law, the attempt was in the highest degree felonious as to all engaged in it; for private war being *unlawful* and *unauthorized* war, or war waged by one *without jurisdiction*, as Grotius expresses it, it necessarily involves the violent felonies which the common law denominates *murder* and *mayhem*, and generally carries in its train those others which it respectively denominates *rape*, *robbery*, *burglary* and *arson*. Besides, all Spanish citizens on board were involved in an attempt to commit *treason*, a crime to which the common law assigns a higher degree and a more heinous dye than to any mere felony. Such being the nature of the attempt, the Spanish admiral might, according to this settled principle of the common law, "repel force by force," nor was he "obliged to retreat," but might lawfully "pursue his adversary" until he found himself, or the territory he was cruising to defend, "out of all danger."

Of course, what is here said has no reference to the summary execution of a portion of those found on board the Virginius, nor does Mr. Curtis or the other two writers to whom we have alluded speak of it except to condemn it. That question is supposed to depend upon other and distinct grounds of law. We may be permitted to suggest, however, that while our government has been swift to demand redress for an insult to its flag which had not been committed, it has been slow to demand reparation for the murder of its citizens by the authorities of Santiago de Cuba. We say *murder*, because it is believed that there can be no law—certainly none that Americans ought to recognize—which can sanction the putting to death by another nation of our citizens found on the high seas, upon the mere supposition, however well grounded it may be, that they *intend* to commit a crime against the municipal laws of such nation and within its territory.

Notes and Queries.

LITTLE ROCK, June 6, 1874.

EDITORS CENTRAL LAW JOURNAL:—Section 9, article 1, of the constitution of Arkansas contains the following provision: * * * "And no person, after having been once acquitted by a jury, for the same offence shall again be put in jeopardy of life or liberty." The constitution of Missouri contains a similar provision. In construing this section our supreme court held (GREGG and MCCLURE dissenting) that "where the indictment

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is sufficient in form and substance, and the defendant is arraigned, pleads, and the jury is empanelled and sworn to try the issue," a dismissal of the indictment without the consent of the defendant operates as an acquittal. Lee v. The State, 26 Ark. 260; McKenzie v. The State, ib. 334.

Has the Supreme Court of Missouri ever passed upon this clause in the constitution? Several volumes of the Missouri reports are missing from our library, or I would not trouble you with the question. G.

ANSWER.—We think there is no Missouri case in point. We have been unable to find any.

Legal News and Notes.

—HON. LUTHER S. DIXON, Chief Justice of the Supreme Court of Wisconsin, has resigned. He has held the office for fifteen years, and resigns it now to return to the practice of law, which he expects to find much more lucrative.

—CHIEF JUSTICE AGNEW, Henry W. Williams, of Tioga county, ex-Attorney-General Benjamin Harris Brewster, Hon. William A. Wallace, of Clearfield, Hon. W. H. Playford, of Fayette county, Attorney-General Samuel E. Dimmick, and Hon. A. T. McClintock, have been appointed by Governor Hartranft commissioners to propose amendments to the new constitution of Pennsylvania, under an act of the late legislature.

—IT appears from the preamble of the Tichborne and Doughty estates bill, recently introduced in the British parliament, that the expenses of the litigation occasioned by the claimant's proceedings, and which are payable by the present baronet, or, in the event of his death during minority, by the family, out of the estates, have already amounted to nearly £92,000. These are exclusive of the expenses of the prosecution for perjury, which were borne by the country.

—A CORRESPONDENT writes from Georgia that the bankrupt business in that state is flourishing. Everybody who is indebted seems eager to have all the property in his own possession, and in the possession of his friends, "assured" to himself, through the machinery of the bankrupt court. Our correspondent adds that the bankrupt law in Georgia is, in many respects, akin to the common recovery of old.

—IN the United States Circuit Court, at Portland, Maine, before Mr. Justice CLIFFORD, the case of Bradish Johnson v. Neal Dow was argued a few days ago. This was an action upon a judgment recovered by Johnson, who was a Union man, against Dow, in the sixth district of New Orleans, for sugar, silver spoons, knives, forks and a silver water pitcher, taken by a military expedition sent by Gen. Dow to the plantation of Johnson. The question was whether or not a Louisiana court had jurisdiction in the case.

—GOV. BAXTER, of Arkansas, has made the following appointments: E. H. English, chief justice, vice John McClure, impeached and suspended; Wm. M. H. Trapon, associate justice, vice M. L. Stephenson, resigned John T. Rearden, F. W. Compton, associate justices, vice Searle and Bennett, impeached and suspended; John J. Clenden, circuit judge, vice John Whytock, resigned; J. C. Davis, circuit judge, vice W. H. S. Clayton, resigned; Robert S. Fuller, circuit judge, vice George A. Kingston, resigned; J. N. Smithee, commissioner of immigration and state lands, vice Wm. H. Gray, impeached and suspended.

—THERE is no divinity that hedges a judge about and protects him from the catastrophes which are liable to befall other men. Some years ago Judge HARRIS, one of the most promising jurists on the supreme bench of Tennessee, lost his life by a steamboat explosion. More recently Judge PECKHAM, of the New York Court of Appeals, found a watery grave with the ill-fated Ville du Havre. And now we are obliged to add to the painful list Hon. CHARLES H. DOOLITTLE, of Utica, New York one of the justices of the Supreme Court of that state, who was lost at sea from the steamship Abyssinia, on the 21st of May. When his death occurred, he had been at sea but one day, the steamship having sailed on the 20th.

—SENATOR ROZIER recently delivered an argument before the Missouri state board of equalization, which is composed of the members of the state senate, in favor of assessing railroad property for taxation at the same rate at which other property is assessed. While it has been decided by the highest court in the Union that a special tax laid on railroad earnings for the purpose of liquidating the indebtedness of such railroad company to the state is valid, yet the mere mention of the proposition to tax railroad property *for general purposes* at a higher rate *ad valorem* than other property is taxed for like purposes, conveys an idea of injustice so obvious as to shock the conscience; and the fact that it was deemed necessary to make a speech against such a measure of taxation is one of the remarkable signs of the times. To tax one man's property at a higher rate than another's for the same purpose is not a whit better than highway robbery.

—THERE has been a conflict of authority between the civil and military authorities at Salt Lake. To appreciate the difficulty it should be understood that the civil authorities are Mormons. The telegraph states:

"A soldier from Camp Douglas was arrested for disorderly conduct. This morning General Morrow demanded the surrender of the soldier, to be tried by the military authorities. The surrender was refused, and Gen. Morrow ordered Captain Gordon, with a detachment of cavalry, to the city with orders to ask for the surrender of the soldier, and in case of refusal to release him by force. The surrender was refused, and the Captain proceeded to break open the jail and released the man, who is now in confinement at the military post. General Morrow some time since presented the subject of arrests by the civil authorities of soldiers to the war department, claiming that, under the articles of war, soldiers are to be tried by the military, and not by the civil authorities. The judge advocate general of the army approved of this view, and the secretary of war directed General Morrow to act accordingly. No resistance was made by the city authorities. The instructions from Washington in regard to the arrest and detention of soldiers by the Mormon authorities was printed in the papers here a day or two ago, and it is supposed a test case is intended to be made of the occurrence to-day, and that the surrender of the soldier was refused for that reason. The soldiers were cheered loudly by the assemblage of citizens witnessing the release."

—AN interesting suit has been on trial in the Fourth District Court of New Orleans, brought under the Louisiana civil rights law of 1869. The suit was brought by Capt. Peter Josephs, a colored police officer, who purchased a ticket of admission and presented it at the door of a theatre, and was refused admission unless he would consent to go to a part of the theatre other than the dress circle. The act in question gives to all parties a right of action for damages against the keepers of public establishments like hotels, theatres, steamboats, railroads, etc., who have excluded them from the legal enjoyment of the privileges of such establishments on account of race, color, or previous condition. This is the first tried of a number of suits which have been brought under the new law. The ticket expressed on its face the right of the proprietor to exclude the holder at his discretion, and assign him to a certain circle or part of the theatre different from that which he insisted on occupying. The court limited the plaintiff to proofs of breach of contract or claim for damages *ex contractu*. Theatre licenses, under the act in question, express the condition that the holders shall make no distinction of color, race or previous condition in the conduct of his business. Under the rulings of the court the plaintiff can only obtain such damages as he proves he actually incurred.

—THE manner in which the English courts keep the members of their bar in the straight and narrow path is aptly illustrated by what befell a solicitor the other day, as it is related by a leading English journal. If our own courts would be as strict in watching the members of their bar, the standard of the profession in this country would be greatly raised: "A motion was made before the Master of the Rolls to strike Mr. Greenhill off the rolls, on the ground that he had made alterations in an affidavit after it had been sworn. Mr. Greenhill's counsel admitted that he had done wrong, but as it was not done from any corrupt motive, but through excessive zeal for his client, it was hoped the court would not inflict a severe punishment. The Master of the Rolls said Mr. Greenhill was a solicitor of twenty years' standing, and therefore what he had done could not be attributed to want of experience. Although it was a case of excess of zeal, it could not be passed over. The court could not help feeling that Mr. Greenhill had no corrupt motive in making the alteration, but it was made in support of the affirmative of the main issue raised between his client and another party. That was a serious matter; and although he (the Master of the Rolls) did not intend to strike Mr. Greenhill off the roll, yet for the purpose of marking clearly his disapproval of Mr. Greenhill's conduct, he would order that he should be suspended from practicing as a solicitor for six months, and that he should pay the costs of this motion."

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JUNE 25, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

Municipal Debts — Mode of Enforcement Latest Phase of the Macoupin Case.

The Macoupin (Ill.) county bond troubles threaten to become as famous in legal history as those which have attracted attention originating in Wisconsin and Iowa. On the 18th inst. the United States Circuit Court (a full bench) granted a mandamus to compel the county board to levy a tax of one and three-fourth per cent. to pay the interest and principal of the court-house debt. Last year a similar mandamus was issued from the same court, which the board did not obey. At the last January term the supervisors, seventeen in number, were declared in contempt, were arrested and brought here by the United States marshal. They were fined $1,000 each, and the money was paid in to the clerk of the court. Afterwards the attorneys for the holders of the judgment against the county asked that the $17,000 be divided among the judgment-holders, alleging that the money was paid out of the county treasury. These facts were reported in the order of their occurrence, and it is reported that Judge DRUMMOND recently ordered that the money be so divided. He said the payment of the fine out of the funds of the county was not a satisfaction of the judgment for contempt, and that a capias would issue against the supervisors on that judgment, which he held to be still unsatisfied, so long as the allegation that the money was paid out of the public funds was not contradicted. The judgment for $1,000 now stands as a lien against the property of each of the supervisors, which can only be discharged by a personal payment of the amount.

Since the Watertown (Wis.) case decided by the Supreme Court of the United States (CENTRAL LAW JOURNAL, *ante*, 161), more than unusual interest attaches to attempts to compel reluctant municipalities to levy and collect taxes by force of mandamus proceedings, and the above presents the latest phase of the Macoupin case.

Author and Continuer of Nuisance.

In the law of *nuisance* a question of very frequent discussion and somewhat variable decision has been, against whom an action is proper to be brought, where the property causing the nuisance has, since the creation of the nuisance, passed into new hands; in other words, whether the *creation* or the *continuance* of the nuisance is the substantial ground of action. The question has arisen alike with regard to the respective or concurrent liabilities of *grantor and grantee*, and of *landlord and tenant.*

In an old case the declaration alleged that the defendant kept and maintained a bank by which a brook was caused to flow around the plaintiff's land. The court said "there is not been any offence committed by the defendant, for he allegeth that he kept and maintained a bank, which is that he kept it as he found it, and it is not any offence done by him, for he did not do anything; and if it were a nuisance before his time, it is not any offence in him to keep it." The case is distinguished from those in which every using is a new nuisance, as the using of an aqueduct which takes water wrongfully from another. There, every turning of the cock to let the water flow is a new nuisance. Beswick v. Camden, Cro. Eliz. 520.

In M'Donough v. Gilman, 3 Allen, 264, it was held that in order to render a lessee liable as for a nuisance to a passageway for refitting a privy, the refitting must have rendered the privy more of a nuisance than it was before.

In Roswell v. Prior, 12 Mod. 635, the plaintiff recovered against the defendant for erecting a building which obstructed ancient lights. The defendant had leased the ground with the nuisance and contended that the action should be against the lessee. But the court said: "Surely this action is well brought against the creator, for before his assignment over he was liable for all consequential damages, and it shall not be in his power to discharge himself by granting it over, and more especially here where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz., the rent for the same; for thereby, when one erects a nuisance and grants it over in that manner, he is a continuer with an interest."

It is held that the lessor of premises for the purpose of carrying on a business necessarily injurious to the adjacent owners is liable as the author of the nuisance. Fish v. Dodge, 4 Denio, 311. See Brady v. Weeks, 3 Barb. 157; Kint v. McNeal, 1 Denio, 436 Also (in New York) that *an action of nuisance* against an assignee alone for maintaining a nuisance erected by his grantor was unknown to the common law, and is not authorized by the revised statutes. Brown v. Woodworth, 5 Barb. 550. So, if one erect a nuisance and then convey the land with warranty, he remains liable for a continuance of the nuisance. Waggoner v. Jermaine, 3 Denio, 306. A municipal corporation is liable for the continuance of a nuisance which it has created. Pennoyer v. Saginaw, 8 Mich. 534. More than 20 years before suit was brought, the defendant had constructed a sewer or water course through property owned and occupied by him. In 1845 he let a house, shop and cellar to the plaintiff (which he had previously occupied with the property). In 1851 the watercourse burst, damaging the plaintiff's cellar and goods. In an action for negligently and improperly constructing the sewer, and keeping and continuing it in that state, the jury found that it was not originally constructed with proper care, and it was proved that it had been continued in the same state. *Held*, the action was maintainable, both upon the ground of "*sic utenetur*," etc., and because it was in derogation of the demise to the plaintiff to allow what was before rightful to become wrongful to him. Alston v. Grant, 24 Eng. L. & Eq. 122.

The remedy for a nuisance, however, is concurrent. If the owner of land on which a nuisance is created lets the land, or if a tenant, after creating a nuisance, underlets, and the nuisance is continued, an action lies at the option of the party injured, either against landlord or tenant. Rex v. Pedly, 1 Ad. & Ell. 822; Staple v. Spring, 10 Mass. 72; Plumer v. Harper, 3 N. H. 88.

The action lies for the continuance of a nuisance, though the plaintiff has accepted money paid into court in full satis-

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faction of the original erection. Holmes v. Wilson, 10 Ad. & Ell. 503.

In Ryppon v. Bowles, Cro. Jac. 373, COKE, C. J., inclined to the opinion that a tenant for years is not liable for the mere occupation of a building erected by his lessor, and which obstructs the plaintiff's lights, because his taring down the building would be waste as to his landlord.

It is no defence to an action for continuing a nuisance, by acts done on the land of a stranger, that the defendant cannot enter to abate it without rendering himself liable to action by the owner of the land. Smith v. Elliott, 9 Barr, 345. If the plaintiff recover damages for a nuisance from a lessee, who afterwards underlets, the nuisance continuing, an action still lies against the lessee for the continuance. Rosewell v. Prior, Salk. 460. See 12 Mod. 635. In a late case it is held, that one who creates a nuisance is not liable for its continuance after parting with the property with which it is connected, unless he is benefitted by such continuance, or warranted the continued use of the property, as enjoyed in connection with the nuisance. Hanse v. Cowing, 1 Lans. 288. And, in another recent case, a lessee in possession under a lease which binds him to keep the premises in repair, is held liable for a nuisance, in connection with the general principle that control of the premises creates such liability. Fisher v. Thirkell, 21 Mich. 1.

In the case of French v. Richards (Leg. Intel.), partly, however, upon the ground of a statute of Pennsylvania, the lessee of premises destroyed by fire was held entitled to contribution from the lessor, for expenses incurred in the removal of a wall which was left in a dangerous condition. HARE, P. J., suggests the following important distinctions: "It is a general and invariable rule in equity that charges necessarily incurred for a common object, or in pursuance of a legal obligation, shall be so apportioned or distributed that those shall bear the burden who receive the benefit. Under this salutary and comprehensive principle insurers may be liable for goods stolen or destroyed during the process of removal from a building which is on fire; the ship-owner bound to contribute to a loss occasioned by a jettison of the cargo; a landlord compelled to refund taxes paid by his tenants; or a tenant for life or in common entitled to require that the co-tenant or remainder-man shall bear a due proportion of a charge or incumbrance resting on the land. A lessee from year to year has, by reason of the imbecility of his title, a stronger claim to protection against charges on the inheritance than a tenant for life. That the premises which he holds are destroyed by fire or devastated by a flood, will not, it is true, entitle him to call on the landlord for aid, or even suspend the rent. If he repairs the dykes or builds up the walls it must be at his own cost. If, however, under these circumstances, a duty is imposed by the law, which though primarily that of the lessor is yet obligatory on the tenant, and actually performed by him, the right to indemnity or contribution will be as clear as in the instances already cited; and such in effect is the case now in hand, because the walls being, according to the evidence, in a condition dangerous to all around, were a nuisance, requiring instant measures for its abatement. The obligation to do this devolved in the first instance upon the tenants, as the persons in possession, and who would have been liable civilly and criminally if injury had ensued. But inasmuch as the effect of removing walls that are unfit for use is to benefit the inheritance to the full extent of the expense incurred, the plaintiffs would probably have been entitled to call on the owners of the reversion for reimbursement, even if the duty of the latter had not been defined by statute."

It is generally held, in qualification of the liability for mere *continuance* of a nuisance erected by another, that the defendant had knowledge of its injurious character, or was notified or requested to remove it. Pickett v. Condon, 18 Md. 412; Brown v. Cayuga, 2 Kern, 486; Hubbard v. Russell, 24 Barb. 404; Caldwell v. Gale, 11 Mich. 77; Crommelin v. Coxs, 30 Ala. 318; Penruddock's Case, 5 Co. 100; Winsmore v. Greenbank, Willes, 583; Woodman v. Tufts, 9 N. H. 92.

In a late case, mere complaints and attempts forcibly to abate the nuisance were held not equivalent to the direct and unequivocal notice which the law requires. M'Donough v. Gilman, 3 Allen, 264. F. H.

Conclusiveness of Judgments of Sister States.

JOSEPH J. THOMPSON, PLAINTIFF IN ERROR, v. JOHN WHITMAN.

Supreme Court of the United States, No. 111, *October Term*, 1873.

1. **Effect of Judgments of Sister States — Jurisdiction.**—Neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedidgs of every other state, nor the act of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.

2. ——. ——. **Record may be Contradicted.**—The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

3. ——. ——. ——. **In what Particulars.**—Want of jurisdiction may be shown either as to the subject matter or the person, or, in proceedings *in rem*, as to the thing.

4. ——. ——. ——. **Case in Judgment.**—By a law of New Jersey non-residents were prohibited from raking clams and oysters in the waters of that state under penalty of forfeiture of the vessel employed, and any two justices of the county in which the seizure of the vessel should be made were authorized, on information given, to hear and determine the case: *Held*, that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be enquired into in an action for making such seizure brought in New York, notwithstanding the record of a conviction was produced which stated that the seizure was made within such county.

In error to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice BRADLEY delivered the opinion of the court.

This is an action of trespass for taking and carrying away goods, originally brought in the Superior Court of New York City, and removed by the defendant (now plaintiff in error) into the circuit court of the United States. The declaration charges that on the 26th of September, 1862, the defendant, with force and arms, on the high seas, in the outward vicinity of the port of New York, and within the southern district of New York, seized and took the sloop Ann L. Whitman, with her tackle, furniture, etc., the property of the plaintiff, and carried away and converted the same. The defendant pleaded not guilty and a special plea in bar. The latter plea justified the trespass by setting up that the plaintiff, a resident of New York, on the day of seizure, was raking and gathering clams with said sloop in the waters of New Jersey, to-wit, within the limits of the county of Monmouth, contrary to a law of that state, and that by virtue of said law the defendant, who was sheriff of said county, seized the sloop within the limits thereof, and informed against her before two justices of the peace of said county, by whom she was condemned and ordered

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to be sold. In answer to this plea the plaintiff took issue as to the place of seizure, denying that it was within the state of New Jersey, or the county of Monmouth, thus challenging the jurisdiction of the justices, as well as the right of the defendant to make the seizure. On the trial conflicting testimony was given upon this point, but the defendant produced a record of the proceedings before the justices, which stated the offence as having been committed, and the seizure as made, within the county of Monmouth, with a history of the proceedings to the condemnation and order of sale. The defendant claimed that this record was conclusive both as to the jurisdiction of the court and the merits of the case, and that it was a bar to the action, and requested the court so to charge the jury. But this was refused, and the court charged that the said record was only *prima facie* evidence of the facts therein stated, and threw upon the plaintiff the burthen of proving the contrary. The defendant excepted, and the jury, under the direction of the court, found for the plaintiff generally, and, in answer to certain questions framed by the court, found specially, first, that the seizure was made within the state of New Jersey; secondly, that it was not made in the county of Monmouth; thirdly, that the plaintiff was not engaged on the day of the seizure in taking clams within the limits of the county of Monmouth. Judgment being rendered for the plaintiff, the case is brought here for review.

The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated, with due particularity, sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another state? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true that the court charged generally that the record was only *prima facie* evidence of the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specially thereon, the charge may be regarded as having reference to the question of jurisdiction. And if upon that question it was correct, no injury was done the to defendant.

Without that provision of the constitution of the United States which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," and the act of congress passed to carry it into effect, it is clear that the record in question would not be conclusive as to the facts necessary to give the justices of Monmouth county jurisdiction, whatever might be its effect in New Jersey. In any other state it would be regarded like any foreign judgment; and as to a foreign judgment it is perfectly well settled that the enquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing. "Upon principle," says Chief Justice MARSHALL, "it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without, its jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." Rose v. Himely, 4 Cranch, 269 To the same effect see Story on the Constitution, chap. xxix.; 1 Greenleaf on Evidence, § 540.

The act of congress above referred to, which was passed 26th of May, 1790 (1 Stat. 122), after providing for the mode of authenticating the said records and judicial proceedings of the states, declares, "and the acts, records, and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court in the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state the same effect, in all respects, which they have in the state where they were rendered. And the language of this court in Mills v. Duryee, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each state the same conclusive effect, as records, in all the states, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed. Justice STORY, who pronounced the judgment in Mills v. Duryee, in his Commentary on the Constitution, after stating the general doctrine established by that case with regard to the conclusive effect of judgments of one state in every other state, adds: "But this does not prevent an enquiry into the jurisdiction of the court in which the original judgment was given, to pronounce it; or the right of the state itself to exercise authority over the person or the subject-matter. The constitution did not mean to confer [upon the states] a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory." Com. on Const. § 1313.

In the Commentary on the Conflict of Laws, § 609, substantially the same remarks are repeated, with this addition: "It" (the constitution) "did not make the judgments of other states domestic judgments to all intents and purposes; but only gave a general validity, faith and credit, to them, as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they ware pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." Many cases in the state courts are referred to by Justice STORY in support of this view. Chancellor KENT expresses the same doctrine in nearly the same words, in a note to his Commentaries, vol. 1, p. 281. "The doctrine in Mills v. Duryee," says he, "is to be taken with the qualification that in all instances the jurisdiction of the court rendering the judgment may be enquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another state is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the *cause*, but of the *parties*, and in that case the judgment is final and conclusive. The learned commentator adds, however, this qualifying remark: "A special plea in bar of a suit on a judgment in another state, to be valid, must deny, by positive averments, every fact which would go to show that the court in another state had jurisdiction of the person or of the subject-matter." See, also, 2 Kent's Com. 95, note, and cases cited.

In the case of Hampton v. McConnel, 3 Wheat. 234, this court reiterated the doctrine of Mills v. Duryee, that "the judgment of a state court should have the same credit, validity, and effect in every other court of the United States which it had in the state courts where it was pronounced; and that whatever pleas would be good to a suit therein in such state, and none others, could be pleaded in any court in the United States." But in the subsequent case of M'Elmoyle v. Cohen, 13 Peters, 312, the court explained

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that neither in Mills v. Duryee, nor in Hampton v. McConnell, was it intended to exclude pleas of avoidance and satisfaction, such as payment, statute of limitations, etc., or pleas denying the jurisdiction of the court in which the judgment was given; and quoted with approbation the remark of Judge STORY, that "the constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisniction over persons and things within the state."

The case of Landes v. Brant, 10 How. 348, has been quoted to show that a judgment cannot be attacked in a collateral proceeding. There a judgment relied on by the defendant was rendered in the territory of Louisiana in 1808, and the objection to it was that no return appeared upon the summons, and the defendant was proved to have been absent in Mexico at the time; but the judgment commenced in the usual form, "And now at this day come the parties aforesaid by their attorneys," etc. The court pertinently remarked that the defendant may have left behind counsel to defend suits brought against him in his absence, but that if the recital was false, and the judgment voidable for want of no tice, it should have been set aside by *audita querela* or motion in the usual way, and could not be impeached collaterally. p. 371. Here it is evident the proof failed to show want of jurisdiction. The party assailing the judgment should have shown that the counsel who appeared were not employed by the defendant, according to the doctrine held in the cases of Shumway v. Stillman, 6 Wend. 453; Aldrich v. Kinney, 4 Conn. 380, and Price v. Ward, 1 Dutch, 225. The remark of the court that the judgment could not be attacked in a collateral proceeding was unnecessary to the decision, and was in effect overruled by the subsequent cases of D'Arcy v. Ketchum, and Webster v. Reid. D'Arcy v. Ketchum, 11 How. 165, was an action in the Circuit Court of the United States for Louisiana, brought on a judgment rendered in New York, under a local statute, against two defendants, only one of whom was served with process, the other being a resident of Louisiana. In that case it was held by this court that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that state; that the constitutional provision and act of congress giving full faith, credit and effect to the judgments of each state in every other state do not refer to judgments rendered by a court having no jurisdiction of the parties; that the mischief intended to be remedied was not only the inconvenience of re-trying a cause which had once been fairly tried by a competent tribunal, but also the uncertainty and confusion that prevailed in England and this country as to the credit and effect which should be given to foreign judgments, some courts holding that they should be conclusive of the matters adjudged, and others that they should be regarded as only *prima facie* binding. But this uncertainty and confusion related only to valid judgments; that is, to judgments rendered in a cause in which the court had jurisdiction of the parties and cause, or (as might have been added) in proceedings *in rem*, where the court had jurisdiction of the *res*. No effect was ever given by any court to a judgment rendered by a tribunal which had not such jurisdiction.

"The international law, as it existed among the states in 1790," say the court, "was that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state when the defendant had not been served with process, or voluntarily made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force. Subject to this established principle congress also legislated, and the question is whether it was intended to overthrow this principle and to declare a new rule which would bind the citizens of one state to the laws of another. There was no evil in this part of the existing law, and no remedy called for, and in our opinion congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the states where made. p. 176.

In the subsequent case of Webster v. Reid, 11 How. 437, the plaintiff claimed, by virtue of a sale made under judgments in behalf of one Johnston and one Brigham against "The Owners of Half-Breed Lands lying in Lee County," Iowa territory, in pursuance of a law of the territory. The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were rendered, and no notice by publication as required by the act. This court held that, as there was no service of process, the judgments were nullities. Perhaps it appeared on the face of the judgments in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published.

In Harris v. Hardeman *et al.*, 14 How. 334, which was a writ of error to a judgment held void by the court for want of service of process on the defendant, the subject now under consideration was gone over by Mr. Justice DANIEL at some length, and several cases in the state courts were cited and approved which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings *in rem*, no jurisdiction of the thing. Amongst other cases quoted were those of Borden v. Fitch, 15 Johns. Rep. 141, and Starbuck v. Murray, 5 Wendell, 156; and from the latter the following remarks were quoted with apparent approval: "But it is contended that if other matter may be pleaded by the defendant he is estopped from asserting anything against the allegation contained in the record. It imparts perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgment are void, and, therefore, the supposed record is, in truth, no record. * * The plaintiffs, in effect, declare to the defendant, The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle."

The subject is adverted to in several subsequent cases in this court, and generally, if not universally, in terms implying acquiescence in the doctrine stated in D'Arcy v. Ketchum.

Thus, in Christmas v. Russell, 5 Wall. 290, where the court decided that fraud in obtaining a judgment in another state is a good ground of defence to an action on the judgment, it was distinctly stated in the opinion that such judgments are open to enquiry as to the jurisdiction of the court and notice to the defendant. p. 305. And in a number of cases, in which was questioned the jurisdiction of a court, whether of the same or another state, over the general subject-matter in which the particular case adjudicated was embraced, this court has maintained the same general language. Thus, in Elliott *et al.* v. Piersol *et al.*, 1 Pet. 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that state to order a certificate of acknowledgment to be corrected, and for want of such jurisdiction to regard the order as void. Justice TRIMBLE, delivering the opinion of this court in that case, said: "Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The same views are repeated in The United States v. Aredondo, 6 Pet. 691; Voorhees v. Bank U. S., 10 Pet. 475; Wilcox v. Jackson, 13 Pet. 511; Shriver's Lessee v. Lynn, 2 How. 59, 60; Hickey's Lessee v. Stewart, 3 How. 762; and Williamson v. Berry, 8 How. 540. In the last case the authorities are reviewed, and the court say: "The jurisdiction of any court exercising authority over a subject may be enquired into in every other court when the proceedings in the former are relied upon and brought before the

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latter by a party claiming the benefit of such proceedings;" and "the rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states."

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent enquiry, a slight form of words might always be adopted so as to effectually nullify the right of such enquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the states, it is true, are held to impart absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force.

It may be observed that no courts have more decidedly affirmed the doctrine that want of jurisdiction may be shown by proof to invalidate the judgments of the courts of other states than have the courts of New Jersey. The subject was examined and the doctrine affirmed, after a careful review of the cases, in the case of Moulin v. Insurance Co., 4 Zabriski, 222; and again in the same case in 1 Dutcher, 57, and in Price v. Ward, ib, 225; and as lately as November, 1870, in the case of Mackay *et al.* v. Gordon *et al.*, 34 New Jersey Rep. 286. The judgment of Chief Justice BEASLEY in the last case is an able exposition of the law. It was a case similar to that of D'Arcy v. Ketchum, in 11th Howard, being a judgment rendered in New York, under the statutes of that state before referred to, against two persons, one of whom was not served with process. "Every independent government," says the chief justice, "is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a state against a citizen of such state in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign state."

On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state, may be questioned in a collateral proceeding in another state, notwithstanding the provision of the IVth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

This is decisive of the case; for, according to the findings of the jury, the justices of Monmouth county could not have had any jurisdiction to condemn the sloop in question. It is true she was seized in the waters of New Jersey, but the express finding is that the seizure was not made within the limits of the county of Monmouth, and that no clams were raked within the county on that day. The authority to make the seizure and to entertain cognizance thereof is given by the 9th section of the act, as follows:

"It shall be the duty of all sheriffs and constables, and may be lawful for any other person or persons, to seize and secure any such canoe, flat, scow, boat, or other vessel as aforesaid, and immediately thereupon give information thereof to *two justices of the peace of the county where such seizure shall have been made*, who are hereby empowered and required to meet at such time and place as they shall appoint for the trial thereof, and hear and determine the same; and in case the same shall be condemned, it shall be sold by the order of and under the direction of the said justices, who, after deducting all legal costs and charges, shall pay one half of the proceeds of said sale to the collector of the county in which such offence shall have been committed, and the other half to the person who shall have seized and prosecuted the same."

From this it appears that the seizure must be made in a county, and that the case can only be heard by justices of the county where it is made—"two justices of the peace of the county where such seizure shall have been made." The seizure in this case, as specially found by the jury, was not made in Monmouth county, but the justices who tried the case were justices of that county. Consequently the justices had no jurisdiction, and the record had no validity.

It is argued that the seizure was continuous in its character, and became a seizure in Monmouth county when the sloop was carried into that county. This position is untenable. Suppose the seizure had been made in Cumberland county, in Delaware bay, could the sloop have been carried around to Monmouth county and there condemned on the ground that the seizure was continuous and became finally a seizure in Monmouth county? This would hardly be contended. But it is said that the seizure was made within the state, off the county of Monmouth, and not within the limits of any county; and, hence, that Monmouth county was the first county in which the seizure took place. If this had been true (as it undoubtedly was), and the jury had so found, still it would not have helped the case. The major proposition is not correct. A seizure is a single act, and not a continuous fact. Possession, which follows seizure, is continuous. It is the seizure which must be made within the county where the vessel is to be proceeded against and condemned. The case may have a *casus omissus* in the law; it is certainly not included in it.

As this disposes of all the errors that have been assigned, the judgment must be affirmed.

JUDGMENT AFFIRMED.

NOTE.—In Knowles v. Logansport Gaslight Co., determined by the same court at the same term, the following points were ruled:

1. A return to a summons by the sheriff that he has served the defendant personally therewith is sufficient, without stating that the service was made in his county. This will be presumed.

2. But, in an action on a judgment rendered in an other state, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served, and that the court never acquired jurisdiction of his person. The previous decision in Thompson v. Whitman affirmed and applied.

Mr. Justice BRADLEY delivered the opinion of the court, as follows:

This was an action on a judgment recovered by the defendant in error against the plaintiff in error and one Harvey, in the Circuit Court for Cass country, in the state of Indiana. The defence was that that court did not have jurisdiction of the person of the defendant. The record produced on the trial was somewhat anomalous. Three defendants were sued in the Cass county court—Bain, Knowles and Harvey—none of whom resided in Indiana. Bain was served with process in New York, and after a long struggle to get the proceedings dismissed as to himself, removed the cause into the Circuit Court of the United States under the act of 1866, and obtained a judgment in his favor. The cause was then remanded to the Cass county court, and judgment by default was rendered against Knowles and Harvey. In some respects the proceedings seem to have been conducted as a suit on attachment, the property of the defendants (who resided in Minnesota) being attached, and other creditors being allowed to come in to participate in the proceeds. Nevertheless the records of the proceedings contained, amongst other things, the copy of a summons in the case, issued to the sheriff of

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Cass county, against all of the defendants, and a return thereto in the following words: "I do hereby certify that I served the within writ on the 14th day of September, 1865, upon Alfred H. Knowles and Thomas Harvey, personally, by reading the same to them. And I further certify that John M. Bain cannot be found in my bailiwick." The return was signed by the sheriff's deputy. This is all that appeared in the record on the subject of service of process on Knowles and Harvey, or in reference to their appearance or non-appearanee to the action. The defendant on the trial of the present action, contended that the return of the sheriff was insufficient to charge him personally in the former action, inasmuch as it did not show that service had been made in the proper county, or where it was made; and, being overruled on this point, he offered to prove by himself and Harvey that neither of them had in fact been served with process, and that the return was false. This evidence was excluded on the ground that the record could not be contradicted a in collateral proceeding. She case is brought here on a bill of exceptions.

Upon the first point, that the return was insufficient, the plaintiff in error relies on a decision of Mr. Justice NELSON, at the circuit, in the case o Allen v. Blunt, 1 Blatchf. C. C. R. 480, in which it is supposed to have been held that a return of service by the United States marshal, without showing that the service was made in his district, was insufficient to give the court jurisdiction of the person. What Justice NELSON held in that case was this: that inasmuch as the 11th section of the judiciary act declares that "no suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ;" therefore, the jurisdiction of said courts depends on service or inhabitancy in the district, one of which should appear of record; and inasmuch as the record of that case contained no allegation on the subject, and the jurisdiction of the court depended entirely on the marshal's return to the process, the return was insufficient to give it. This authority, therefor, is not in point. The case was in the United States court, and depended upon the peculiar phraseology of the act of Congress referred to therein; whereas the case in Cass county, now under consideration, was in a state court; and it is familiar law that a court of general jurisdiction will be presumed to have had jurisdiction of the cause and the parties until the contrary appears. In our judgment, therefore, the return on its face shows no ground of error. It will be presumed that the service was made in the proper county.

But the defendant also offered to prove by himself and Harvey that neither of them had ever in fact been served with process, and that, in consequence the court had never, as to them, acquired jurisdiction of the person.

As this subject has been fully considered by us in the case of Thompson v. Whitman, just decided, it is unnecessary to go over the subject again. In our opinion the defendant had a right to show by proof that he had never been served with process, and that the circuit court of Cass county never acquired jurisdiction of his person. As this was refused him on the ground that the evidence was inadmissible, the judgment must be reversed. We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the state in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state. But in the case of non-residents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears.

Jugdment must be reversed, and a *venire de novo* awarded.

Removal of Causes from State to Federal Court —Power of a Federal Court Pending a Determination of the Question of Jurisdiction to Protect the Rights of the Parties.

GEORGE B. WARREN, COMPLAINANT, v. STEWART IVES *et al.*, DEFENDNATS.

Circuit Court of the United States, Western District of Michigan, March 21, 1874.

Before Hon. SOLOMON L. WITHEY, District Judge.

1. **Removal of Suits from State to Federal Court—Power of Federal Court to Protect the Rights of the Parties pending a Determination of the Question of Juris diction—Injunction.**—When a cause has been removed from a state court to a federal court, and the jurisdiction of the federal court is objected to, the federal court has power, pending the determination of the question of jurisdiction, to protect the rights of the parties; and where land is the subject of the controversy, it will, on a proper showing, award an injunction to restrain waste.

In equity; motion for injunction.

Norris, Blair & Kingsley, of Grand Rapids, solicitors for complainant; *Eggleston & Kleinhaus*, of Grand Rapids, solicitors for defendants.

WITHEY, J.—In 1872 Stewart Ives commenced suit by bill in equity in the state court of Mecosta county, against George B. Warren and others, claiming to be the owner of a tract of some four thousand acres of land, by title derived from Chauncy P. Ives, and alleging that said Chauncy P. Ives, prior to the conveyance to Stewart Ives, had, by deed, absolute on its face, of date July 15th, 1859, conveyed same land to George B. Warren and Frederick B. Leonard, to secure indebtedness from the grantor to the grantees. The bill claims such prior conveyance to be but a mortgage, prays for an accounting, offers to pay any balance found due to Warren and Leonard, and asks that the deed to them be decreed to be cancelled.

Warren and the other defendants, being citizens of New York, petitioned to have the cause removed to this court, which was opposed, but the state court held the petition to be sufficient and ordered the removal. In May, 1873, the papers were presented and allowed to be filed in this court. This was followed by a motion of Ives to remand for non-compliance with the act of congress providing for the removal of causes from the state to the national courts. After hearing that motion, my impression was that the cause ought to be remanded, but the question raised was new and the case an important one. I therefore reserved the motion for hearing before the circuit judge, and ordered it placed on the reserved list. Owing to Judge EMMONS' continued absence the motion has not been heard.

On the 25th February last, the cause and parties being thus situated, Mr. Warren, by leave, filed his cross-bill in this court against Stewart Ives and others, in which he sets up his title in fee to the land in question; claims the conveyance of July 15th, 1859, from Chauncy P. Ives to Warren and Leonard, was not only absolute in form, but made, executed and delivered as such, and not for the purpose of securing indebtedness. Statements are made in the bill for the purpose of showing the absolute character of the deed, and of the intention of the parties to it. The lands are shown to be principally valuable for their standing pine timber, and defendants, or some of them, have, during the winter 1873–4, cut and removed a large quantity of the timber, and were, when the bill was filed, still at work cutting and removing the timber. Complainant prays that his title be confirmed, and that defendants be restrained from committing waste, and from sawing, selling or using the saw-logs already removed, etc. A provisional injunction was issued, and an order granted on defendants to show cause. They have answered, and filed affidavits against the injunction. The showing is conclusive on the question of waste, and if the court has power to protect the lands from depredation, pending a settlement of the question of title, it should be exercised.

Jurisdictional questions are urged by defendants' counsel, and these I proceed first to dispose of. It is claimed that the bill filed by Warren is a cross-bill, and as such cannot be sustained, for the reason that there has been no removal of the cause of Ives against Warren and others from the state court. Again, that as an original suit, this court has no jurisdiction of complainant's bill, inasmuch as it covers the same subject-matter and is between the same parties in interest as the suit brought by Ives in the state court.

When the bill of complaint of Warren was presented to me for leave to file, and for an order for a provisional injunction against waste, I understood it to be framed with a double aspect, asking that the bill stand as a cross-bill if the motion to remand was denied, or as an original bill in case that motion should prevail. By reference to page 26 of the printed bill it will be seen that such must have been the original intention of the pleader, but its language very singularly asks that the bill may stand as a cross-bill in either event. Thus framed, the clause wants appropriateness

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and proper expression. After what complainant's counsel has said at the argument, that the bill was designed to be in the alternative, I shall so regard the case, and permit an amendment at once and without terms.

Touching the status of the suit brought by Mr. Ives in the state court, and sought to be removed to this by Warren and others, it is urged that inasmuch as I intimated the petition to be defective, on the argument of the motion to remand, any exercise of jurisdiction now by the court over that case would be inconsistent with such expressed views, and *prima facie* unauthorized. This objection assumes the bill filed by Warren to be a cross-bill and nothing more, whereas it was, as already explained, presented and allowed to be filed either as a cross-bill or as an original bill, depending upon the disposition which should ultimately be made by Judge EMMONS of the motion to remand. As I shall show when the second objection is discussed, jurisdiction attaches to Mr. Warren's bill as an original bill if the suit by Ives is dismissed to the state court. But I entertain the view that, as a cross-bill, the court would be justified in asserting jurisdiction. The question is new, for I find no authorities to govern me; but *prima facie*, the suit of Mr. Ives has been removed from the Mecosta Circuit Court and is pending here. That court ordered the cause removed, and it was so far consummated that the papers were taken from that into this court, and are here filed and the case docketed. The state tribunal, by an order of removal granted after a hearing, judicially declared itself without further jurisdiction, and would not now probably assert further jurisdiction. The case is one clearly within the act of congress providing for the removal, and defendants in that suit have attempted, and, as they claim, successfully, to comply with the statute. This court has so far entertained the cause as to hear a motion to remand, after allowing the papers to be filed, and without deciding the motion, has allowed a provisional injunction to protect rights for the time being. The simple fact that the jurisdiction of this court is challenged does not raise a *prima facie* case against it, nor do I quite appreciate why a previous intimation against retaining the cause, but which intimation is not a decision, should have the effect claimed of preventing the court from giving such incidental protection as the rights of the parties require, while the jurisdictional question is pending and undetermined. For the present the controversy is pending here *prima facie*, and while courts are careful not to exercise a doubtful jurisdiction, they will not, while parties are before them under a claim of right, refuse to protect the interests of the parties in an emergency like the present one, from the fact that jurisdiction is questioned or even doubtful.

But, as I have already said, the bill by complainant Warren is not to be regarded merely as a cross-bill for the purposes of this motion. Whether it will stand here as a cross or as an original bill depends upon the future disposition of the motion to remand. It is claimed, however, that by the well-recognized rule of comity, this court will not entertain a suit where it appears the same parties in interest are litigating the same subject-matter in a state court. The proposition is fully conceded, and if we are to regard this bill as an original and not as a cross-bill, then the rule of comity insisted upon fails to defeat jurisdiction, for the reason that it appears that the question of an injunction to restrain waste is not involved in the suit by Ives against Warren and Leonard, and although the title to the land is in controversy in that suit, this court may properly entertain a suit between the same parties having for its object the prevention of waste pending the litigation in the state tribunal. Citizenship of the parties and the amount in controversy, as well as the subject-matter, injunction, gives to complainant the right to invoke the jurisdiction and power of this court to protect his rights in the land, and so far as those rights are not involved in the other suit, this court has no right to refuse what the act of congress imposes as a duty.

It is true this bill is framed to meet an emergency, and, therefore, is not more than an injunction-bill, inasmuch as it asks other relief than an injunction. The undetermined question on the motion to remand the Ives suit induced and justified framing the bill in this present aspect.

Should the Ives suit be remanded, it would be competent for complainant to so amend the prayer of his bill as to render it simply an injunction-bill, and under the circumstances attending the case, the court would so administer the rules of practice as to accomplish the end and purpose of jurisdiction instead of defeating them. It is one of the distinguishing features of equity that it adapts itself to the circumstances and rights of parties, when once its jurisdiction attaches, so that if it cannot give the precise remedy asked, it will grant such as the very right of the matter demands under the general prayer for other relief. Upon the whole I am not in doubt as to jurisdiction.

Authorities were cited and discussion had touching the abolute or conditional character of the deed of July 15th, 1859, by Chauncy P. Ives to Warren and Leonard; it is enough to dispose of that question for the present, that the showing here leaves that consequence in doubt. "Who owns the land?" is the principal and vital question at issue, and when the evidence shall be before the court, it can be more intelligently determined. Thus far the showing on both sides is necessarily incomplete, and, as it is *ex parte*, is unsatisfactory for the purpose of passing on the absolute or conditional character of such deed. This belongs to the final hearing, and should await that stage of the cause. Meanwhile neither party ought to be suffered to remove the timber, which is the chief value of the land. So far I feel constrained to go under the showing. But Mr. Ives having been suffered to remove timber during the winter of 1873-4, and having a steam-mill to be stocked from the logs got in part from the lands in question, to enjoin him from sawing and disposing of this lumber, would work great, if not irreparable injury to him. I am not disposed to do that which will break up his business, under all the facts and circumstances of the case. Mr. Warren is not without remedy at law for the value of the timber cut, or by replevin for the logs, if he is owner. If the deed is but a mortgage, then the land and remaining timber, worth not less than one hundred and twenty thousand dollars, are ample security for his debt.

The injunction will be modified to prevent cutting the timber, and continued.

INJUNCTION AWARDED.

Power of Married Women to Borrow Money in Mississippi.

VISER v. SCRUGGS.

Supreme Court of Mississippi, April Term, 1874.

1. **Contracts of Married Women—Mississippi Statute.**—The statute respecting the separate estate of married women, and their power over it, is enabling, and confers a *legal* capacity to make the class of contracts therein mentioned.

2. ——. ——. **Power of Feme Covert to Borrow Money.**—A *feme covert* has not the general power to borrow money, although it is specified in the note (signed by herself and husband) to be for one of the purposes for which she may make a valid contract.

3. ——. ——. ——. If, however, it is shown that the money was actually used for *such* purpose, her promise to repay would be binding. The actual use to which the money was put makes the liability.

4. ——. **Liability of Husband.**—A note given for money loaned the wife, signed by husband and wife, may not be binding on wife, but it is nevertheless good against the husband. In such case a deed in trust on wife's property encumbers the income.

Opinion of the court by Mr. Justice SIMRALL.

It is not now controverted that the statutes respecting a married woman's separate estate, and her power of disposing of and binding it and herself by contracts, are enabling, in derogation of the rights of the husband as at common law, and confer upon her *legal* capacity which she did not before have. In determining,

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therefore, her responsibility for a debt, it must be ascertained what was the subject-matter and consideration. If it comes within the statute, and is of the class of those for which she could bind her separate estate, then it is a *legal* demand, enforceable in a court of law. The statutes, so far as they go, relieve from disability and confer legal capacity.

Considering the note and deed of trust in this case as the promise and security therefor, given by the wife for a loan of money by Viser to her, two enquiries arise. First, has she capacity to borrow money at all? and, secondly, how is the question affected if borrowed for any of the purposes set forth in the statute? The purpose and consideration stand out prominently as the test and criterion of the validity. It does not at all advance the argument whether the contract is by promissory note, bond, or verbal. If a married woman can incur the debt at all, she may make a memorial of it in any form and dignity of writing.

Manifestly a married woman has no power to bind her estate for borrowed money, for that is not one of the obligations which she may incur within either the 24th or 25th sections of the statutes of 1857. Code, p. 336. She may contract for "family supplies or necessaries, wearing apparel for herself and children, or for their education." * * * (Last clause of § 25.) If she is under an obligation already to pay such a debt, she might, in order to discharge it, borrow money, and so apply it. The lender of the money in such case would be substituted to the merit of the debt of the original creditor. The transaction would not impose an additional burden on her property. The effect would be merely to shift a meritorious debt from one person to another. It might be very beneficial to her, by avoiding the expense and vexation of a suit, and procuring a postponement until her resources would be available. She might borrow money to defray domestic and family expenses, and apply it from time to time as exigencies required. The debt in this instance would be to the lender, instead of to the person who furnished the necessaries.

The general proposition remains true that the wife cannot borrow money. If that were all that was shown, no liability would be imposed upon her estate. But if the money was actually used to pay debts already existing for the domestic purposes named in the statute, or if borrowed so that the ready money might be paid for such expenses, and was [illegible] paid, it would be within the equity and policy of the statute to hold her estate bound to the lender. The merit and validity of such contract depend exclusively on the fact that the money in the first case actually extinguished a charge upon her estate, and in the second, that it was used to defray the expenses of the family. It is the use, and that only, to which the money is put, that makes the debt meritorious. This question arose in Brown and Wife v. Thomas E. Helm (MS. opinion). It was conceded that the *feme covert* did not, under the statute, have the power to borrow money. "But," said the court, "if the money was used in making purchases or discharging obligations which were within her power to make or incur, and the separate estate shall have received the benefit of it, she would be liable; but she should not be liable for any more of such money than was used by her as aforesaid." The principle is, that whilst a married woman cannot bind her estate for money loaned, nevertheless, if the lender can show that it was really applied to discharge a debt for which her estate was already bound, or to make purchases for the objects enumerated in the statute, then the lender may recover.

In making the loan, Viser took the risk that Mrs. Scruggs would devote the money to the purposes recited in the note—"purchasing family supplies and necessaries, wearing apparel for herself and children." If the money was not appropriated to exonerate her estate from valid debts, or to improve per property, or for the objects named in the note, or other objects for which she would incur liability, there is none resting upon her or her estate. The appellant, Viser, has failed to show such use of the money. It would follow, then, that the decree of the chancery court is right unless Mrs. Scruggs is responsible upon some other view of the case.

It has been strenuously pressed in argument that Mrs. Scruggs is bound by the recitals in the note and deed in trust, and that they operate by way of estoppel. Mrs. Scruggs could no more borrow money for the purposes named than for any other. The circumstance that charges her estate is not the intent or use to which the loan was to be put, but how was it used? Was it employed to relieve her estate from debt, or for any of the objects named in the statute? If not, the estate is not chargable. It is not a question of good faith, but a capacity to make a particular contract. Viser occupies no better position than if he had made the loan without a specification of the purposes. Suppose Mrs. Scruggs had given a warrant that she would apply the money as recited in the note, could a suit be maintained upon it? That would not be pretended. The recital of the objects for which the money was procured gives no validity to the promise. If there had been a verbal statement of the reasons for borrowing, and the note had omitted the recitals, containing simply the promise to pay, it would have been this transaction in legal effect. The right of recovery depends on the *fact* of how the money was used.

We are thus brought to the conclusion that the note, and deed in trust to secure it, considered exclusively with reference to Mrs. Scruggs' power to borrow money, would be null and of no effect.

2d. The next question is, is the deed in trust a valid security, regarding the note as the debt of the husband? It was ruled in Sessions *et ux.* v. Bacon *et al.*, 23 Miss. 273, and other cases, that inasmuch as the wife had the power under the act of 1839 to convey her property absolutely, she had the lesser power of making a conditional conveyance—that she could mortgage for her husband's debt. This construction enabled her to pledge the entire separate property, its *corpus* and title in fee. This decision was made in 1852. Prior to this, in Berry v. Bland, 7 S. & M. 83, and Frost v. Doyle & Co., *et ux.*, 7 S. & M. 75, 76, and other cases, it had been held that the debts of the wife could not be chargeable upon her separate estate held under the statute except in the mode therein mentioned. It was in this condition of the law that the revision of 1857 was made, which enacts, "and no conveyance or encumbrance for the separate debts of the husband shall be binding on the wife beyond the amount of her income." Last clause of sec. 23, p. 336, code. The first clause provides that the wife's property shall not be taken for the husband's debts, "nor shall such property, or any part, * * be sold, conveyed, *encumbered* or *mortgaged*, unless the wife shall join in the conveyance." We take the last clause as a limitation upon the right to encumber or mortgage for the separate debts of the husband. Although the notes are not obligatory on Mrs. Scruggs, there is no doubt they are on the husband. Whitworth v. Carter, 43 Miss. 66. Being void as to her, does that make them the separate debts of the husband, within the statute? Aside from this, we think that the preponderance of testimony is that the loan was made to the husband on the credit and faith of the deed in trust on the wife's property. In her original bill Mrs. Scruggs gives that complexion to the transaction. "She merely signed the notes and deed in trust for her husband, and as his security." In her amended bill she makes substantially the same statement—denies that any money was ever paid to her, or advanced to her to buy family supplies. The testimony sustains her pleading. The meaning of the words "separate debts" in the statute, is those debts for which there is no liability upon the wife or her property—debts for which the husband alone is responsible. Debrell v. Carlisle, 48 Miss. 691. In that case the note was signed by husband and wife, and secured by mortgage on her separate property. Part of the note was for a separate liability of the husband, and part was valid against the wife. *Held*, that the mortgage pledged the *corpus* of the property for so

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much of the debt as the wife could contract. But as to the residue, which was only obligatory on the husband, it would stand as security on the income. It was so ruled, also, in Foxworth v. Magee, 44 Miss. 432–4.

Under the statute of 1857 the wife may encumber her estate for all the liabiliites which she can by the statute incur. Such encumbrance extends to the *corpus* of the property. But for the debts of the husband the wife can only mortgage or encumber the income.

If Mrs. Scruggs were, through her separate estate, bound for this debt, then the deed in trust would take hold of the *corpus* of the estate to the full extent of her interest; but inasmuch as the debt was the husband's alone, the deed in trust encumbered no more than the income.

Wherefore the decree is reversed and cause remanded.

REVERSED AND REMANDED.

Removal of Causes from State to Federal Courts.

FARMERS' LOAN AND TRUST COMPANY v. SAMUEL MAQUILLAN.

United States Circuit Court, District of Kansas, June Term, 1874.

Before Mr. Justice MILLER, and DILLON, Circuit Judge.

1. Removal of Causes from State Courts—Act of March 2, 1867—Corporations—Affidavits.—Corporations are within the act of March 2, 1867 (14 Stats. at Large, 558), in respect to the removal of causes from state to federal courts, and on a petition, and the making by the proper officer of the corporation of the required affidavit, are entitled to the benefit of the act.

The plaintiff is a New York corporation and commenced this suit in one of the state courts of Kansas, and afterwards made an application in the state court to remove the same to this court. The petition and affidavit for removal were made under the act of congress of March 2, 1867. The state court ordered the removal; and in this court the defendant moves to remand the cause to the state court. The ground of the motion is that corporations are not within the act of March 2, 1867.

Doniphan & Reed, for the plaintiff; *Nathan Price*, for the defendant.

Mr. Justice MILLER, orally delivering the opinion of the court, in substance said:

I think this motion must be denied. A great proportion of causes in the federal courts are those in which corporations are parties, and which come by transfer from the state court, and it was never before claimed to me that they were not within the acts of congress on that subject, or within the act of March 2, 1867. My impression in favor of the jurisdiction in this particular class of cases was so strong that I should have overruled the motion at once but for the circumstance that a decision of the Court of Appeals of New York, and a decision of the Supreme Court of Minnesota, were produced, the former doubtfully, the latter positively, denying to corporations the right to remove cases under the act of March 2, 1867, 14 Stats. at Large, 558.

I have considered the opinions in those cases, and with great respect for the courts whose judgments they pronounce, I think their views upon this subject are not sound, and that, not unnaturally, perhaps, they incline too much to narrow and cripple the federal jurisdiction. The history of the state court decisions on the subject of federal jurisdiction from the case of Cohens v. Virginia, 6 Wheat. 464, shows that, if the state courts could have defined the limits of that jurisdiction, the fabric of federal jurisprudence, as it exists to-day in this country, would have been shorn of its beauty and symmetry, and the system of its efficacy and usefulness.

I am not impressed with the soundness of the argument that because corporations cannot make an affidavit, except through the proper officers, they were not within the contemplation of congress. I think that the proper officers of corporations may make the necessary affidavit to procure the removal.

I do not join in the condemnation of the act of 1867. It does not allow the removal solely on the ground of citizenship. It requires the requisite citizenship to exist, and in addition thereto requires the existence of prejudice or local influence to be shown by affidavit. In this respect the policy of that act is not unlike that which prevails in perhaps all the states in regard to the change of venue from one county, or one judicial district, to another. Johnson v. Monell, 1 Woolw. 390. The object in each case is to secure an impartial tribunal, and the federal courts are not courts for non-residents more than for residents, and no injustice is done to the latter to be compelled there to litigate controversies which they may have with citizens of other states.

DILLON J., concurs. MOTION DENIED.

Correspondence — An American Lawyer in London—A Day at the Old Bailey.

LONDON, May, 1874.

EDITORS CENTRAL LAW JOURNAL:—I said in a former letter to you I was pleased with the administration of law here. I had heard a great deal said before I came here about the "Old Bailey." It was always represented as an altogether unseemly place—a place where cases were disposed of in a summary manner and insufficient opportunity given to the defendant to be heard in his defence; where mostly atrocious men and women were atrociously tried; where the fact that the defendant had been complained of and brought into court to answer to the complaint was deemed to be *prima facie* evidence that he was guilty; the presiding justice sometimes propounding to the already confounded defendant the perplexing conundrum—"if you are not guilty, what are you here for?" Many a fourth of July oration would have lost its point if the fancied statements contrasting the way of doing these things in England with that of doing them in the United States had been omitted. Yet I have seen a judge in Massachusetts, who, when a jury returned a verdict acquitting a defendant, contrary to the tendency of his charge and expectation, look and act, for all the world, as though he had sustained a personal loss; or, for example, not unlike a hitherto hopeful administrator *de bonis non* when all of a sudden he discovered there were no goods to be administered. And more recently than that, I have heard a district attorney in Boston, in summing up, and when there was no opportunity to reply, say to a jury that he was justified in pronouncing certain papers that had been offered in the case to be forgeries, when in truth he had seen the papers and knew them to be genuine. Perhaps a little reflection ought to have satisfied me that there must be reasonable fairness, at least, in trials in England at this time. But I was desirous to see for myself. I had attended the courts at Westminster, and seen how admirably cases were heard and determined there—about which I may at another time write you.

Accordingly, with a friend from California, on Monday the 4th of May, I walked from Charing Cross up to Oxford street, down Holborn, over the Viaduct to Newgate and the Old Bailey. The exterior has an uninviting aspect. The same old, high, black wall, flush with the street, encloses the prison and the court on that side. Within, the court is separated from the prison by a court-yard. The jurisdiction of the court is defined by act of parliament. It is called in the act the Central Criminal Court. It has jurisdiction of cases arising in the police courts of the city of London, and certain metropolitan police courts. In point of fact, I believe its jurisdiction covers certain offences committed within ten miles of St. Paul's. The presiding judge is the Right Honorable RUSSELL GURNEY, the recorder of London. He has an assistant, Sir T. CHAMBERS, the common seargeant of the corporation of London. I sent my card to the sheriff, and was admitted. Mr. Justice GURNEY was presiding. A woman was set to the bar to be tried. The indictment charged her with the larceny of certain books. She pleaded "not guilty." A jury was empanneled. The counsel for the government stated the case briefly and very fairly. He introduced a witness by whose statement it appeared that the books belonged to the firm named in the indictment as the owners, and that they had been stolen by some person or persons from their store. Another witness testified that he saw the books on a barrow on the sidewalk, and the barrow was upset and the books spilled out, and that a man and the defendant were stand-

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ing near by, and that one of them—the woman, I believe—took hold of the barrow to right it. He also testified that he had some conversation with the woman in which she denied that the man was her husband, whereas the man insisted that the woman was his wife. The witness also testified to some conversation with the woman in respect to the barrow and the books; but his testimony failed to show any original taking of the books by the woman or the possession, either alone or in conjunction with the man, afterward. The defendant was about to put some questions to the witness, when the judge very considerately said to her, the evidence thus far failed to connect her with the crime, and perhaps it were best to leave it as it was, which the poor woman had sense enough to do. Another witness was called, but he, too, failed to show recent possession of the stolen property by the defendant. Still another witness was introduced, who testified to conversations with the defendant at the time of her arrest, but this testimony only went to show that she made contradictory and incredible statements with reference to her relationship with the man near the barrow. The counsel then offered the examination of the defendant before the lower court as taken down at the trial; but the presiding judge, after argument and inspection of the examination, deemed it inadmissible, and excluded it. At the close of the government's evidence, the judge instructed the jury that there was no evidence to warrant a conviction; and they returned verdict of a "not guilty." I stayed to see another case tried in part. I was the more interested in the judge because he was one of the "joint high commission," and had, when in Boston on his way back to England, visited our own supreme court. His manner at this trial was admirable, having respect to the counsel, respect for the law and the rights of the defendant as well as those of the government. So fair a mind must have been fair as a member of the commission; and I am willing to believe his government appointed him thereto not merely because they knew him to be able, but because he was known to be honorable and fair also. I observed, too, that the jurors were attentive to the evidence, but asked no questions; the counsel for the government was respectful and gentlemanly, and where I had been told to look only for what is coarse, I found instead only elegance and refinement. PELHAM.

Important Bankruptcy Decision—The Amendatory Act of 1873 Unconstitutional.

Chief Justice WAITE, sitting in the United States court at Richmond, has recently delivered an important opinion in the case of Daniel Deckert holding that the amendatory bankrupt act of 1873, so far as it seeks to give effect to the exemption laws of a state, different from that which is given by the state itself, is unconstitutional. We have not seen the full opinion, nor do we know whether a written opinion was rendered; but we learn from the Albany Law Journal that the chief justice said that by article XI of the constitution of Virginia, adopted in 1869, every householder or head of a family was entitled, in addition to the articles then exempt from levy or distress for rent, to hold exempt from levy and sale under execution, etc., issued on demand for any debt theretofore or thereafter contracted, his real and and personal property, etc., to the value of $2,000, to be se lected by himself. By an act of the general assembly, approved June 27, 1870, effect was given to this provision. Under the original bankrupt law there was exempted from assignment by a bankrupt such property as was exempt from levy and sale under the execution by the laws of the state in which the bankrupt had his domicile when proceedings in bankruptcy were begun, to an amount not exceeding that allowed by the state exemption laws in force in 1871. In 1872 the Court of Appeals of Virginia unanimonsly decided (22 Gratt. 266) that the provision of the constitution referred to, and the statute giving effect to the same, so far as they applied to contracts entered into, or debts contracted before their adoption, were in violation of the constitution of the United States, and therefore void. On March 3, 1873, congress passed another act declaring the exemptions allowed by the state laws existing in 1871 should be valid against debts contracted before or after the adoption of such state constitution and laws.

The first question, the chief justice said, was whether the act of 1873, in so far as it seeks, in the administration of the bankrupt law, to give an effect to the exemption laws of a state different from that which is given by the state itself, is unconstitutional. Congress has the power to "establish uniform laws on the subject of bankruptcies throughout the United States." A bankrupt law, to be constitutional, must be uniform, and whatever rule it prescribes for one it must for all. If it provides that property exempt from execution, shall be exempt from assignment in one state, it must in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other place within which it is to have effect. It is quite proper to confine the operation of the bankrupt law to such property as other legal process could reach. The act of 1872 excepts from the operation of the assignment not only such property as was actually exempted by virtue of the exemption laws, but more. It does not provide that the exemption laws as they exist shall be operative and have effect under the bankrupt law, but that in each state property specified in such laws, whether actually exempted by virtue thereof or not, shall be excepted. It in effect declares its own enactment, without regard the laws of the states, that there shall be one amount or description of exemption in Virginia and another in Pennsylvania. In this we think it is unconstitutional, and therefore void. It changes existing rights between the debtor and creditor. Such changes to be warranted by the constitution, must be uniform in their operation. This is not. The consequence is that the act of 1872 remains unchanged, notwithstanding its attempted amendment in 1873.

The act of 1872 gives effect to the exemption laws of Virginia as they existed in 1871. The bankrupt claims his exemption under a law passed in 1870, which does not apply to contracts made or debts incurred previous to the time the new constitution went into effect. That certainly was not before July 6, 1869, and certain of the debts were incurred previous to that time, so that the bankrupt is not entitled to the benefit of the exemption.

One of the contracts made by the bankrupt was entered into November 15, 1869, and the claim under it required that the time when the constitution went into effect should be determined. The chief justice, after reviewing the history of the constitution, said: "In our opinion the constion of Virginia took effect, so far as it related to the provision for exemptions, on the 6th of July, 1869, the day of its ratification by the people. It follows that the exemption laws passed to give effect to that are to become operative for the benefit of its citizens from that date." Since the foregoing was written, the Chicago Legal News of June 29, has come to hand, containing the full opinion.

Tribunals of Commerce.

The report of the royal commissioners on this subject, dated January 21, 1874, has lately been issued, and twenty-four out of the twenty-seven commissioners appointed, whilst expressing themselves as quite alive to the evils occasionally resulting from cases being tried at *nisi prius* before a court having no special knowledge of the trade or business necessary for a proper determination, yet, at the same time, deny the expediency of establishing tribunals of commerce. We may perhaps remind our readers that the reports of the select committee of the house of commons on tribunals of commerce made in 1871, drew attention to the very general dissatisfaction existing among the commercial community as to the manner in which mercantile cases are often decided in the superior courts—dissatisfaction caused principally by the delay and expense attendant on the bringing of the question in dispute before the court in a satisfactory manner. To remedy this state of things the committee advocated the establishment of tribunals of commerce. These courts, which were to be set up in various large towns in different parts of the country, were to be composed partly of legal, and partly of mercantile members, and they were to take cognizance, and, in fact, have exclusive jurisdiction over all causes that might be classified as commercial. The majority of the royal commissioners, as above stated, have reported unfavorably to this scheme, but have advised that in cases where there appears to be a necessity for it, merchants shall be appointed as assessors or advisers of the legal judge, thus preserving uniformity of judicial decision. The three commissioners who dissent are Lord Penzance, Sir Sydney Waterlow and Mr. Ayerton, whose opinions, of course, carry with them great weight and authority. Lord Penzance reports favorably of the plan on the ground of its greater speed and less expense; Sir Sydney Waterlow sees its advantage in the fact that friendly business relations where a dispute has arisen, would be sooner resumed, if the differences between two firms were settled by brother merchants, and not subjected to the prolonged ordeal of an action at law; and Mr. Ayerton that the scheme proposed would provide for commercial disputes that special treatment which they require whilst under adjudication.

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The government will, no doubt, adopt the report, and in fact the judicature act already contains provisions by which the judges may sit with skilled assessors having technical knowledge or practical experience of the matter in hand.—*Banker's Magazine.*

Book Notices.

THE LAW OF DESIGN PATENTS. Containing all reported decisions of the United States courts and the patent office in design cases in A. D. 1874, with digests and treatise. By WILLIAM EDGAR SIMONDS, counselor at law. New York: Baker, Voorhis & Co. 1874.

This is one of those compilation of cases on a special subject which cannot fail to be useful. The collection of court cases and patent office decisions is full and complete, excepting that the case of Binns v. Woodruff, 4 Wash. 52, is omitted from the former; for though this case was decided before the act of 1842—the present design act—it is quite as important as if it were subsequent. In the court cases drawings of the devices have been introduced, thus giving a clearer understanding of the decisions, but thereby making the omission of such from the patent office decisions more marked. The index is not as full as it might, with a little more labor, have been made. For instance, there is no reference to any place where the fees required for design patents are given. A little attention would have avoided the use in the running head-line of p. 145 of the words "patent office," instead of "courts;" and a laudable desire to impart information would have suggested the propriety of indicating in which of the supreme court reports the case of Gorham Mfg. Co. v. White might be found, inasmuch as it is the leading case on this subject. These, however, are minor defects—errors of omission rather than commission, which, while they make a defect in the book, do not detract from its intrinsic value. Of the remainder of the book, consisting of 40 pages, in which the compiler essays the more difficult role of author, we cannot be quite so charitable, since it presents some propositions which, though most certainly "novel," are anything but "useful." On page 181, he says: "This latest act [1870] expressly makes design patents, granted under the act of 1842, extensible." If this were true it would be a strange piece of legislation, working serious results to the community, but happily the law does no such thing. The act of 1842, § 3, granted a term of seven years, with no extension. The act of 2d March, 1861, § 11, superseded this section, granting a different term, with privilege of extension to subsequent patents. The act of 1870 repeals all prior acts, gives the same term as that of 1861, but no extension, save to design patents issued prior to 2d March, 1861, and to these only "in the same manner and under the same restrictions as are provided for the extension of patents for inventions." Looking at the law to see what these "restrictions" are, we find that the "application shall be filed * * * not less than 90 days before the expiration of the original term of the patent, and no extension shall be granted *after the expiration of the original term.*" Now, then, as the act of 1842 granted a term of but seven years, with no extension, and the act of 1861, superseding this act, authorized the extension of subsequent patents only, there could not have been a patent granted under the act of 1842 whose original term had not expired by March 2, 1868, and, consequently, no such patent could, under the act of 1870, be extended, unless in the face of the express prohibition of that act, that "no extension shall be granted after the expiration of the original term." Gorham Mfg. Co. v. White, p. 30 (14 Wallace, 511), is the leading case on the point of patentability and infringement, or test of identity, and yet the author strangely misstates this decision, and, as a consequence, deduces certain erroneous rules, or tests of patentability. On page 195, he says the supreme court in this case decides that "'*pleasing* appearance' is the chief end of patentable designs;" whereas, not only does the court decide no such thing, but does not even use the word "pleasing" anywhere in the opinion. It does decide, however, that "sameness of appearance" and "the resultant effect" are the true tests. If it were "pleasing" appearance only that was within the purview of the law, one half, perhaps more, of the articles now covered, or that might be protected by design patents, would be excluded. In summing up the result of his researches (p. 195), the author lays down these tests: "1. Substantially unlike any previous design." If we insert "appear" before "substantially," no objection can be found to this. "2. Not absolutely frivilous in its character." This is too broad, inasmuch as in regard to only two of the ten different subjects of design patents enumerated on page 179, need the question of utility be considered at all. "3. Gives *pleasing* appearance in any degree, etc." This qualification, "pleasing," as we have shown, has nothing to do with the matter, and cannot be a test. We can scarcely acquiesce in the doctrine enunciated on p. 194 as to the similarity of functional and design patents in respect to the question of double use, but quite agree with him in the result of his argument in chapter 7, that the law of 1870 does not destroy the right of extension of patents granted under the act of 1861, and think the true ground for such conclusion is that the law does not attempt to do so, not that congress had no power to take this right away; for, since a notable decision of the supreme court, it may be questionable whether the old phrase "obligation of contracts" has not become obsolete as regards the acts of that body of law-makers. S S. B.

SENEY'S CIVIL CODE OF OHIO. The Code of Civil Procedure of the state of Ohio, and subsequent amendments and supplementary acts and statutes regulating the practice. With notes of the decisions of the courts of Ohio. By Hon. GEORGE E. SENEY. Second edition, revised and enlarged. 1 vol. 8vo. pp. 880. Price $7.50. Cincinnati: Robert Clarke & Co. 1874.

We quite concur in a view expressed by Dr. Hammond when he edited the Western Jurist, that the reviewer of a book ought to examine it as patiently and give his views concerning its merits or demerits as candidly as though he were writing a private letter to a friend who had asked his opinion about the propriety of purchasing it. But it is obvious that in most cases it will be impossible for an editor of a weekly law journal thus to notice the many books which are sent to him for that purpose; and the difficulty becomes greater when the book in question is one relating to local practice with which he is not familiar. Such is the book now on our desk, and therefore it cannot be expected that we shall be able to say anything concerning it which will be of value to the Ohio practitioner, or which will convey more than a general notion of its character to others.

Seney's Ohio Code resembles in its construction Voorhis' New York Code—a book which, we believe, has gone through eleven editions, and has, nevertheless, not got its growth. It simply gives the code of procedure of Ohio, amended and brought down to the present time, and collates under each section the decisions of the courts of Ohio in which such section has received exposition, or in which the same subject-matter has been ruled upon. The sections of the code are numbered and preceded by titles in small-capitals, indicating their substance; and the notes are likewise numbered, and catchwords in small-capitals are thrown in for convenience of reference. The index is nearly 90 pages in length, and appears to be all that could be desired. We do not observe any table of cases, but perhaps in a work of this kind the usefulness of such a table would not compensate for the increased bulk. We believe it is Mr. Bishop who has compared a table of cases in a law book to the hair on the back of a man's hand; its use is not obvious to the superficial observer, but the practitioner well understands it. The observation, however, would seem to be applicable not so much to works of this kind as to general treatises, where the searcher may frequently wish to ascertain the manner in which the author has presented or discussed the doctrine of a familiar case, or what other cases he has grouped with it. Of course a table of cases would possess some value in a work of this kind, but in a lesser degree than in a treatise, or even in a general digest.

The publishers say in their prospectus: "Thirteen years have elapsed since the publication of the first edition. During this period numerous changes have been made in the code by amendment, also by supplemental and other statutes; while its provisions, in many particulars, have received a settled construction by judicial decisions. These changes and decisions are found, amid other matter, dispersed through seventy volumes of statutes and reports. This work presents a complete copy of the code as it now stands, with notes of all the judicial decisions in Ohio, which, in any way influence its construction. By thus presenting in this volume, and as near as possible, at one view, all that is authoritative upon the code of civil procedure, it is believed that great labor and research will be saved to the profession." We quite concur in the last observation. It will be indispensable to the Ohio practitioner, and of great use to practitioners in other states, whose system of procedure is similar to that of Ohio.

Considering the slovenly manner in which books of a local character are generally manufactured, Messrs. Robert Clarke & Co. deserve the thanks of the profession for the excellent manner in which they have performed their share of this work.

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THE FIRE GUARD.—A monthly journal devoted to fire insurance. Saint Louis: L. L. and Moses King editors and publishers. Terms, $1 per annum; single copies 10 cents.

This handsome monthly has now reached its third number, and has grown from a quarto of eight to sixteen pages. The matter is varied and interesting, but appears to be devoted chiefly to the very important subject of the prevention and extinguishment of fires. The information on that subject in the present number will be well worth the dollar of every subscriber. The youthful editors have favored us in this number with their portraits, handsomely engraved, one of which looks familiar. Although we have never had the pleasure of the acquaintance of either of them, yet from what we have heard of them, we believe they have begun the battle of life in the right way; and unless their fame exceeds their deserts, St. Louis will one day number them among her most honored citizens.

Notes of Cases.

Bankrupt Act—Waiver of Exemption.—Chief Justice WAITE sitting in the circuit court at Richmond, Virginia, has recently given an opinion in the case of Joseph Solomon, a bankrupt, in which the district court had declared that the provisions of the state law of June, 1870, allowing a waiver of he exemption, were unconstitutional. The bankrupt had, under the law, waived his right by a clause in a note to his creditors. The chief justice said that the exemption laws did not intend to exempt absolutely, but gave a householder the right to claim an exemption. This he must do before a sale, or he could not have an exemption. If he has the right to waive at the time of sale by refusing to select, there is no reason why he cannot waive before. The chief justice decided that the legislature acted within the scope of its constitutional powers in passing the law of 1870, and reversed the judgment of the district court.

Liability of a Public Corporation to a Contractor where the Specifications of the Engineer of the Corporation Cannot be Carried Out.—An interesting case (Thow v. The Corporation of London) has recently been decided in the English Court of Exchequer, before the Lord Chief Baron and Barons PIGOTT and AMPLETT. The point ruled is that where a contractor contracts to do a peice of work for a public corporation, according to specifications submitted by the engineer of the corporation, and in the progress of the work it is found impracticable to carry out the specifications, and the contractor, at the suggestion of the engineer, proceeds to complete the work in a different manner from the original specifications, whereby more time is consumed than would have been consumed had the original specifications proved practicable, he cannot recover of the corporation damages for the increased time thus expended. The lord chief baron in giving his judgment said that the corporation employed an engineer to prepare the necessary specifications for the building of the proposed bridge, and caused advertisements to be issued inviting tenders for the building, and stating that the specifications were prepared and could be inspected. Thereupon, the plaintiff came forward, having, as must be assumed, carefully considered the proposals and the specifications, and he accepts to execute the work on the terms proposed and signs the contracts accordingly. The work was commenced in due course, and at a particular period of the work the plaintiff found that the original plans could not be carried out. The engineer of the defendants proposes a new mode of working, which entails upon the plaintiff great extension of time, and during that period the plaintiff entails serious monetary loss by reason of not being able to enter into other contracts. The plaintiff then complains and insists that the reason of the delay was the insufficiency of the specification, though nothing relating to that is to be found in the contract. The plaintiff urges that there was an implied term [condition] that the plans were such as were reasonably practicable, and could be carried out within the time mentioned in the contract, but no authority has been cited during the argument to show that in such a contract there is such an implied term. What, then, are the principles of the law on the subject? None are known which import any such implied undertaking, and to import it into the present contract would be to make a new contract between the parties. The corporation relied on the skill of the engineer by whom the plans and specifications were prepared, and had no means of knowing whether the plans could be carried out within the stated time, and the corporation was no more liable than was the contractor for the failure of the plans. Whether the plans had been badly or improperly prepared was a matter between the corporation and the engineer. The plaintiff has failed to show that he is entitled to the judgment of the court.

Baron PAGOTT agreed with the Lord Chief Baron, holding that while the plaintiff might have some claim in honor or equity, there was no legal claim against the corporation. Of the same view was Baron AMPLETT, who said that the case would be different in case the plans had been fraudulently put forward by the corporation, or by the engineer himself, with the view of imposing upon the plaintiff.

Legal News and Notes.

—THE 23d volume of Grattan's Virginia Reports will make about 1000 pages. About 800 pages are now printed.

—THE lawyers of Iowa have organized a state bar association, the first, we believe, that has yet been organized in this country.

—DR. Ernest Uhling has been sentenced to eighteen months' imprisonment by the Court of General Sessions of New York city for the crime of burying a box of bricks. The point is that the box was shaped like a coffin, and the "doctor" held a policy of insurance on the life of a young woman whom he fraudulently represented to be dead and buried in the coffin.

—THE article in another column as to the respective liability of the *author* of a nuisance connected with property, and the *continuer* of the nuisance, when the property has, by conveyance or demise passed into other hands, is from the pen of the well-known author of the Law of Torts—Francis Hilliard, Esq., of Worcester, Mass. We shall be glad to hear from him often, and hope he will favor our readers with frequent articles.

—WE have received, through the courtesy of Julius L. Brown, Esq., of Atlanta, Georgia, a pamphlet containing the constitution and by-laws of the Atlanta bar association. This association is organized "to promote social intercourse among its members, advance their interests, and increase their usefulness to the public in the administration of justice." The officers are, L. E. Bleckley, president; D. F. Hammond, first vice-president; S. Weil, second vice-president; Julius. L. Brown, recording secretary; John Milledge, corresponding secretary; A. Stephens, treasurer.

—THE following is the text of the British demand upon Spain for compensation for the execution of British subjects found on board the Virginius, as couched in a dispatch from Lord Granville to Mr. Layard, the British envoy to Spain, dated February 20: "Her majesty's government consider that they are justified in demanding a reparation from the Spanish government for the execution of the British subjects in question, both in the form of a national recognition of the wrong done, and also of compensation to the relatives of the persons executed. Her majesty's government do not take the ground of complaining of the seizure of the Virginius, nor of the detention of the passengers and crew. The real ground of complaint her majesty's government hold is: that, even assuming the vessel to have been lawfully seized, and the crew properly detained, there was no justification for their summary execution, after an irregular proceeding before a drumhead court martial. No possible aspect of the Virginius and her crew could authorize or palliate such conduct on the part of the Cuban authorities. There was no pretence for treating such an expedition as piracy *jure gentium*." The British government have recently renewed this demand, stating that it has hitherto failed to press for an answer on account of the "grave difficulties with which the Spanish government has had to contend." In the meantime, what is *our* government doing to compel Spain to award compensation for the massacre of *its* citizens?

—IN 1854 the British parliament passed an act (17 and 18 Vict., ch. 36.) by the terms of which every bill of sale, or a true copy thereof, must be filed in the Queen's Bench office within twenty-one days of execution, otherwise it will be null and void against assignees in bankruptcy and execution creditors. Parties have found a device to evade this law by holding the bill without filing it until the twenty one days had nearly expired, and then executing a new bill, and so repeating this operation as long as it should serve their purpose. A bill has now been introduced in parliament to amend this act, which provides that "whenever hereafter a bill of sale is executed in consideration of or to secure a debt, and afterwards another bill of sale is executed in consideration of or to secure the same debt or any part thereof, the subsequent bill of sale, so far as regards a property in or right to the possession of any personal chattels comprised in or made subject to the former bill of sale, shall be null and void to all intents and purposes as against the same persons, and to the same extent as the former bill of sale shall, under the provisions of the act of 1854, or of the new act, be null and void, notwithstanding the requirements of the act of 1854 or of the new act shall be complied with as to the subsequent bill of sale, or the twenty-one days for complying therewith shall not have elapsed."

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JULY 2, 1874.

SUBSCRIPTION:
$8 PER ANNUM, in Advance

THE NEW BANKRUPT LAW.—We print in this number the full text of the new bankrupt act. In order to lay this important law before our readers at the earliest date, we have set it up from a copy furnished by our correspondent at Washington, which is vouched for as correct, and we have no doubt of its entire accuracy. In a few days, however, we shall have an *authenticated copy* from the state department, and if, on comparison, any inaccuracies should be detected in the law as we now print it, our readers will be advised of it.

INVOLUNTARY BANKRUPTCY—NUMBER OF CREDITORS.—We publish in this number a very late opinion of Mr. District Judge BLODGETT upon the effect of the recent amendment of Sec. 39 of the bankrupt act as to pending cases of involuntary bankruptcy commenced since December 1, 1873, concerning the number of creditors who must join in the proceeding. The learned judge holds that the petition, in cases thus pending, must be amended or made to show that one-fourth in number and one-third in value of the creditors concur.

FEDERAL JURISDICTION UNDER THE 14TH AMENDMEMT, AND THE ACT OF APRIL 20, 1871, TO ENFORCE ITS PROVISIONS.—Under the existing railway regulation laws of Illinos, the state in its own name commenced, in one of the courts of the state, a prosecution against the Chicago and Alton Railroad Company, to enforce the law, and the company sought to transfer the cause to the federal circuit court, under the act of April 20, 1871 (17 Stats. at Large, 13). In an opinion delivered by DRUMMOND, circuit judge, on the 18th instant, and in which it stated that Mr. Justice DAVIS concurred, it was held that the cause could not be transferred, and the jurisdiction of the federal court was denied. The opinion of the learned judge is withheld until next week to enable us to get a correct copy.

"Township" Railroad Bonds Under the Missouri Act of March 23, 1868—Remedy of Bondholder—Cass County Case.

A subscriber has desired us to publish the opinion of the Circuit Court of the United States for the Western District of Missouri on the subject of the validity of *township* bonds and the liability of *counties* therefor, and the *remedy* of the bondholder thereon, delivered at the November term, 1873, in the case of Jordan v. Cass County. We had intended to publish the opinion before this, but want of space has prevented. We give now a condensed statement of the case. The action was against the county of Cass upon bonds of the following tenor:

$1,000 "STATE OF MISSOURI.
Cass County Bond.

"Know all men, etc., that the county of Cass, in the State of Missouri, acknowledges itself indebted and firmly bound to the Pacific Railroad of Missouri, in the sum of $1,000, which sum the said *County of Cass, for and on account of Mt. Pleasant township*, hereby promises to pay said company, or bearer, at, etc., seventeen years after date, with interest, etc. This is one of twenty five bonds for $1,000 each issued pursuant to an order of the county court of the said county of Cass, made by authority of an act of the General Assembly of the State of Missouri, entitled 'An act to facilitate the construction of railroads in the state of Missouri,' and approved on the 23d day of March, A. D., 1868, and authorized by a vote of more than two-thirds of the voters of said township, to aid in the construction of the Pleasant Hill and Lawrence branch of the Pacific Railroad of Missouri."

The bonds were signed by the presiding justice and attested by the clerk and sealed by the seal of the county court of Cass county.

The petition asked judgment against the county for the amount of the coupons in suit, with interest, damages and costs.

The court (DILLON and KREKEL, JJ.) ruled the following points on a demurrer to the petition:

1. The act of the general assembly of Missouri, of March 23, 1868 (Laws 1868, p. 927; 1 Wagner's Stats. 312), authorizing *township* aid to railways, is not in conflict with the constitution of the state.

2. Art. II, sec. 14, of the constitution of the state, which prohibits the legislature from authorizing any "county, city or town" to subscribe for the stock of any railroad company, unless authorized by two-thirds of the qualified voters therein, does not restrain the legislature from authorizing *township* aid to railways, if two-thirds of the voters of the township shall sanction the proposition.

3. Whether the legislature could, in the case of townships, dispense with the popular sanction, doubted but not decided.

4. As townships were not incorporated bodies, the act of March 23, 1868, above mentioned, when the proposal had been adopted by the voters of the township, authorized the *county court* to issue bonds, *in the name of the county, on behalf* of the township voting the aid. *Held* (construing the legislation of Missouri):

(1.) That the owner of bonds thus issued by a county (or a township) had no remedy by *action* against the township, or taxable inhabitants theirein.

(2.) That the remedy of the owner of the bonds was by *mandamus* to the county court, to compel it to levy and collect the special tax which the act provided as the means to pay the bonds and interest thereon.

(3.) That such an owner could *sue the county* in whose *name* the bonds were issued, in the federal court, and recover judgmeut thereon; but that such judgment could not be enforced against the county or its property, or the tax-payers of the county at large, but only by *mandamus* to the county court to compel the levy and collection of a special tax, according to the statute in such case provided.

The demurrer was overruled and judgment was rendered accordingly in this special form. The opinion in the case concludes in these words:

"Upon the whole, our judgment is that the action is well brought against the county; that the county may make defence, but if the plaintiff shall be found entitled to recover, he may have judgment against the county for his debt, damages and costs, to be enforced, if necessary, by *mandamus* against the county court or the judges thereof, to compel them to levy and collect a special tax according to the statute in such case provided, and not otherwise."

The principle asserted in the above case that debts iccurred by or in the name of a public or *quasi* corporation cannot be enforced against the *private property* of the inhabitants, has since then been affirmed by the Supreme Court of the United States in Rees v. Watertown (Central Law Journal, *ante*, p 161.).

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Exemptions Under the Bankrupt Law—Act of March 3, 1873.

It is well known that under the bankrupt law, as originally enacted, there was exempted from the assignment of property required to be made by the bankrupt to his assignee, among other, such property as was exempt from levy and sale under execution by the laws of the state in which the bankrupt had his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864.

By an amendatory act passed on the 8th June, 1872, this provision was changed so as to give the bankrupt the benefit of exemptions under laws in force in 1871. In 1872 the Court of Appeals of Virginia unanimously decided (22 Gratt. 266) that the provision of the constitution just referred to, and the statute giving effect to the same, so far as they applied to contracts entered into, or debts contracted before their adoption, were in violation of the constitution of the United States, and therefore void. After this decision, on the 3d of March, 1873, congress passed another act in the following words:

"*Be it enacted, etc.*, That it was the true intent and meaning of an act approved June 8, 1872, entitled, etc., that the exemptions allowed the bankrupt by the said amendatory act should and it is hereby enacted, that they shall be the amount allowed by the constitution and laws of each state respetively, as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decison of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

On the 6th day of July, 1869 the new constitution of Virginia took effect, in which it was provided that every householder or head of a family should be entitled, in addition to the articles then exempt from levy or distress for rent, to hold exempt from levy and sale under execution, etc., issued on any demand for any debt *theretofore* or thereafter contracted, his real and personal property, etc., to the value of $2,000, to be selected by him. An act of the general assembly of Virginia, approved June 27, 1870, gave effect to this provision by prescribing in what manner and upon what conditions such householder could set apart and hold such exemption.

The validity of the act of March 3, 1873, recently came before Chief Justice WAITE and BOND, circuit judge, in the U. S. circuit court in Virginia, in the case of Daniel Deckert, a bankrupt, a synopsis of which we published last week. After affirming that it was competent for congress to adopt the exemption laws in force in the several states, though the amount exempted was different (*In re* Beckerford, 1 Dillon 45), the court proceeded to notice the act of 1873, and held that it violates the principle of *uniformity* required by the constitution (Art. 1. § 8.) Speaking of this subject, the chief justice says:

"The act of 1873 goes further, and excepts from the operation of the assignment not only such property as was actually exempted by virtue of the exemption laws, but more. It does not provide that the exemption laws as they exist shall be operative and have effect under the bankrupt law, but that in each State, the property *specified* in such laws, whether actually exempted by virtue thereof or not, shall be excepted. It in effect declares by its own enactment, without regard to the laws of the states, that there shall be one amount or description of exemption in Virginia and another in Pennsylvania. In this we think it is unconstitutional, and therefore void. It changes existing rights between the debtor and creditor. Such changes, to be warranted by the constitution, must be uniform in their operation. This is not. The consequence is that the act of 1872 remains unchanged, notwithstanding its attempted amendment in 1873."

Deckert became a bankrupt March 31, 1873, and on the 20th day of August, 1873, filed his petition claiming a homestead under the new constitution of Virginia and the act of congress of March 3, 1873. Applying the principles above stated it was held that as to all debts contracted by the bankrupt prior to July 6, 1869, the bankrupt was not entitled to the homestead exemption, but was thus entitled as to all debts contracted after that time.

Admissions to the Bar.

Considerable discussion is going on in some of the law journals with reference to the practice of admitting candidates to the bar upon no other guaranty of fitness than the diploma of a law school. The law journals which have discussed the propriety of this practice, have, so far as we know, taken grounds against it. The Albany Law Journal, The Legal Intelligencer, the Washington Law Reporter, and the Daily Register have recently called attention to the practice, taking ground in favor of its abolishment.

The Albany Law Journal for May 23 contained a brief but pointed reference to this subject, which has called forth two or three commendatory letters. It said: "Within the past two weeks the ranks of the legal profession in this state have been swelled by the admission to the bar of about four hundred gentlemen. It is, however, doubtful whether the profession is to be congratulated for this accession. In 1871 the legislature provided that a term of three years' study should be necessary to qualify a person for admission to the bar, but at the same time excepted the law schools of the state from the provisions of the act. As the graduates of these schools are entitled, by statute, to admission to the bar, and as the term of study in some of them covers only nine months, and in none of them exceeds two years, the practical effect of the act has been to drive students to the law schools as a short-cut to the bar. These schools are good so far as they go, but that they are equal to the proper preparation of young men for the practice of the legal profession is not true. The instruction of the school combined with that of the office is to be preferred to the instruction of either alone; but if a young man can avail himself of only one, he would much better take that of the office. He will there get some experimental knowledge along with his theories, which he never can do at a school. We believe that no man should be admitted to the bar without having first studied the law for at least three years, and that at least a year of that term should be spent in the office of a practicing attorney. Anything short of this is an injury to the student himself. Every lawyer who has turned his attention to the matter knows that a premature rushing into practice without a competent knowledge of the law has blasted the hopes and ruined the expectations of hosts

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of young men who, properly instructed, might have acquitted themselves creditably. It is an old observation, and one generally true, that if a man does not obtain a character in any profession soon after his entrance therein he is not likely ever to obtain one."

The Daily Register pithily says: "The question then resolves itself into this: Who shall stand as sentinels at the entrance to the bar—members in active practice of the law and identified with the honor and dishonor of the profession, or those who have studied the theory of the law only and teach it to all comers who can pay the matriculation fee?"

It seems that in New York a law exists which provides that a certificate of certain law schools, setting forth the fact that the holder has studied law for two years, shall be held to be sufficient to entitle the presenter thereof to be admitted to the practice of the law in any of the state courts. Concerning this law, the Daily Register says:

"This law virtually denies to the judges on the bench and the lawyers practicing at the bar any authority to pass upon the qualifications, either mental or moral, of candidates for admission, except such as have studied for three years in some law office. We will not now stop to speak of this invidious distinction, but confine ourselves to the question: Is it wise in the profession to part, without a struggle, with the power to examine, by a committee of members in good standing, into the qualifications of men seeking admission to the most conservative, the most influential and the most honorable of all the learned professions? We think that a sufficient number of unworthy members have crept in under the system which this law overrides, and society has grievously suffered at the hands of those ignorant and bad men, but open wide the gate and let a professor's certificate insure ready admission to the bar and soon you will have our courts filled with mere theorists and speculators, whose blunders and mispleadings will cause great confusion and serious losses."

The New York bar association have recently had the matter under discussion, but with what result we are not informed. At a recent meeting of the Washington bar association a resolution was passed for the appointment of a committee to wait upon the judges, and to urge that the rule of court under which graduates from the various law schools in that city are admitted to the bar without examination, be so modified as to require a reference of the applications of such graduates to examining committees, for action and report as in other cases.

In St. Louis candidates for admittance to the bar must undergo a rigid examination before the five circuit judges, unless they are attorneys of some other court of Missouri, or have been graduated from one of the two law schools of this state. Out of each class of candidates examined, a large per centage is usually rejected; and candidates are not unfrequently rejected who have diplomas from the leading law schools of the country. It looks odd to see lawyers who have had twenty years' successful practice in other states sit down with the tyros and undergo a searching examination in the elements of the law; but justice to the public and to the bar require that all should go through this ordeal. And it has happened in these examinations that old lawyers, or at least that old men claiming to be old lawyers, have been rejected, and not improperly; and it has not unfrequently happened that young men who came armed with the diplomas of law schools, have betrayed in these examinations scarcely the faintest glimmering of legal knowledge.

Whether the diploma of a law school ought, without further examination, to entitle its possessor to admittance to the bar, is a question of much interest to the bar, and also to the public. Much, doubtless, could be said in favor of such a regulation, as well as against it. Considering the great work which law schools are expected to accomplish in the training of scientific lawyers, it has no doubt been thought wise to encourage their attendance by young men seeking admittance to the bar, by making a certificate of graduation a passport to its honors. But it would really seem that such effect ought not to be given to the diplomas of law schools whose course of study is only one year in duration, or to those of schools whose course is nominally two years, but whose yearly terms are but six or eight months in length. It is impossible that the best intellects, in so short a space of time, can do more than learn how to study the law; to say nothing of acquiring sufficient knowledge to entitle them to hold themselves out to the public as persons learned in the law; to advise clients and manage causes in matters involving life, liberty and property, and the dearest interests of society.

In Massachusetts, whose bench and bar have always maintained a high standard and exerted a great power upon the jurisprudence of the whole country, it seems that the diploma of no law school—not even that of Cambridge, renowned for its eminent professors, and for its thorough course of study, lasting three years—will entitle its possessor to admittance to the bar. A correspondent in the Albany Law Journal, of June 20, says: "Even if a student spend a three-years' course and graduates from the Cambridge law school, still he is obliged to submit himself to an examination by a committee of the supreme court, or by a judge of that court, and on written questions at that—questions numbering upwards of two hundred, and covering the broad fields of topics and subjects which are usually taught at schools of law—before he can be admitted to practice in the courts of the state. I speak from personal experience." We should suppose that if even Cambridge may not claim for the possessors of its diplomas an unquestioned admittance to the honors and profits of the Massachusetts bar, the lesser law schools throughout the country might submit to the same rule with advantage to the public, to the bar, and especially to their students, although it is quite likely that it might diminish their annual receipts.

Taxation—The Illinois "Grab Law" of 1869 Unconstitutional.

RUFUS N. RAMSAY v. CHARLES HOEGER, COLLECTOR OF TAXES.

Supreme Court of Illinois, Springfield, June Term, 1874.

Hon. SIDNEY BREESE, Chief Justice.
" PINKNEY H. WALKER,
" BENJAMIN R. SHELDON,
" JOHN M. SCOTT,
" W. K. MCALLISTER,
" A. M. CRAIG,
" JOHN SCHOLFIELD,
} Judges.

1. **Taxation—Illinois Act of 1869 Unconstitutional.**—The act of the Illinois legislature in force April 16, 1869, which provided that whenever a county, township, town, or city shall aid a railroad, the increase of revenue which shall accrue from such county, township, town or city, together with such revenue as shall accrue from the

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taxation of such railroad within the same shall be appropriated and set apart by the state for the liquidation of the registered bonds of such county, township, town or city, instead of being applied to general purposes, is in conflict with § 6 of article 9 of the constitution of 1870, and is therefore inoperative and void.

2. Exemption from Taxation--Contract.—A law exempting several municipalities from taxation does not create a contract between the state and municipality, although debts may have been contracted upon the faith of such exemption.

This was an agreed case appealed from Clinton county,

G. Van Hoorebeke, for the appellant; *F. A. Lietze,* for the appellee.

SCHOLFIELD, J., delivered the opinion of the court.

The question is presented by this record whether under the constitution and laws in force when the tax sought to enjoined was levied, a higher rate of taxation can be imposed for state purposes on taxable property in counties which have no outstanding indebtedness incurred in aid of the construction of railways than is imposed on taxable property in counties which have such indebtedness. That the tax levied by the act in force July 1, 1873, has been so apportioned is admitted by both parties, and it is claimed by the appellee to be justified by the provisions of an act in force April 16, 1869, entitled "an act to fund and provide for paying the railway debts of counties, townships, cities and towns." The only sections of this act bearing on the question are the first, fourth, fifth and ninth, and are as follows:

"SECTION 1. Whenever any county, township, incorporated city, or town shall have created a debt which still remains unpaid, or shall create a debt, under the provisions of any law of this state, to aid in the construction of any railway or rail ways that shall be completed within ten years after the passage of this act, whose line shall run near to or into, or through said county, township, city, or town, it shall be lawful for the state treasurer, and he is hereby required, immediately upon receiving the revenue of each year, to place to the credit of such county, township, city, or town, so having incurred such indebtedness in the state treasury, annually, for and during the term of ten years, all the state taxes collected and paid into the state treasury on the increased valuation of the taxable property of said county, township, city, or town as shown by the annual assessment rolls over and above the amount of the assessment rolls of the year 1868, excepting the state school tax and the two-mill tax provided for by the constitution of this state for the payment of the state debt; and whenever any county, township, city, or town shall have created a debt as aforesaid, it shall also be lawful for the collector of the taxes, and he is hereby required annually for and during the term of ten years, to pay into the state treasury all the tax collected for any purpose whatever on the assessment of the railway or railways for whose aid the said debt was incurred, including the roadbed and superstructure, and all fixtures and appertunances thereof—the locomotives, cars, machinery, and machine-shops, depot, and all other property real and personal of said railway companies within such county, township, city, or town, and immediately upon receiving the same the state treasurer shall place to the credit of such county, township, city, or town in the state treasury the whole amount so received, except the state school tax and the two mill tax provided by the constitution of the state for the payment of the state debt; and it shall be the duty of said collector of taxes to furnish the state auditor a separate and detailed account of taxes collected from said railway or railways at the time of his annual settlement with the state auditor; and the state treasurer shall give to said collector separate receipts for the respective amounts paid into the state treasury to the credit of said county, and said receipts shall be taken and received by the county court, or other legal authorities, as vouchers for the amount collected on account of the county and local assessment on said railway property in the annual settlement with such collector, and the several amounts of money in this section provided and ordered to be placed to the credit of such county, township, city, or town, shall be applied by the state treasurer to the payment of the bonded railway debt of such county, township, city, or town, as hereinafter provided.

"SEC. 4. When the bonds of any county, township, city, or town shall be so registered, the state auditor shall annually ascertain the amount of interest for the current year due and accrued and to accrue upon such bonds, and from the amount so ascertained he shall deduct the amount in the state treasury placed to the credit of such county, township, city, or town, as herein provided and directed, and from the basis of the certificate of valuation of property heretofore provided to be transmitted to him, or in case no such certificate shall be filed in his office, then upon the basis of the latest assessment of such county, township, city, or town for the year next preceding, he shall estimate and determine the rate per centum on the valuation of property to meet and satisfy the amount of interest unprovided for, together with the ordinary cost to the state of collection and disbursement of the same, to be estimated by the auditor and treasurer, and shall make and transmit to the county clerk of such county, or to the officer in authority, whose duty it shall be to prepare the estimates and books for the collection of state taxes in such county, township, city, or town, a certificate stating such estimated requisite per centum for such purpose to be filed in his office, and the same per centum shall thereupon be deemed added to a part of the per centum which is or may be levied, as provided by law for the purpose of state revenue, and shall be so treated by the clerks or officers in authority in making such estimates for the collection of taxes; and the said tax shall be collected with the state revenue, and all relating to the state revenue shall apply thereto, except as herein otherwise provided.

"SEC. 5. The state shall be deemed the custodian only of the several taxes so collected and credited to such county, township, city, or town, and shall not be deemed in any manner liable on account of any such bonds; but the tax and funds so collected shall be deemed pledged and appropriated to the payment of interest and principal of the registered bonds herein provided for until fully satisfied. The state shall annually collect and apply all the said taxes and funds placed to the credit of such county, township, city or town, for and during the term of eight years, to the payment of the annual interest on such registered bonds of such county, township, city or town, in the same manner as interest on the bonds of the state, or may be collected and paid out in like moneys as shall be receivable in payment of state taxes, and for and during which said registered bonds shall remain unpaid the funds provided in the first section of this act, accruing from taxes collected from the property of said railway or railways, and the surplus of any of the other funds provided in this act remaining after the payment of interest on the bonds, shall be applied to the payment of the principal of said registered bonds, on presentation at the state treasury; or the treasurer shall purchase the same in open market at not more than par, and upon such payment or purchase of the said bonds, the amount paid upon the principal of said bonds shall be endorsed thereon, and receipts therefor shall be taken and filed in the office of the state treasurer, and the interest coupons or bonds, when fully paid, shall be returned to the office of the state treasurer, and shall be canceled and destroyed in the same manner as those appertaining to the state debt; and the fund derived from the taxes collected on the increased assessment over the year 1868, and the tax levied to meet the interest on said registered bonds shall continue to be annually applied to the interest of said bonds; and the said taxes and funds required in this act to be placed to the credit of counties, townships, cities and towns, shall be applied by the state treasurer to the payment of the registered railway bonds of such counties, townships, cities and towns equally and without discrimination.

"SEC. 9. The state auditor, from the total value of all the property in the state, after the same shall have been equalized in ac-

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cordance with the provisions of 'an act to amend the revenue laws and to establish a state board of equalization of assessments,' approved March 8, 1867, shall deduct the amount of said increased valuation of the taxable property above the valuation of the year 1868, in such counties, townships, incorporated cities and towns as may be entitled to the benefits of this act, and the taxes upon which are herein directed to be credited to counties, townships, cities and towns, and upon the amount remaining he shall cause to be collected such a per cent. as shall be sufficient to pay the appropriations and other demands upon the treasury due to the end of each fiscal year, and the same per cent. shall also be collected on the said increased valuation above the valuation of 1869, and applied as herein provided."

It cannot be held, as insisted by the counsel for the appellee, that this statute constitutes a contract between the state and the creditors of the counties, townships, cities and towns intended to be aided, for the plain reason that the legislature was prohibited from making such a contract by article 3 of the constitution of 1848, which declares that the credit of the state shall not in any manner be given to or in aid of any individual, association or corporation. It is impossible to say that such creditors can have a claim upon the state unless its credit was in some manner given, nor can we conceive how there can be a vested right in that which cannot be granted. The necessary effect of the act was to exempt tax-payers in the counties, townships, cities and towns included in its provisions from the payment of so much of the state tax as is appropriated to the particular counties, townships, cities and towns. The debts in aid of which the appropriation is made are local only. Dunnovan *et al.* v. Green, 57 Ills. 63. They are created by municipal authority for what are, at least theoretically, municipal purposes, and therefore, for a sufficient consideration received by the municipality. It is upon this hypothesis, alone, that such corporations have been held to possess power to subscribe for shares of capital stock in railway companies and incur indebtedness to pay the subscription. Prettyman v. The Supervisors of Tazewell Co., 19 Ill. 406; Robertson v. The City of Rockford, 21 Id. 457; Johnson v. County of Stark, 24 Id. 85. It cannot be denied that at the date of this enactment the state possessed power to require that full and equal taxation should be levied for state purposes upon all the taxable property in the state, without regard to the indebtedness of the particular counties, townships, cities and towns favored by the act; and since the taxpayer is, aside from the act, liable to be taxed for the payment of the debts of the county, township, city or town in which his property is subject to taxation, it cannot be said that the state has received any consideration for the exemption granted by the act. We cannot, then, otherwise regard the exemption from state taxation, as contemplated by the act, than as mere gratuity, the continuance of which rested in the pleasure of the legislature and the sovereign power of the state. No doubt many persons have been, through a misapprehension of its proper construction or effect, induced to vote to incur indebtedness by particular counties, townships, cities and towns to a greater extent than they otherwise would, but we can perceive no difference between their condition and that of the individual who, relying on the continuance of the bounty of a friend or relative, contracts debts which the subsequent withdrawal of that bounty leave him to pay from his own limited resources. The rule is that exemptions from taxation are always subject to be recalled when they have been granted as a mere privilege and not for a sufficient consideration. Cooley's Constitutional Limitations, 383. It is manifest, therefore, that a system of taxation enforced either by a new constitution, or by an act of the general assembly, inconsistent with the provisions of this act, would necessarily to that extent render it inoperative, although there might be no professed design to repeal it. Hills v. Chicago, 60 Ill. 86. It is argued that it was not intended by those who framed the present constitution to repeal any of the provisions of the act of 1869; that it was only intended to ordain a revenue system which should apply to the future. This may be so; yet if the language of that instrument is clear and free from ambiguity or doubt, it must control whatever may have been the design of those by whom it was framed. Cooley's Constitutional Limitations, 69. It cannot be denied that when the general assembly did, subsequent to its adoption, enact a revenue system, such system was required to conform to its provisions. It surely cannot be claimed that, under the guise of enacting laws to give effect to the provisions of a constitution, principles can be perpetuated in diametrical opposition to those provisions. The present constitution contains the following, section 6, article 9: "The general assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their proportionate share of the taxes to be levied for state purposes; nor shall the commutation for such taxes be authorized in any form whatsoever." Section 1 of the same article requires the general assembly to provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his property. The language of these sections is so clear and unambiguous that there can be no necessity of resorting to the debates of the constitutional convention to ascertain their plain, obvious and natural meaning. The tax involved in the present suit is levied by virtue of an act in force July 1st, 1873, which is as follows:

"There shall be raised by levying a tax by valuation upon the taxable property in this state the following sums for the purpose hereinafter set forth for general state purposes, to be designated a revenue fund: $2,500,000 upon the assessed value of 1873, and $1,500,000 annually thereafter; for state school purposes, to be designated a state school fund in lieu of the two mill tax therefor, $1,000 000 annually."

"Sec. 2. The governor and auditor shall annualiy compute the separate rates of per centage required to produce not less than the above amounts, anything in any other act providing a different manner of ascertaining the amonnt of revenue required to be levied for state purposes to the contrary notwithstanding, and when so ascertained the auditor shall certify to the county clerks the proper separate rates per cent. therefor, and also such definite rate as now or hereafter may be provided by law to be levied and collected as state taxes."

This tax is levied on all the taxable property in the state, and it is not admissible either under the language of the act of the constitution that the proportional amount of each taxpayer, as determined with reference to such valuation in some counties, townships, cities or towns, there shall only be required to pay one-half or one-third, while in other counties, townships, cities and towns shall be required to pay that much more.

The duties of the governor and auditor in respect to this levy were purely ministerial. They had no authority to do more than compute the separate rates of per centage required to produce the amount of the levy, and when this was done, and the result certified to by the auditor to the county clerks, there was no authority in the law or under the constitution to extend it otherwise than equally upon all taxable property, in proportion to its value, as ascertained and determined by those upon whom the law imposes the duty of assessing it. Section 4 of the act of 1869, it will have been observed, requires the auditor and treasurer, after ascertaining the deficiency in the amount necessary to pay the interest upon the indebtedness of any county, township, city, or town, incurred in aid of the construction of railways for the current year, after deducting the sum which may have been received for that purpose, under section 1, to estimate and determine the rate per centum on the valuation of property within such county, township, city, or town required to meet and satisfy the amount of interest unprovided for, together with the ordinary cost to the state of collection and disbursement of the same, to be

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estimated by the auditor and treasurer, and shall make and transmit to the county clerk of such county a certificate of such estimated requisite per centum for such purpose, to be filed in his office, and the same per centum shall thereupon be deemed added to and a part of the per centum which is or may be levied and provided by law for the purposes of state revenue, and shall be so treated by such clerk, etc. This clearly authorizes the levy and collection of the amount necessary to supply the deficiency in the payment of the interest due upon the indebtedness of such counties, townships, cities, and towns, incurred in aid of the construction of railways, as state revenue; but it is expressly limited to the county, township, city, or town by which the particular indebtedness is incurred, and so far as the last clause of section 2 of the act in force July 1, 1873, can have any reference to the act of 1869, it must relate to this section. It certainly confers no authority to extend a tax levied for the purpose of paying municipal indebtedness incurred by one county, township, city, or town upon the taxable property of a different county, township, city, or town; nor does it authorize the $3,500,000 to be apportioned otherwise than equally upon the assessed value of all the taxable property in the state. No words that we can conceive can add force of expression to the language of the constitution before quoted: "but the general assembly shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for state purposes." Even the general assembly, which levied the present tax, derived its existence from the provisions of the same constitution, and if this provision was not binding upon it, it is impossible to conceive that it ever can have any obligatory force. It is impossible for us to escape the conclusion that under the constitution and law now in force, so much of the act of 1868, as requires the state revenue to be collected on the valuation of the taxable property in the state remaining after deducting in counties, townships, cities, and towns which have outstanding indebtedness incurred in and for the construction of railways, the increased valuation of the taxable property over that of the year 1868, is abrogated and cannot be enforced. The same question substantially as that represented by the present case was before this court in People *ex rel.* v. Kaskaskia Navigation Co., at the June term, 1872, and the views here expressed are in harmony with what was there said. We forbear the expression of any opinion as to whether so much of the $3,500,000 actually and legally levied for state purposes, as shall be collected from the increased valuation over that of 1868, which is claimed to be appropriated to the particular counties, townships, cities, and towns, can be maintained as a standing appropriation, as that question is not now before us. The decree of the court below is reversed and the case remanded with directions to that court to ascertain the rate per cent. required to produce the sum levied by the act in force July 1, 1873, for state purposes; to enjoin the collection of all state taxes levied on the property of the appellee in excess of that rate.

SCOTT, J., dissenting.

REVERSED AND REMANDED.

Forms of Action in the Territorial Courts—Mingling of Legal and Equitable Remedies.

JAMES HORNBUCKLE *et al.* v. JOHN TOOMBS.

Supreme Court of the United States, No. 139, *October Term,* 1873.

1. Procedure in Territorial Courts—Forms of Action—Mingling of Legal and Equitable Remedies.—There is nothing in the process act of 1792, nor in the act organizing the territory of Montana, which prohibits the territorial legislature from passing an act providing that in the territorial courts legal and equitable remedies may be pursued in the same suit.

2. ——. ——. ——. Whether this would be so where the territorial courts sit *as federal courts* in cases arising under the constitution and laws of the United States, as distinguished from cases arising under the territorial municipal laws, *quære*.

3. Cases Overruled.—Orchard v. Hughes, 1 Wall. 77, and Dunphy v. Kleinsmith, 11 Wall. 610, overruled.

4. Dictum—Statement of the General Rule.—The court conclude that the practice, pleadings, forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves, subject to a few express or implied conditions in their organic acts.

In error to the Supreme Court of the territory of Montana.

Mr. Justice BRADLEY delivered the opinion.

This was an action brought by Toombs, the defendant in error, against the plaintiff in error in a district court of the territory of Montana, for damages caused by the diversion of a stream of water, by which the plaintiff's farm was deprived of irrigation, and for an adjudication of his right to the stream, and an injunction against further diversion. The action was framed and conducted in accordance with the practice as established by the legislative assembly of the territory, of which the following are the material provisions:

"Section 1. There shall be in this territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs."

"Sec. 2. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant."

"Sec. 38. The only pleadings on the part of the plaintiff shall be the complaint, demurrer, or replication to the defendant's answer; and the only pleadings on the part of the defendant shall be a demurrer to the complaint, or a demurrer to the replication, or an answer to the complaint." * * *

"Sec. 155. An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act."

The case was tried by a jury, who found for the plaintiff, assessed his damage at one dollar, and decided that he was entitled to seventy inches of the water. Upon this verdict the court gave judgment, and awarded an injunction as prayed.

The only errors assigned are based on the intermingling of legal and equitable remedies in one form of action.

Such an objection would be available in the circuit and district courts of the United States. The process act of 1792 (1 Stat. 275) expressly declared that in suits in equity, and in those of admiralty and maritime jurisdiction, in those courts, the forms and modes of proceeding should be according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, subject to such alterations and additions as the said courts respectively should deem expedient, or to such regulations as the supreme court should think proper to prescribe. The supreme court in prescribing rules of proceeding for those courts, has always followed the general principle indicated by the law. Whether the territorial courts are subject to the same regulation is the question which is now fairly presented.

In the case of Orchard v. Hughes (1 Wall. 77) a majority of this court was of opinion that the territorial courts were subject to the same general regulations in equity cases which govern the practice in the circuit and district courts. That was the case of a forclosure of a mortgage in the territorial court of Nebraska, and the court, under a territorial law, not only decreed a foreclosure and sale of the mortgaged premises, but gave a personal decree against the defendant for the deficiency. We had decided in Noonan v. Lee, 2 Black, 499, that under the equity rules prescribed for the circuit and district courts, such a decree could not be made. The majority of the court now applied the same rule in the case of Orchard v. Hughes, although it was decided by territorial court. Following out the principle involved in that decision, we subsequently, in the case of Dunphy v. Kleinsmith, 11 Wall. 610, reversed a judgment of the Supreme Court of Montana, on the ground

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that the case (being in nature of a creditor's bill, filed to reach property which the debtor had fraudulently conveyed) was a clear case of equity, whilst the proceedings therein exhibited no resemblance to equity proceedings, there being a trial by jury, a verdict for damages, and a judgment on the verdict.

On a careful review of the whole subject we are not satisfied that those decisions are founded on a correct view of the law. By the 6th section of the organic act of the territory of Montana (13 Stat. 85), with which that of Nebraska substantially agreed, it was enacted, "that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act." By the 9th section it was provided "that the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace," and that the "jurisdiction of the several courts herein provided for, both appellate and original, and of that of the probate courts and justices of the peace, shall be limited by law; *Provided*, [that] the said supreme and district courts respectively shall possess chancery as well as common-law jurisdiction."

Now, here is nothing which declares, as the process act of 1792 did declare, that the jurisdictions of common law and chancery shall be exercised separately, and by distinct forms and modes of proceeding. The only provision is, that the courts named shall possess both jurisdictions. If the two jurisdictions had never been exercised in any other way than by distinct modes of proceeding, there would be ground for supposing that congress intended them to be exercised in that way. But it is well known that in many states of the Union the two jurisdictions are commingled in one form of action. And there is nothing in the nature of things to prevent such a mode of proceeding. Even in the circuit and district courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side; and the enforced separation of the two remedies, legal and equitable, in reference to the same subject-matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice. In most cases it is difficult to see any good reason why an equitable right should not be enforced, or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated. Be this, however, as it may, a consolidation of the two jurisdictions exists in many of the states, and must be considered as having been well known to congress; and when the latter body, in the organic act, simply declares that certain territorial courts shall possess both jurisdictions, without prescribing how they shall be exercised, the passage by the territorial assembly of a code of practice which unites them in one form of action, cannot be deemed repugnant to such organic act.

A clause in the 13th section of the act, however, has been referred to, by which it is declared "that the constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said territory of Montana as elsewhere in the United States;" and it is argued, that by virtue of this enactment, all regulations respecting judicial proceedings which are contained in any of the acts of congress, are imported into the practice of the territorial courts. But this proposition is not tenable. Laws regulating the proceedings of the United States courts are of specific application, and are, in truth and in fact, locally inapplicable to the courts of a territory. There is a law authorizing this court to appoint a reporter. In one sense this law is not locally inapplicable to the supreme court of the territory; but in a just sense it is so. The law has a specific application to this court, and cannot be applied to the territorial court without an evident misconstruction of the true meaning and intent of congress in the clause of the 13th section above referred to. That clause has the effect, undoubtedly, of importing into the territory the laws passed by congress to prevent and punish offences against the revenue, the mail service, and other laws of a general character and universal application; but not those of specific application.

The acts of congress respecting proceedings in the United States courts are concerned with, and confined to, those courts, considered as parts of the federal system, and as invested with the judicial power of the United States expressly conferred by the constitution, and to be exercised in correlation with the presence and jurisdiction of the several state courts and governments. They were not intended as exertions of that plenary municipal authority which congress has over the District of Columbia and the territories of the United States. They do not contain a word to indicate any such intent. The fact that they require the circuit and districts courts to follow the practice of the respective state courts in cases at law, and that they supply no other rule in such cases, shows that they cannot apply to the territorial courts. As before said, these acts have specific application to the courts of the United States, which are courts of a peculiar character and jurisdiction.

Whenever congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature; and the jurisdiction of the territorial courts is collectively co-extensive with and correspondent to that of the state courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state courts, are invested with plenary municipal jurisdiction.

It is true that the district courts of the territory are, by the organic act, invested with the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States, and a portion of each term is directed to be appropriated to the trial of causes arising under the said constitution and laws. Whether, when acting in this capacity, the said courts are to be governed by any of the regulations affecting the circuit and district courts of the United States, is not now the question. A large class of cases within the jurisdiction of the latter courts would not, under this clause, come in the territorial courts; namely, those in which the jurisdiction depends on the citizenship of the parties. Cases arising under the constitution and laws of the United States would be composed mostly of revenue, admiralty, patent, and bankruptcy cases, prosecutions for crimes against the United States, and prosecutions and suits for infractions of the laws relating to civil rights under the XIVth and XVth amendments. To avoid question and controversy as to the modes of proceeding in such cases, where not already settled by law, perhaps additional legislation would be desirable.

From a review of the entire past legislation of congress on the subject under consideration, our conclusion is that the practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the organic act itself, were intended to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves. Of course, in case of any difficulties arising out of this state of things, congress has it in its power at any

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time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper.

The judgment is affirmed.

Chief Justice WAITE did not sit in this case and took no part in the decision.

Hornbuckle v. Toombs, No. 139. Davis v. Bilsland, No. 141. Hirshfield v. Griffith, No. 208.

DAVIS and STRONG, JJ.—We dissent from the judgments in these cases, for the reason that this court has several times decided that claims at law and claims in equity cannot be united in one action, even in the territorial courts. And we think, if a change in the rule is to be made, it should be made by congress.

JUDGMENT AFFIRMED.

Descent and Distribution of Property Among the Wyandott Indians.

PAMELA GRAY v. JACOB COFFMAN *et al.*

United States Circuit Court, District of Kansas, June Term, 1874.

Before DILLON, Circuit Judge.

1. Wyandott Indians—Construction of Treaty.—The treaty of March 17, 1842 (7 Stats. at Large, 608, § 14), and of January 31, 1855 (10 Ib. 1159), between the United States and the Wyandott Indians in respect to the grant to members of the tribe, of a right to select and locate a section of land, construed.

2. ——. ——. Reservations.—The treaty of 1855 requires the patent to issue in the *name of the reservee*, though, if he be dead, the selection may be made by his "heirs or legal representatives," to be determined by the laws, usages and customs of the tribe. Whether a patent issued in the name of the heirs of the reservee is void, *quære?*

3. ——. Indian Wills—Devise of "Float."—A will of the right to this "float" made and executed according to the laws of the tribe, and proved and allowed by the proper tribunal of the tribe, is valid and will be respected by the civil courts. See Mackey v. Coxe, 18 How. 100.

4. Relation of the Wyandott Indians to the civil laws of the territory of Kansas, in respect to the disposition of property before and after the treaty of 1855, considered.

This is an action of ejectment for lands situate in Lyon county, in the state of Kansas. The case was tried upon testimony submitted to the court, a jury having been waived. The evidence was voluminous, but the material facts sufficiently appear in the opinion of the court.

R. M. Ruggles and *Clough & Wheat*, for the plaintiff; *Wilson Shannon, W. P. Montgomery*, and *E. S. Waterbury*, for the defendant.

DILLON, Circuit Judge.—To determine the title to the land here in controversy involves the necessity of deciding several novel and highly interesting questions.

The plaintiff claims title under a patent dated the 3d day of May, 1861, reciting the treaties of 1842 and 1855, below mentioned, between the United States and the Wyandott nation of Indians, and which patent was issued to the heirs of John Hicks. John Hicks was a Wyandott Indian.

It is necessary briefly to refer to the history of the Wyandott tribe and their removal to Kansas. In 1825 the Kansas Indians ceded, with the exception of a limited reservation, this country to the United States. 7 Stats. at Large, 244. In 1830 congress adopted the policy of causing Indian tribes residing east of the Mississippi to be removed to specified reservations west of the Missouri. 4 Stats. at Large, 411. The Wyandott Indians were the last tribe in Ohio which ceded their reservations in that state to the United States. This was done in 1842 by the treaty of Upper Sandusky, of March 17th of that year. 7 Stats. at Large, 608. By the 14th section of that treaty, the United States agree to grant to the above named John Hicks, to his heirs, and to thirty-five other specified persons of the Wyandott nation, one section of land: "The land hereby granted to be selected by the grantees, surveyed and patented at the expense of the United States, but never to be *conveyed* by them or their heirs without the permission of the president of the United States."

The next year, 1843, the Wyandott Indians, including John Hicks, removed to their reservation in Kansas. Here he lived with the tribe until 1853, when he died. On the 10th day of January, 1853, a short time before his death, he made his last will in writing. It was drawn up with all the usual formalities of such instruments, by Governor William Walker, an educated Wyandott Indian, attested by him and signed by the testator. The third clause of this will is in these words: "I will and bequeath unto my sons, Francis A. Hicks, and John Hicks, Jr., the section of land granted to me by the treaty of Upper Sandusky, dated March 17, 1842." This instrument is produced and bears upon it this endorsement: "The within will and testament was read in open court, and allowed probate and ordered recorded. Wyandott Council, February 16, 1853."

JOHN D. BROWN, Principal Chief.

"JOEL WALKER, Clerk *pto tem.*"

It is indisputably established by evidence *aliunde* that the will was presented to the Wyandott Council at that date, and was regularly allowed by it as the will of John Hicks, Sr.

These devisees, John Hicks, Jr., and Francis A. Hicks, were the only living children of John, Sr., but there were then living grandchildren by two of his deceased children.

On the 31st day of January, 1855 (10 Stats. at Large 1159), another treaty was made with the Wyandott Indians, which was ratified March 1st of that year. The first article states that "The Wyandott Indians having become sufficiently advanced in civilization, and desirous of becoming citizens, it is hereby agreed and stipulated that their organization and their relations with the United States as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement, except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification the said Wyandott Indians, and each and every one of them, except as hereafter provided, shall be deemed and are hereby declared to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges and immunities of such citizens; and shall in all respects be subject to the laws of the United States and the territory of Kansas, in the same manner as other citizens of said territory; and the jurisdiction of the United States and of said territory shall be extended over the Wyandott country in the same manner as over other parts of said territory." Then follows a provision excepting, for the time, from the above provision as to citizenship, such Indians as may apply for it.

The treaty makes provision for the survey, platting and partition of their reservation, and for lists of the members of the tribe, divided into three classes: 1st. Of those who are able to control and manage their affairs and interests. 2d. Those who are not. 3d. Orphans, idiots and insane persons. Lists of the second and third classes were to be furnished by the Wayandott council, under whose supervision and guardianship the treaty continues them.

The eighth article of the treaty defines the persons entitled to money and lands thereunder "to be such only as are actual members of the Wyandott nation, *their heirs and representatives*, and as are entitled to share in the property and funds of the said nation, *according to the laws, usages and customs thereof.*"

Article 9, which is important, is in these words: "Each of the individuals to whom reservations are granted by the 14th article of the treaty of March 17, 1842 (of Upper Sandusky), or *their heirs or legal representatives*, shall be permitted to select and locate said reservations, on any government land west of Missouri and Iowa subject to pre-emption and settlement; said reservations to be *patented* by the United States *in the names of the reservees*; and

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the reservees, their *heirs and proper representatives* shall have the unrestricted right to sell and convey the same; but in cases where any of the said reserves may not be sufficiently prudent and competent to manage their affairs in a proper manner, which shall be determined by the Wyandott council, or where any of them have died, leaving minor heirs, the said council shall appoint proper and discreet persons to act for such imcompetent persons and minor heirs in the sale of the reservations, and the custody and management of the proceeds thereof; the persons so appointed to have full authority to sell and dispose of the reservations, and to make and execute a good and valid title thereto."

On the 30th day of May, 1854—the year preceding this treaty—congress passed the act organizing the territory of Kansas, but previous to this the public lands therein had been thrown open to pre-emption and settlement, and these Wyandott "floats," by which 640 acres could be secured for town sites, instead of 320 acres, were in great request. Francis A. Hicks, one of the devisees of the John Hicks' "float," died August 16, 1855, a few months after the treaty of that year, leaving children and grandchildren. He made a will on the 7th day of August, 1855, and therein directs "the one-half of the section of land willed to him by his father, under the treaty of March 17, 1842, to be sold, and the avails thereof to be applied to the liquidation of his debts and liabilities," and appoints Joel Walker his executor.

Now at the date of the death of Francis A. Hicks, on the 16th day of August, 1855, no statute of descents or will had yet been passed by the territorial legislature of Kansas. The council still continued to act, and the will of Francis A. Hicks was admitted to probate September 25, 1855, the executor gave bond, and was authorized by the council to act as such. Subsequently, to-wit, January 5, 1863, the will was presented to the regular probate court of Wyandott county, and proved and allowed, but without any notice being published or otherwise given, so far as appears of record. Joel Walker, the executor of Francis A. Hicks, pursuant to directions in his will, sold the testator's undivided half of this 640 acre "float" to Jacob Ulrich for $1,000, and reduced the contract to writing. Ulrich located the float on the land in question, which was approved, and the patent issued, as above mentioned, May 3, 1861, *to the heirs of John Hicks, Sr.* Subsequently, conveyance was made to Ulrich's estate, for this interest, and the heirs of Ulrich conveyed the land in question to the defendant.

The plaintiff claims a title through conveyances from granchildren of John Hicks, Sr., who, if his will and the will of Francis A. Hicks are valid, had no title. In other words, the right of the plaintiff to recover is based upon the proposition that these two wills are nullities; that, though made, executed and probated according to the laws, customs and usages of the Wyandott nation of Indians, to which they belonged, these instruments have, in law, no legal effect in determining the rights of the parties.

The Wyandott Indians, before their removal from Ohio, had adopted a written constitution and laws, and among others, laws relating to descent and wills. These are in the record, and are shown to have been copied from the laws of Ohio, and adopted by the Wyandott tribe, with certain modifications, to adapt them to their customs and usages. One of these modifications, was that only living children should inherit, excluding the children of deceased children, or grand children.

The Wyandott council, which is several times referred to in the treaty of 1855, was an executive and judicial body, and had power, under the laws and usages of the nation, to receive proof of wills, etc.; and this body continued to act, at least to some extent, after the treaty of 1855.

The first question arises under the patent. The treaty of 1855 required the patent to be issued in the *name of the reservee.* The patent of May 3, 1861, was in fact issued not to John Hicks, the reservee, but to the *heirs of John Hicks.* If it had been issued in the name of John Hicks, though he was then dead, it would, under the act of 1836, have inured to his heirs, devisees or assignees, (5 Stats. at Large, 31.) What is the effect of its being issued as it was to the heirs of John Hicks? The plaintiff contends that the patent was rightfully issued, and that under it the heirs of John Hicks take by *purchase.* That to ascertain who are his heirs, resort must be had, not to Indian laws, but to the laws of Kansas at the time, and that the legal effect of the patent is the same as if the children or heirs of John Hicks, Sr., had been named therein, which, if true, would cut off the rights of the creditors, devisees or assignees of John Hicks, Sr.

On the other hand the defendant insists, inasmuch as it is true, that if the patent is valid, the heirs of John Hicks take by purchase, that the patent is void because it was not issued, as the treaty specifically required, in the name of the reservee.

The issuing of a patent is a ministerial act, and a patent issued without authority is void.

I am inclined to think that the departure of the patent in respect to the name of the grantee from the requirements of the treaty is material, and that the patent is therefore a nullity. The effect of this would be that the legal title is still in the United States, and, of course, the plaintiff could not recover in ejectment.

But this point I leave undetermined, preferring to rest my judgment upon the ground that under the circumstances, the court must give effect to the well established laws, customs, and usages of the Wyandott tribe of Indians in respect to the disposition of property by descent and will.

John Hicks, Jr., had a valuable right given by the treaty of 1842—a right to select and locate 640 acres of land—not land but "a float," or right to land. He died in 1853, within the limits of what afterwards became the territory of Kansas. There is no national law of descent and wills, none regulating the rights of members of Indian tribes. The treaty of 1855 recognizes and provides in several places for the rights of the *heirs or legal representatives* of the reservees under the treaty of 1842. These must mean heirs and legal representatives "according to the laws, usages and customs" of the tribe. See articles 8 and 9 of the treaty of 1855.

The government was aware that between 1842, when the right was given, and 1855, when the second treaty was made, that some of the reservees were dead, and it provided carefully for this contingency by authorizing their *heirs or legal representatives* to select and locate the section of land. It is hardly possible to suppose that congress meant to refer to the law of Missouri territory of 1815, to ascertain who were the heirs or legal representatives of the deceased reservees. There is but one way to determine this and that is by the laws, customs and usages of the tribe. If this is so, then the will of John Hicks, Sr., made and allowed in 1853, was valid and gave the right to his sons, John, Jr., and Francis A. If the will of the elder Hicks is valid, so likewise is the will of Francis A., whose death occurred previous to the enactment of any statute of wills or descents in Kansas, but after the ratification of the treaty of 1855.

The dates are as follows: the treaty was ratified March 1st, 1855; Francis A. Hicks, died August 16, 1855; the territorial statute of Kansas concerning wills was approved August 30, 1855 (Laws of Kansas, 1855, p. 753-761.) The will of Francis A. Hicks was admitted to probate by the Wyandott council Sept. 25, 1855.

If the foregoing views are correct, the will of Francis A. Hicks was valid when he died, because it conformed to the laws and usages of his tribe, and there were no laws of either the United States or the territory of Kansas upon the subject.

Passing the question whether it is necessary to valid action by an executor, under a will, that his appointment should be ratified by some court with probate powers, the only remaining inquiry would be, must Indian wills, after the ratification of the treaty of 1855, be presented to and allowed by the civil tribunals, before

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acts done thereunder and authorized thereby, can be treated as valid?

Notwithstanding the broad language of the first article of the treaty of 1855 as to the dissolution of the tribal relation of the Wyandott Indians, and as to their becoming citizens of the United States and subject to its laws and the laws (prospective) of the territory of Kansas, it is evident from the view of the whole treaty that their property rights were regulated by it, and that the Wyandott council, which was a tribunal with executive and judicial functions, was still to continue in force, at least for a time.

Francis A. Hicks died, leaving a will made and executed in due form, according to the laws of the tribe, before there were any laws of Kansas on the subject of the descent of property or of wills. The Wyandott council, with jurisdiction over wills, continued to act.

Wills which would be formal and valid by the laws of usages of the tribe, might be, and probably would be, informal when tested by territorial laws subsequently enacted. The foregoing views find strong, if not, indeed, full support in the case of Mackey v. Coxe, 18 How. 100.

I am of opinion, therefore, that both wills are valid, and that the plaintiff, whose case rests upon the hypothesis of their nullity has no title to the land in controversy. Accordingly, there will be a judgment for the defendant.

JUDGMENT FOR DEFENDANT.

Important Decision under the New Bankrupt Law — Petition must show Requisite Number of Creditors.

In re SCAMMON.

United States District Court, Northern District of Illinois, June 26, 1874.

1. **Bankrupt Act, § 39 — Petition must show requisite number of Creditors.**—By the amendment of section 39 of the Bankrupt act recently passed, creditors to the extent of one-fourth in number and one-third in value must petition for the adjudication, and this provision is applied by the act to all cases of involuntary bankruptcy commenced since December 1, 1873: *Held*, that not only in new cases, but in those pending when the amendment took effect, brought since December 1, 1873, the petition must show affirmatively that the requisite number of creditors join in the proceeding.

BLODGETT, J.—By the recent amendment to the bankrupt law, some radical changes are made in the proceedings of voluntary or compulsory bankruptcy.

The 39th section has been practically repealed, and a new section substituted. By this section, as it now stands amended, various acts are declared acts of bankruptcy, and the law then proceeds to say that any person guilty of said acts, or any of them, "shall be deemed to have committed an act of bankruptcy, and subject to the conditions hereinafter prescribed, and shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." * * * *

And the provisions of this section shall apply to all cases of compulsory or of involuntary bankruptcy commenced since the 1st day of December, 1873, as well as those commenced hereafter. And in all cases commenced since the first of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, *if such allegation as to the number or amount of petitioning creditors be denied by a statement in writing to that effect*, require him to file in court forthwith a full list of his creditors, with their places of residence, and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount have petitioned that the debtor be adjudged bankrupt. * * * *

The question now raised is, whether cases pending, which have been commenced since the first of December last, can proceed without an amendment of the petition, so as to show affirmatively that the requisite number of creditors desire the debtor to be adjudicated bankrupt, or must the debtor in such cases object in the first instance, and file a schedule of his creditors.

There is no doubt in my mind that in new cases the petition must show affirmatively that the requisite number of creditors join in the petition. Not that the creditors petitioning must swear positively that they constitute a fourth in number and a third in value of a debtor's creditors, but they should at least allege it according to their best information and belief, because we all know that debtors frequently misstate the amount of the debts to their creditors, and creditors have no means in the first instance of verifying the truth of the debtors' statements to them. So that I think an allegation that those petitioning constitute a fourth in number of the creditors, and a third in value of the provable debts, would make a good *prima facie* case, so far as this clause is concerned. If the debtor comes in and denies this allegation, then he can be ruled to file a correct list of his creditors, with their residences and the amount due them respectively, and a time is given in which to obtain the report of the requisite number of them to the proceeding.

The evident spirit and intent of the amendment is that all cases pending, commenced since the 1st of December last, shall conform to, and proceed upon the requirements of the law in the same manner as new cases. The language is: "If the *allegation as to the number or amount of petitioning creditors be denied by the debtor.*" And this is declared to apply as well to pending cases as to those hereinafter commenced. Now, by all the analogies from the rules of pleading, a party is not required to deny an *allegation* which has not been made. It seems to me it would be basurd to require a debtor to come in and deny the *allegation* that a fourth in number and third in amount of his creditors had not joined in the proceedings against him when the record contained no such *allegation*. The creditors should first make the allegation, and then it will be time for the debtor to deny it and furnish a correct list of his creditors.

Nor do I see that there is any hardship in this. It being clear that the proceedings cannot go on without the assent of the requisite number of creditors, their assent seems to me indispensable to enable the court to retain jurisdiction of the case, and the petitioning creditor may as well amend his petition in the first instance by obtaining the assent of the requisite number as to require the debtor to exhibit his schedule. As I construe the law, the debtor is not obliged to give a schedule of his creditors until a *prima facie* case is made against him. Certainly a debtor against whom a new petition is filed cannot be compelled to disclose the names and residences of his creditors, and amounts due to each without such *prima facie* case being made, and I do not see why any different rule should apply to one against whom proceedings were pending when the law passed.

I therefore conclude that in all cases pending which have been commenced since the first of December last, the petitioning creditor should take steps to secure the joining of a fourth in number and third in amount of the creditors within some reasonable time, and that the debtors are entitled to a rule that unless the requisite number of creditors do so join within such time as the rule may require, the proceeding shall be dismissed.

This saves the rights of creditors in all cases when the limitations of the law would apply if the petitions should be dismissed and new proceedings commenced.

—JUDGE DANIELS, in accordance with the verdict previously rendered, has sentenced the Brooklyn charity commissioners to pay a fine of two hundred dollars each. The Herald says: "The punishment is a gentle one, but it brands the men for all time to come as offenders against the law, and prevents them forever from holding office. Judge DANIELS throughout this trial has comported himself well, and, in spite of all the influence which was brought to bear upon him, he has been true to himself and faithful to the people. A pure and incorruptible bench is the best safeguard of the Republic."

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The New Bankrupt Act.

§ 1. Receiver to take possession of property and carry on business, when.
§ 2. Amends § 1 of act of 1867; suits in state courts to collect bankrupt's debts.
§ 3. Amends § 2 of act of 1867.
§ 4. Sales by assignee; notice; supervisory power of court over; assignee's account of expenditures; removal of assignee for neglect of duties, etc.; assignee fraudulently or corruptly selling, subject to removal, forfeiture of fees, fine and imprisonment; punishment of his confederates; reports of assignee; quarterly settlements of assignee—to account for interest and benefits—oath to be taken, and penalty for swearing falsely.
§ 5. Amends § 11 of Act of 1867; notice to creditors by publication.
§ 6. Amends § 20 of act of 1867 with reference to offsets.
§ 7. Amends § 21 of Act of 1867; waiver of right of action by creditor.
§ 8. Amends § 26 of act of 1867; bankrupt or other parties competent witnesses.
§ 9. Repeals § 33 of act of 1867; what *per centum* of indebtedness to be covered by assets, and consent of what number of creditors necessary to entitle bankrupt to discharge.
§ 10. Amends § 35 of act of 1867, by reducing periods within which property fraudulently conveyed may be recovered or discharge may be contested respectively to two and three months.
§ 11. Makes other specific amendments to § 35 of the act of 1867.
§ 12. Amends § 39 of the act of 1867; what shall be deemed acts of bankruptcy; number and amount of creditors who must join in petition; within what time petition to be brought; proceedings with reference to the number and amount of petitioning creditors; effect of payment or conveyance where proceeding is arrested on proof that the requisite number and amount of creditors have not joined; what creditors counted in estimating requisite number.
§ 13. Amends § 40 of act of 1867, as to number and amount of creditors.
§ 14. Amends § 41 of Act of 1867; trial by jury of facts set forth in petition; dismissal; discontinuance.
§ 15. Amends §§ 11 and 42 of act of 1867; inventory and valuation.
§ 17. Supplements § 43 of Act of 1867; compositions with creditors.
§ 18. Fees and emoluments; register, clerk, etc., not to be interested in or of counsel for, estates, etc.
§ 19. Annual report of marshal, register, assignee and clerk.
§ 20. Proof of debts may be taken before notary public.
§ 21. General repealing clause.

[General Nature, No. 74.]

An act to amend and supplement an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and for other purposes.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, be, and the same is hereby, amended and supplemented as follows: That the court may in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt: *Provided*, That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.

Sec. 2. That section one of said act be, and it is hereby amended by adding thereto the following words: "*Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed $500, be collected in the courts of the state where such bankrupt resides having jurisdiction of claims of such nature and amount."

Sec. 3. That section two of said act be, and it hereby is, amended by striking out, in line ten, the words, "the same," and inserting the word "any;" and by adding next after the words "adverse interest," in line twelve, the words "or owing any debt to such bankrupt."

Sec. 4. That unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels, and at such times and places as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee or officer of the court shall be published once a week, for three consecutive weeks, in the newspaper or newspapers, to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a re-sale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one-fourth cash at the time of sale, and the residue within eighteen months, in such instalments as the court may direct, bearing interest at the rate of 7 per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall at reasonable times have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall, in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell or dispose of, or in any manner fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services in connection with such bankrupt's estate, and, upon conviction thereof before any court of competent jurisdiction, shall be liable to a fine of not more than $10,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid shall, upon conviction, be liable to a like punishment. That the assignee shall report, under oath, to the court at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee he shall be required to account for all interest, benefit or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal, or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall willfully swears falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and, on conviction thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

Sec. 5. That section 11 of said act be amended by striking out the words ,' as the warrant specifies" where they first occur, and inserting the words "as the marshal shall select, not exceeding two;" and inserting after the word "specifies," where it last occurs, the words "But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law, to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars."

Sec. 6. That the first clause of section 20 of said act be amended by adding, at the end thereof, the words "or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off."

Sec. 7. That section 21 of said act be amended by inserting the following words in line six, immediately after "thereby:" "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt, where a discharge has been refused, or the proceedings have been determined without a discharge."

Sec. 8. That the following words shall be added to section 26 of said act: "That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness."

Sec. 9. That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to 30 per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section 33 of said act of March 2, 1867, requiring 50 per centum of such assets, is hereby repealed.

Sec. 10. That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section 35 of the act to which this is an amendment, is hereby changed to two months; but this provision shall not take effect until two months after the passage of this act. And in the cases afore-

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said, the period of six months mentioned in said section 35 is hereby changed to three months; but this provision shall not take effect until three months after the passage of this act.

Sec. 11. That section 35 of said act be, and the same is hereby amended, as follows: First, after the word "and" in line eleven, insert the word "knowing;" secondly, after the word "attachment" in the same line, insert the words "sequestration, seizure;" thirdly, after the word "and," in line twenty, insert the word "knowing." And nothing in said section 35 shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan.

Sec. 12. That section 39 of said act of March 2, 1867, be amended so as to read as follows:

"Sec. 39. That any person residing, and owing debts, as aforesaid, who, after the passage of this act, shall depart from the state, district, or territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States, or of any state, district, or territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding $100, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States or of such state, district, or territory, applicable thereto, for a period of 20 days, or has been actually imprisoned for more than 20 days in a civil action founded on contract for the sum of $100 or upward; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment; or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have commttted an act of bankruptcy, and subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable; *Provided*, That such petition is brought within six months after such act of bankruptcy shall have been committed. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as to those commenced hereafter. And in all cases commenced since the 1st day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegations as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor, shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith), shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold assigned or transferred contrary to this act; *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt. And this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy; and the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed $250 shall not be reckoned. But if there be no creditors whose debts exceed said sum of $250, or if the requisite number of creditors holding debts exceeding $250 fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

Sec. 13. That section 40 of said act be amended by adding at the end thereof the following words: "And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section 39 of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section 39 of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

Sec 14. That section 41 of said act be amended as follows: After the word "bankruptcy," in line eight, strike out all of said section and insert the words "Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district, returnable within ten days before him for the trial of the facts set forth in the petition, at which time the trial shal be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one-half of his creditors in number and amount; or, in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect."

Sec. 15. That section 11 of said act be amended by inserting the words "and valuation" after the word "inventory" in the twenty-first line; and taht section 42 of said act be amended by inserting the words "and valuation" after the word "inventory" in the fifteenth line.

Sec. 16. That section 49 of said act be amended by striking out, after the word "the," in line five, the words "supreme courts," and inserting in lieu thereof "district courts," and in line six, after the word "states," inserting the words "subject to the general superintendance and jurisdiction conferred upon circuit courts by section 2 of said act."

COMPOSITION WITH CREDITORS.

Sec. 17. That the following provisions be added to section 43 of said act: That, in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition, proposed by the debtor, shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and

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the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any enquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor, as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, enquire whether such resolution has been passed in the manner directed by this section; and, if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner, and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertantly by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

Sec. 18. That from and after the passage of this act the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges and allowances heretofore provided for or made in like cases *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections 10 and 47 of said act, and no longer, which duties they shall perform as soon as may be. And said justices shall have power under said sections, by general regulations, to simplify and so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided. And no register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts. And the words "except such as are established by this act or by law," in section 10 of said act, are hereby repealed.

Sec. 19. That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices,

First, the number of cases in bankruptcy, in which the warrant prescribed in section 11 of said act has come to his hands during the year ending June 30, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year from or in respect of any matter in bankruptcy;

Fourthly, a summarized statement of such fees, costs and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner every register shall, in the same month and for the same year, make a report to such clerk of,

First, the number of voluntary cases in bankruptcy coming before him during said year;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupts;

Thirdly, the amount and rate per centum of all dividends declared;

Fourthly, the disposition of all such cases;

Fifthly, the number of compulsory cases in bankruptcy coming before him in the same way;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupts;

Sevently, the disposition of all such cases;

Eighthly, the amounts and rate per centum of all dividends declared in such cases;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year in each class of cases above stated.

And in like manner, every assignee shall, during said month, make like return to such clerk of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year;

Secondly, the amount of assets and liabilities therein, respectively and separately;

Thirdly, the total receipts and disbursements therein, respectively and separately;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class, respectively and separately;

Fifthly, the total amount of all his fees, charges, and emoluments, of every kind therein, earned or received;

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees;

Seventhly, the disposition of the cases respectively;

Eighthly, a summarized statement of both classes as aforesaid.

And in like manner the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June 30th, of,

First, all cases in bankruptcy pending at the beginning of the said year;

Secondly, all of such cases disposed of;

Thirdly, all dividends declared therein;

Fourthly, the number of reports made from each assignee therein;

Fifthly, the disposition of all such cases;

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Sixthly, the number of assignee's accounts filed and settled;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and, if any have failed to make such reports, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall, in said month of August, transmit every such statement and report so filed with him, together with his own statement and report aforesaid, to the attorney-general of the United States.

Any person who shall violate the provisions of this section shall, on motion made under the direction of the attorney-general, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than $500, or by imprisonment not exceeding one year.

Sec. 20. That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law; such proof to be certified by the notary and attested by his signature and official seal.

Sec. 21. That all acts and parts of acts inconsistent with the provisions of this act, be, and the same are hereby repealed.

Approved June 22, 1874.

Correspondence — An American Lawyer in London—English Courts and Lawyers.

LONDON, May, 1874.

EDITORS CENTRAL LAW JOURNAL:—It seems me there is no lack of business among the London lawyers. Apparently, here as elsewhere, so far as I know, they are among the busiest of men. London is a great city. According to the census of 1871, its population then was upwards of three and a quarter millions. It is said the increase is at the rate of about 42,000 per annum, which would give a present population of about three and a half millions. Then there are at all times, but especially at this season of the year, a great many strangers in the city not included in the census, a considerable part of whom are here on busines; so that while it would not be quite correct to say the number of people here is infinite, it is, at least, pretty safe to say, it is indefinite. And when it is said, by some one who knows little, there are in London, 3,000 attorneys and 3,900 barristers, to "aggravate or settle the little differences," it ought to be added by some one who knows more and better, that a large proportion of the population of London is engaged in traffic, and that, as in the United States, so here in England, to no profession or class are the people so much indebted for their well-being as to lawyers.

The leading lawyers here are usually occupied in some one of the courts or at chambers or before some master in some trial, hearing or examination from ten to four. The two hours from four to six are usually devoted to office consultations, mostly by prior appointment. The house of parliament usually sits at six, and such lawyers as are members attend such sittings at that hour. These sittings sometimes last into the morning. Most lawyers of note belong to some club. The principle clubs are about forty in number. One of them, it is said, has two thousand members; several others have nearly as many. Most of the club houses are delightfully located; they are generally very large, and sumptuously fitted and furnished. Membership, I should think, must be expensive; but such lawyers as are members are doubtles in the receipt of large incomes. The salary of the lord high chancellor is £10,000, equal to $50,000 in gold; the salary of the chief justice of the Queen's Bench is £8,000; that of the lord chief baron of the Exchequer, £7,000; and that of the lord chief justice of the Common Pleas, £7,000. Yet I am told the fees of some of the London lawyers in full practice aggregate annually more than the largest of these sums. But such cases I think must be rare, and will be found only where laborious and steady application is conjoined with great ability. The receipts of most lawyers are doubtless considerably less than the smallest of these sums. Yet I believe, as a rule, the lawyers in London are better paid than lawyers in the leading cities of the United States for like service. Mr. Webster said his observation led him to believe that most good lawyers in America worked hard, lived well and died poor. I should not be surprised to learn that such was the history of lawyers here.

There are now four courts sitting at Westminster Hall—the Court of Chancery, the Queen's Bench, Common Pleas, and Exchequer. Besides these, there is the Vice Chancellor's Court, that sits at Lincoln's Inn; the "Crown Cases Reserved Court;" the Court of Appeals in Chancery; the Courts of Probate and Divorce and Matrimonial Causes; the High Court of Admiralty; the London Bankruptcy Court; the Rolls Court; the City and Metropolitan Courts, and some others whose names I do not remember; besides associate judges sitting at chambers, masters' and auditors' hearings, and the like. And over all these, in the last resort, the House of Lords is the court of appeals from the Exchequer, in error; from the Queen's Bench and Common Pleas; from the decrees of the equity courts in England, including appeals in bankruptcy; from the decisions of the courts for matrimonial causes, or petitions for dissolution of marriage; from the orders of the courts of probate, and from the courts of Scotland and Ireland. It is also the court for the trials of impeachments. It sits in its own house, and the Lord High Chancellor of Great Britain, at present the Rt. Hon. ROUNDELL, BARON SELBORNE, presides.

PELHAM.

Book Notice.

BYLES ON BILLS. By the Hon. Sir JOHN BARNARD BYLES, late one of the judges of Her Majesty's Court of Common Pleas. 6th American from the 11th London edition, with notes illustrating the law and practice in the United States, by the Hon. GEORGE SHARSWOOD of the Supreme Court of Pennsylvania. Philadelphia: T. & J. W. Johnson & Co. 1874. pp. 783.

This treatise has a distinctive character among the works on Notes and Bills. The first edition appeared over forty-five years ago, and the eleventh London edition passed under the eye of the venerable author in 1873. When it first appeared the elaborate work of Mr. Chitty was, with the exception of the small volume of Mr. Justice BAYLEY, almost the only one then in use. Mr. Chitty's work is very full, and laboriously collects nearly all the English cases upon the subject which had then been reported; and the purpose of Mr. Justice BYLES was to produce a treatise of a different character, namely, "a plain and brief summary of the practical points relating to bills and notes, supported by a reference to the leading or latest authorities." Whoever examines the work will find abundant evidence that it was written by an experienced and practical hand for practical use. It is not enriched by mere learning and philosophic discussion like the Commentaries of Mr. Justice STORY, nor does it aim, like the treatises of Chitty and Parsons, to supply a library on the subject of Commercial Paper, and to bring into view the fine distinctions with which, on many points of minor consequence the cases abound. A leading point of merit in the work is that it is not too large, and to us its chief value consists in giving, in so excellent and reliable a form, the *condensed essence of the English law* of negotiable paper, by a judge of great ability, and whose performance has maintained it in favor with the profession for near half a century.

Summary of Our Exchanges.

The Chicago Legal News, June 20th, publishes Merchants' Ins. Co. v. Baring, Supreme Court U. S., holding that maritime liens constitute an insurable interest. Also, Burke v. Tigre, same court, relating to the question when the functions of the Provisional Court of Louisiana cease—in other words, when the war ceased and civil authority was restored in that state. Also the opinion of Chief Justice WAITE, sitting in the Eastern Virginia Circuit Court, in the case of Daniel Deckert, a bankrupt, holding that the amendatory bankrupt act of 1873 is unconstitutional in so far as it exempts against the creditors of a bankrupt a different amount of property in one state from the amount it exempts in another. Also, The People v. Chicago and Alton R. R. Co., U. S. Circuit Court, Southern District of Illinois, DAVIS, DRUMMOND and TREAT, JJ., which involves a construction of the act of congress of April 20, 1871, being the act to enforce the 14th amendment, relative to the removal of causes from the state courts to the federal courts.

The state commenced a prosecution in its own name against the railroad company, a corporation of the state, for a violation of the state act of May 2

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1873, in the Circuit Court of Sangamon County. After the action was commenced the defendant, in vacation, filed a petition, verified by affidavit, with the clerk of this court, which alleged, in substance, that the railroad company claimed the rights, privileges and immunities secured by the constitution of the United States, and that, under the color of the act of this state, above mentioned, the company was subject to be deprived of the same, and asking for a writ of *certiorari* to the state court, where the action was pending; the clerk accordingly issued the writ of *certiorari*, requiring the state court to send to the court the record and proceedings in the cause. The court hold that *certiorari* will not lie to the state court in such a case, and that the remedy remains as before the act of 1871, by writ of error under the 25th section of the judiciary act. The Legal News also prints notes of several Michigan cases by Mr. Chaney, and also Mrs. Lockwood's brief holding that "Queen Victoria controls parliament, the legislative power of England."

The Albany Law Journal for June contains an editorial article on "The Contract of Marriage," the occasion of which is the Brinkley divorce case, in which it takes a similar view of that case to the view taken by this journal in a previous number, and in which it also commends the New York rule on the subject of marriage as the preferable one. It concludes by saying: "We hope our legislature will never enact that, to constitute a valid contract of marriage, there must be the sanction of a priest, or the warrant of a magistrate, or a permission from the state, or the consent of parents, or a previous announcement to the public in any way of the intention to enter into such a contract." The Albany Law Journal also contains an article on "Ancient Lights," by J. Alexander Fulton, Esq., of Dover, Delaware. This reminds us that we have had on our desk, for some time, the "Opinion of Hon. DANIEL M. BATES, Chancellor of the State of Delaware, in the case of James E. Clawson v. Joseph Primrose, Kent County, September term, 1873," in which Mr. Fulton was counsel for the complainant, and for which we are indebted to his courtesy. This case holds that the English doctrine upon the subject of ancient lights is in force in Delaware. We have not been able to publish this opinion on account of its length.

In the article in the Albany Law Journal, Mr. Fulton says: "In Massachusetts, New York, New Jersey, Maryland, South Carolina, Louisiana, Illinois and Delaware, the principle has been recognized and enforced as a rule of property. In Connecticut, Pennsylvania, Maine and West Virginia it has been repudiated. In the other states there are no reported cases, so far as we are aware. It is to be noted, however, that the law has been changed in Massachusetts by positive enactment; while in New York, Maryland and South Carolina, it has been changed or modified by judicial departure. In New Jersey, Delaware, Illinois and Louisiana the law remains undisturbed in all its vigor. What it may be in the states yet to hear from can only be matter of conjecture. The opinion of the bar is somewhat divided, but the large preponderance is in favor of the common law principle. As one evidence of this, it may be noted that no exception was taken or dissatisfaction expressed for more than sixty years after our revolution."

We may add that the doctrine has been repudiated in Texas by judicial decision; although the common law is in force in that state, having been introduced by statute in 1840.

Mr. Fulton concludes his article as follows:

"The general doctrine in England, and the states which have adopted the common law principle, has evolved a prime and several incidental rules, which may be conveniently reduced to these *formulæ*:

"1. The uninterrupted use and enjoyment of light and air flowing into one's apartment over another's land for a period of twenty years or upwards, gives an indefeasible right to its future use and enjoyment.

"2. It is not necessary, to the acquisition of the right, that the ancient light should be on the division line between the two lots; if near enough to be materially affected by the new erection, it is sufficient

"3. The enlargement of the light will not enlarge the right, and if the increased flow cannot be obstructed without obstructing the ancient light as well, the right is lost, as the fault was with the owner of the ancient light. But a restoration of the ancient light to its former dimensions will restore the right.

"4. The right may be lost in the same way it is acquired; to-wit, by twenty years' disuse. But if an ancient light be shut up and disused by a tenant for twenty years, without the landlord's consent, it is not so.

"5. The conversion from one use to another does not enlarge or impair the right; and if an apartment have an ancient light, and the owner sets up some business therein which requires two, he gains no additional right thereby.

"6. Obstructing an ancient light is an injury to the inheritance, and a remainderman may sue.

"7. If the owner of two adjoining lots, with a house on one and none on the other, sell the one with the house, neither he nor a subsequent purchaser can build on the unimproved lot so as to shut up the windows on that side, and this although they are not ancient.

"8. In a contemporaneous sale of such lots by the same owner, the same rule applies.

"9. Formerly, the remedy was more frequent at law; but latterly, in equity, and generally whenever the injury is substantial, a bill will be entertained. It is the preferable method in most cases, and the only complete remedy in many."

The Albany Law Journal also publishes two New York decisions of a local character, and also its usual amount of notes, abstracts of cases, etc.

The Pittsburgh Legal Journal for June 17, contains a charge of Judge WHITE, of the District Court of Allegheny county, expounding the Pennsylvania statute which relates to the forfeiture of floating logs where the owner fails to take them away within three months, holding that it is to be strictly construed. Also an opinion by SHERMAN, J., in the Circuit Court of the United States for the Northern District of Ohio, construing the United States practice act of 1872. The rest of its matter is selected.

The Chicago Railway Review for June 20, contains an article on the Wisconsin railroad law, which is creating such a stir—by E. Walker, Esq., of Chicago—which concludes as follows:

"And finally that the act of '74, does not in any manner affect the *title* of stockholders in R. property, and so far as it attempts to limit or control its income, or prescribe arbitrary tariffs for its use, it is unconstitutional and void."

The Daily Register for June 19 and 20 contains an elaborate decision of FREEDMAN, J., in Astor v. The Mayor, etc., in which he discusses the exercise of the right of eminent domain in taking property for the purpose of widening streets, and holds that a statute empowering a report to be made by *two* of three commissioners without a consultation with the third, is unconstitutional, because the constitution of the state provides that there must not be less than three commissioners. This opinion is worth the attention of those having this subject under investigation.

The Chicago Legal News of June 27, prints United States v. Cook, United States Supreme Court, which relates to the right of Indians to cut and sell timber on their reservation. Also Osborne v. United States, same court, construing the 7th section of the act of congress imposing taxes on distilled spirits (15 Stat. 127.) Also the case Porter v. Rockford, Rock Island and St. Louis Railway Co., Supreme Court of Illinois, upon the subject of the taxation of railway shares, and the equalization of railroad taxation. Also the opinion of Judge BRADY, of the New York Supreme Court, General Term, on the application of Tweed for a mandamus to compel Judge NOAH DAVIS, before whom Tweed was tried, to settle a bill of exceptions. This is a short but interesting opinion. We shall publish it hereafter. The News also contains an opinion of the United States Supreme Court in Commissioners of Boise County v. Gorman, by WAITE, C. J., holding that under the practice act of 1872, upon the filing of the bond within sixty days from the time of the entry of the judgment, a *supersedeas* may be obtained; that such a *supersedeas*, however, stays proceedings only from the filing of the bond; that it prevents further proceedings under an execution which has been issued, but does not interfere with what has already been done.

Several cases not noticed in this summary, will be noticed in our Notes of Cases next week.

Legal News and Notes.

—THE governor of Virginia has adopted a series of rules in regard to the surrender of alleged fugitives from justice from other states. Copies can be had on application to the secretary of the commonwealth.

—THE latest improvement which we have to chronicle is a telegraph service to be established between the various courts of New York city, and the offices of those lawyers who subscribe to it. The great advantage of

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such a service is obvious. We trust it may prove so advantageous in New York that it will be initiated in St. Louis.

—In the New York Court of Common Pleas Justice DAILY has decided that a horse breaking away from a street car and dashing into another car, whereby a citizen was killed, was an unavoidable accident, and directed a dismissal of a suit for damages. If judges have a right to decide questions like this, what are juries for?

—The Daily Register says: "Judge LOEW, at the Chambers of the Court of Common Pleas, on the application of Col. Geo. H. Hart, has just given a decision that Sister Irene, of the Catholic Foundling Asylum, must, if her evidence be necessary, give it in a divorce case; and that when it is specifically shown that the books of such an institution, however sheltered its ordinary position under the sacred wing of religion, must be produced if they are essential in the elucidation of a matter of right and justice. Many years ago this assumed right of exemption of those in seclusion from the world was sought to be fought in England, but in a memorable case in which a charge was made of the ill usuage of a child, the ladies of a nunnery had to appear in court under the mandate of the lord chief justice."

—Hon. GEORGE S. HILLIARD, of Boston, is said to be so far recovered from an attack of paralysis as to be able to appear in public. He is planning the publication of his life of Professor Ticknor. His last literary work before his recent illness was an elaborate biography of Jeremiah Mason (the celebrated lawyer of the last generation in New England), who, like Daniel Webster, began his professional career in New Hampshire, but achieved his greatest eminence after emigration to Boston. Mr. Hilliard's biography of Mason has not been published, but was prepared and printed for private distribution among the Mason family. Mr. Hilliard will be remembered as an early associate of Mr. Sumner in the practice of the law, and in the editorial management of The American Jurist.

—The president has approved of the bill for the distribution of the Geneva award, and nominated the following gentlemen to be judges of the court of commissioners of the Alabama claims: Hezekiah G. Wells, of Michigan; Martin Ryerson, of New Jersey; Kenneth Raynor, of Mississippi; George W. Woodward, of Pennsylvania, and Caleb Baldwin, of Ohio. Also, John Davis, of Massachusetts, to be clerk of the court of commissioners. The president afterwards withdrew the name of George W. Woodward, and nominated in his place William A. Porter, of Pennsylvania. The latter, and the other nominees to be commissioners, together with John Davis to be clerk of the court, were subsequently confirmed.

—The New York Herald says of the ring suits recently decided by the court of appeals of that state: "The decision of the court of appeals in the suits brought in the name of the people of the state against Ingersoll, Tweed, and other members of the old city government is not a surprise to the legal profession. Very few lawyers have doubted the result. The money sought to be recovered belonged to the county of New York, and an action lies at the suit of the board of supervisors for its recovery, for the title to and ownership of the money must determine the right of action. The people of the state are not injured, and the defendants were not agents of the state. These points appeared so clear to legal minds before the decision that wonder has been expressed that the suits were ever instituted. It has been a costly litigation to the city, and it is to be hoped that the county suits will not have a similar disastrous termination.

—Through the courtesy of Dr. HAMMOND, of Iowa City, we have received a copy of the constitution of the Iowa state bar association. Its objects are: "To promote mutual acquaintance and harmony among the members of the Iowa bar; to maintain a high standard of professional integrity, honor and courtesy among them; to encourage a thorough and liberal legal education; to give expression to the deliberate and well-considered opinion of the legal profession upon all matters wherein its members are properly expected to act as a body; and to assist in the improvement of the laws and the better administration of justice to all classes of society without distinction." As this is, we believe, the the first *state* bar association which has yet been organized in the the country, it may not be uninteresting to note that its principal feature is that it provides for the organization of auxiliary associations embracing one or more counties—the state association occupying the position, not exactly of a grand lodge, but of a general convention of the whole. This constitution was drawn by Dr. HAMMOND, except those sections which are borrowed from the constitution of the Chicago bar association.

—The application of Miss Anthony for a remission of her fine (see *ante*, p. 296), met with a different fate at the hands of the senate judiciary committee, from that which it received at the hands of the judiciary committee of the house. Mr. Edmonds, from the senate judiciary committee, by unanimous consent, made a report upon the petition of Susan B. Anthony for a remission of the fine imposed upon her by the United States District Court for the Northern District of New York, and the bill introduced in the senate to enable her to pay her fine. He said the committee reported adversely and asked to be discharged from a further consideration of the subject, for the reason that the committee did not feel satisfied that the statement contained in the petition in respect to the rulings of the judge of the northern district of New York was precisely as represented by the petitioner; and, again, the committee did not believe it had the power to review United States courts. If the petitioner thought her conviction erroneous she could apply to the executive, who had the power to pardon her. The committee was discharged from the further consideration of the subject, and the bill was indefinitely postponed. There was one senator, however, who thought that congress ought not to let the occasion pass without declaring its disapproval of the fact that a citizen had been convicted in a criminal case without the verdict of a jury. Mr. Carpenter, expressing his views as a minority of the senate judiciary committee, regarding the memorial of Susan B. Anthony, says the decision of the court on her trial was erroneous in taking the case from the jury and directing their verdict, and refusing the request of her counsel to have the jury polled—thus denying to the jury, not only the moral right, but even the power of rendering a verdict of not guilty. Mr. Carpenter concurs with the majority of the committee that congress cannot grant the precise relief prayed for in the memorial; but he deems it to be the duty of congress to declare its disapproval of the doctrine asserted and the course pursued in the trial of Miss Anthony, and all the more for the reason that no judicial court has jurisdiction to review the proceedings therein.

—It appears that General Butler espoused the cause of Mrs. Lockwood, whose application to be admitted to the bar of the Court of Claims was recently denied. He reported a bill authorizing women, otherwise qualified, to practice as attorneys in the several courts of the United States. It was ordered to a third reading by a vote of 96 to 65, "amid great hilarity." In the meantime Mrs. Lockwood has prepared a brief on the question, which some of the law journals have done her the kindness to print. We confess to being somewhat disappointed in this brief. If Mrs. Bradwell had had the matter in hand she would have done better. But perhaps it only illustrates the old maxim which does not impute much wisdom to the person who attempts to be his own lawyer. But seriously, Mrs. Lockwood had a golden opportunity before her, not only to give character to her cause, but also to advance her reputation as a lawyer, by answering the inconclusive arguments which Mr. Justice NOTT put forth as *legal* reasons for refusing her application. She might have gone further. She might, *perhaps*, have uprooted that learned justice in the more solid position he took when he planted himself upon ancient custom and prejudice and the eternal fitness of things. In fact, she might have

> "Made herself a fearful monument—
> The wreck of old opinions."

But, unfortunately, she made no such thing. She cited the District of Columbia married woman's law, called attention to the fact that women have been admitted as attorneys in several other courts throughout the country, and informed the persons for whose benefit the brief was intended that Queen Victoria "controls parliament—the legislative power of England." This last observation probably failed to strike the average congressman as being very profound. Indeed, Mrs. Lockwood would have been more discreet had she gone back into antiquity and cited the doubtful fame of Semiramis, or the more historic achievements of Zenobia, Queen of the East, who sent one Roman general home with the loss of his army and of his reputation, and the conquest of whose dominions deserved the utmost exertions of the great Aurelian. Indeed, had Mrs. Lockwood quoted a few of the stately sentences in which Gibbon describes that most splendid woman of antiquity, they would have impressed the reader more profoundly than all the rest of her brief.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JULY 9, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURT UNDER ENFORCEMENT ACT.—The opinion of Mr. Circuit Judge DRUMMOND on this interesting and important question, which we withheld from our readers last week in order to get a correct proof, we now give, the proof having been corrected by the learned judge himself.

THE BANKRUPT ACT.—Having carefully compared the amendatory bankrupt act, as printed by us last week, with an authenticated copy furnished by the state department, we are glad to state that as given by us it was correctly printed—the only deviation from the authenticated copy being one or two slight matters of punctuation which do not affect the sense.

INSANITY OF DEFENDANT PENDING DIVORCE PROCEEDINGS—THE MORDAUNT CASE.—A cable dispatch of June 22 announces that the House of Lords, in the celebrated Mordaunt case, has decided that the proceedings for a divorce shall proceed notwithstanding the insanity of the lady occurring during the pendency of the trial. The inferior court decided that the effect of insanity supervening on the trial was to cause the proceedings to be suspended while that condition remained. On the appeal of the husband, Sir Charles Mordaunt, this decision has, it seems, just been reversed. To the legal mind this decision is of more interest than the disgusting details of the respondent's criminal infidelities with various persons in British high life.

REVISION OF THE STATUTE LAW AND CODIFICATION OF THE COMMON LAW.—The Irish Law Times of June 20 contains an article under the above caption, which concludes with the following language, indicating the remarkable changes which are taking place in the British Islands, no less in the judiciary system than in the body of the law itself: "If the lord chancellor should proceed with the codification of the common law during the next session, as he proposes, we will then have the three new systems simultaneously established, which will alter the entire administration of the law in all its branches—expediting, simplifying and contracting its rules, enactments and procedure, and effecting a revolution which will be unprecedented in its nature and extent." We shall reprint the article hereafter.

RAILWAY MANAGEMENT—INVITATION TO PASSENGERS TO ALIGHT.—The Irish Law Times for June 20 contains an interesting article on the question of the liability of a railway company for damages sustained by passengers in attempting to alight after an invitation to do so has been given by the servants of the company, in which the following cases are examined and compared: Nicolls v. Great Southern and Western Ry. Co., 7 Ir. Law Times, 58; Cockle v. London and Southeastern Ry. Co., L. R. 7 C. P. 321; Weller v. London, Brighton and South Coast Ry. Co., 29 L. T. Rep. N. S. 888, and Bridges v. North London Ry. Co. L. R. 6 Q. B. 377. The learned editor concludes as follows: "The result of the cases seems to be that the liability of the company rests on the fact whether the passengers were warranted in forming the conclusion that the final stand-still was arrived at; but that the calling out the name of the company's station by the company's servants is not enough to authorize the passengers to assume that this is the case in the absence of other circumstances."

INSOLVENT INSURANCE COMPANIES.—THE "BANNER COMPANY" OF CHICAGO.—POWER OF RECEIVER TO SUE IN ANOTHER STATE.—LIABILITY OF STOCKHOLDER.—At the request of several subscribers, we have procured, and in this number publish, the substance of a recent important decision, in the United States Circuit Court for Iowa, of Mr. Justice MILLER, of the Supreme Court of the United States, on the points above indicated. It will be seen that under the contract which was sought to be enforced against the stockholder, the learned justice was of opinion that a call or assessment or something equivalent thereto, was essential to the defendant's liability.

On the general subject of the liability of subscribers to the stock of corporations, and as to the effect of fraud practiced by the agents of the company to induce a person to subscribe for stock, and the duty as respects creditors of the company, of the person deceived to repudiate the contract promptly on discovering the fraud, and how such repudiation must be made, we refer the reader to the case of Upton, assignee, etc., v. Englehart, published in the Western Jurist for June, 1874, decided by the United States Court for the District of Iowa, at its May Term, 1874.

LAW SCHOOLS—REFORM NEEDED.—As practically conducted at present, we doubt the beneficial effects of law schools upon the profession or the public. This is the period of "commencements," when, in the various states, literally hundreds of young lawyers are made and turned out as with machinery. Let us not be misunderstood. Law schools are valuable as means of instruction, and if they were prohibited from graduating students except those who had attended *two* full courses of instruction in different years, or in lieu of one of the courses two full years in some law office, their effect would undoubtedly be good. But in almost all the law schools students are admitted fresh from the field, plow or college, and at the end of one year's course (about eight or nine months' actual study) graduated under laws which entitle the graduate to full *admission to the bar without further examination.* This is wrong. It is a permanent injury to the young man who is thus prematurely made a lawyer. It is an injury to the profession, and an injury to the community. We protest against it. Many of the young men thus "turned out" as lawyers are not competent, by reason of their inexperience, to take charge of the business which they are supposed to understand. Unless this evil of rapid graduation be reformed the profession ought to set their faces against law schools. But what is better is that the profession shall encourage law schools, but see that, by proper legislation, they are prevented from such rapid and superficial processes of manufacture. One school says we can't adopt the reform of requiring attendance upon *two* full courses, because it will drive all the students to some institution which requires only one course. This is the prac-

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tical difficulty in the way, and it can best be met by legislation requiring two years in a lawyer's office as a substitute for one year's course of instruction in a law school, and by requiring young men who graduate also to submit to an examination before admission to the bar.

Mandamus to Compel a Judge to Settle a Bill of Exceptions.

It will be remembered that not long since William M. Tweed, who had been tried and convicted on a great many counts of the same indictment for misdemeanors in office, and imprisoned in the penitentiary on Blackwell's Island, made an application through his counsel, to the supreme court in general term, for a mandamus to compel Judge NOAH DAVIS, before whom the indictment was tried, to settle a bill of exceptions in the case.

The ground on which the mandamus was sought was not that the judge had refused to sign or settle a bill of exceptions at all, but that he had refused to settle it in a particular manner; and thus a question which has been often passed upon before was again presented, namely, whether an appellate tribunal will, in aid of its jurisdiction, control by mandamus the decision of the judge of the court of first instance, in settling a bill of the exceptions which were taken at the trial. And the court answer this question in the negative. The opinion of the court was delivered by BRADY, J., as follows:

"The rule established by the cases upon applications kindred to this, is that a mandamus will be ordered commanding a judge to sign a bill of exceptions, but not to settle it in a particular manner when there is a dispute as to the incidents of the trial. The justice who presided must say whether or not an exception was taken, and his return is controlling, at least until further proceedings. If the return is alleged to be false, the suggestive remedy is by action. People v. Judges of Washington, 1 Caines, 511; People v. Judges Common Pleas, 2 Caines, 97; People v. Judges Westchester, 2 John. Cases, 118; Fisth v. Weatherwax, 2 John. Cases, 215; Sikes v. Ransom, 6 John. Rep. 279; People v. Sessions, Wayne Co., 15 How. N. Y. 393; Tidd's Pr. 903; Delavan v. Boardman, 5 Wend. 132; but whether such a remedy in fact exists, *quære*; see Weaver v. Devendorf, 3 Denio, 120.

"In England, according to Tidd. *supra*, if the alternative writ contain the surmise of an exception taken and overruled, the command is to sign the bill *quod si ita est* (if it be so); but if the judge returns *quod non ita est* (it is not so), an action lies at the instance of the aggrieved party. If he establish the falsity of the return, he recovers damages and the peremptory mandamus goes forth, because the jury have declared that the exception was taken.

"In this state, in one case, it was said that a referee would be compelled by mandamus to settle a case, and to settle it correctly (The People v. Baker, 35 Barbour, 105), but the writ was not issued, owing to some informality in the proceedings. The decision was made at a special term, and is predicated of the cases in 1 Caines, 6 John. and 5 Wend., *supra;* but an examination of these cases shows that the proposition asserted is not warranted by them, and the case stands alone. I have not found any case in which it has been declared that a mandamus would be issued against a judge, commanding him to settle a bill of exceptions in a particular manner, when as to the manner there was a dispute. There were no authorities to that effect cited on the argument. In this matter there is a dispute as to the correctness of the bill, as passed upon by the presiding justice in reference to exceptions, and he certifies that it is correct, although having directed it to be engrossed, it has not yet been presented for his signature.

"There seems to be a concession that an exception was taken to the exclusion of the juror Hayes upon a challenge to the favor, but the presiding justice certifies that he was excluded for mental incompetency, and it was so understood. Upon a careful examination, not only of the authorities, but of the application, I have arrived at the conclusion, for the reasons assigned, and those presented by Justices DANIELS and WESTBROOK, that the mandamus asked for should not be granted."

Liability of a Married Woman to be Made a Bankrupt.

Our readers will recollect that some time since (*ante*, pp. 137-9) we published a decision of Judge HOFFMAN of the federal district court for California on this interesting subject, together with a note in which we collated at some length the American and English decisions on the question. An interesting case involving the same question has recently been before the English Court of apppeal in Chancery, which consists of the lord chancellor and two lords justices. We refer to *re* Heneage, L. R., 9 Ch. 307, in which it was ruled that a clause of § 12 of the Married Woman's Property Act, of 1870, which provides that a husband shall not, by reason of a mariage after the act takes effect "be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried," does not make a married woman liable to be adjudicated a bankrupt. This decision amounts to a reversal of the judgment of Mr. RUSSELL, judge of the Manchester County Court, in *re* Phillips, 17 Solicitor's Journal, 385, who had taken the contrary view of the statute.

Concerning these decisions the Solicitor's Journal says: "In the exceptional cases where, by the custom of the city of London, or upon the banishment of the husband, the wife is permitted to be sued as a *feme sole*, she may also be adjudicated a bankrupt. Lavie v. Philip, 3 Burr. 1783; *ex parte* Franks, 7 Bing. 764. When the Married Woman's Property Act, 1870, enacted that 'the wife shall be liable to be sued for and any property belonging to her for her separate use shall be liable to satisfy' her debts contracted before marriage, 'as if she had continued unmarried,' it was not unnaturally assumed that the same consequence would follow. Mr. J. A. RUSSELL, Q. C., the Manchester County Court judge, in *re* Philips (17 S. J. 385), held that the effect of the 12th section of the act was to make the wife a single woman in respect of debts contracted before marriage, and to subject her, therefore, to the same consequences as regards liability to be adjudicated bankrupt in respect of those debts as if she had continued unmarried. The majority of the full court of appeal are disinclined thus to carry out the section to its logical consequence. Laying stress on the words 'shall be liable to be sued for,' and gliding gently over the rest of the section, the lord chancellor and JAMES, L.J., came to the conclusion

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that liability to be sued is the only liability imposed by it. MELISH, L.J., who seems to have had his eye upon the words 'and any property belonging to her for her separate use shall be liable to satisfy such debts *as if she had continued unmarried*,' expressed himself as 'not quite satisfied,' that if the wife had been shown to have separate property she might not have been made a bankrupt, and he remarked that he did not 'wish to prejudice the question when it shall arise.' It did not appear, however, in the recent case, that the wife had any separate property, and the lord justice was clear that 'there are no words in the section which can be made to apply to a woman who has no separate property.' It is perhaps not necessary to take the case as deciding more than that a married woman without separate property cannot be made bankrupt in respect of debts contracted before marriage. But the observations of the majority of the court lead to the conclusion that where she has separate property the legislature must be taken to have provided—to use the words of the county court judge—that 'any one creditor, by suing the wife, might snap up every sixpence worth of property and leave all the other creditors in the lurch.' Mr. RUSSELL 'could not conceive that the legislature could have been so extraordinarily forgetful of the operation of the law' as to intend this result. But the lord chancellor's experience of the mode in which acts are framed and passed has taught him 'that the legislature may have overlooked this result.'"

New Amendments to Bankrupt Act—Retroactive Effect—Action of the United States District Court for the Eastern District of Missouri.

The effect of the recent changes in the bankrupt act are seen to be very extensive in the practical administration of it. Recently the United States District Court for the the Eastern District of Missouri, in thirty-six pending cases of involuntary bankruptcy, ordered that the petitions be amended to conform to the new law in its retroactive aspects. Many difficulties were found to arise, for the cases were in various stages of advancement. In some instances adjudications had been made, assignees appointed, property sold, suits by assignees decided, etc. After a full examination of all the pending cases, Mr. District Judge TREAT, instead of making a special order in each one, made the general order below given. The object of this order is to set the new machinery in motion and to expedite the cases. The schedules etc , are before the Registers and they can report so that if no exception be taken, the court can pass at once the necessary orders. In addition to the question as to the necessary "number and amount" of creditors, is the question (vastly important) of an amended petition averring 40 instead of 14 days, suspension of commercial paper and the description of that paper required by the new act. These questions and others will soon arise and we shall aim to keep our readers speedily advised of the decisions. The bankrupt act promises to be a permanent feature in our jurisprudence and its effect and practical operation are essential to be known.

The following are the general orders of Judge TREAT above mentioned.

ORDER NO. 1.

It is ordered that the petitioning creditor or creditors in all compulsory or involuntary cases commenced since December 1, 1873, amend their petitions respectively within thirty days, in conformity with section 12 of an act to amend and supplement an act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and for other purposes, which said amendatory and supplementary act was approved June 22, 1874; said amended petition to be signed and verified as by said section required.

ORDER NO. 2.

It is ordered that in all cases in involuntary or compulsory bankruptcy commenced since December, 1, 1873, wherein the petitioning creditor or creditors have been ordered to file an amended petition within thirty days, the debtor or debtors against whom said proceedings in bankruptcy were commenced shall have within five days from the filing of said amended petition, and notice given, and if no notice is given, then within five days from the expiration of said thirty days (said amended petition having been duly filed), to deny or admit in writing that at least one-fourth in number of his or their creditors, the aggregate of whose debts provable, under said act, amounts to at least one-third of the debts so proveable, have joined in said petition.

And if said debtor or debtors deny in writing the allegation in the amended petition as to the number and amount of petitioning creditors, he or they shall file in court forthwith a full list of their creditors, with their places of residence and the sums due them respectively. And said amended petition and the answer thereto, and said list of creditors, or in the event of the failure to file the answer or list as aforesaid, said amended petition and the fact of such failure shall be certified to the register in charge of the case, or to whom the same is referable under the rules of this court, for his certificate to the court of the facts with respect thereto, to be ascertained after reasonable notice given to the creditors.

Whenever, in any case, the register shall certify that the required number and amount as aforesaid have not so petitioned, the petitioning creditor or creditors shall have twenty days from the filing of said certificate within which other creditors may join in such petition.

In all compulsory cases commenced since December 1, 1873, in which assignees have been appointed, and the property in their hands is perishable, or the keeping thereof attended with expense, they may respectively, with the consent of the respective debtors, sell the same, and retain the proceeds of said sale subject to the further order of this court.

All other proceedings in said compulsory cases are hereby stayed until the further order of this court.

The clerk wrote out the following notification:

Petitioning creditors in all voluntary cases in bankruptcy filed since the first day of December, 1873, are hereby notified that, pursuant to the order of the court this day made herein, they are required to file, within thirty days herefrom, amended petitions in conformity with the requirements of the amended bankrupt act.

Insolvent State Banks—Appropriation of Assets to Pay State Indebtedness.

BARING BROTHERS & CO., *et al.*, v. DABNEY, MORGAN & CO., THE BANK OF THE STATE OF SOUTH CAROLINA, *et al.*

Supreme Court of the United States, No. 153, *October Term*, 1873.

1. **Insolvent State Banks—State Indebtedness—Rights of General Creditors.**—Though the stock of a bank be altogether owned by a state, if the bank is insolvent its assets cannot be appropriated by legislative act or otherwise to pay the debts of the state, as distinguished from the debts of the bank. Those assets are a trust fund first applicable to the payment of the debts of the bank.

2. ——. ——. —— An act of the legislature requiring the managers of an insolvent bank belonging to the state to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts, and, if assented to by them, amounts to a contract with them to carry out said trust.

3. ——. ——. ——. If such an act, however, has the effect to appropriate the assets of the bank to pay the debts of the state, to the prejudice of billholders and other creditors of the bank, it is repugnant to that clause of the constitution which prohibits a law impairing the obligation of contracts and is void.

4. ——. ——. ——. Such an act passed by the legislature of South Carolina reference to the assets of the bank of the state of South Carolina declared to be void.

In error to the Supreme Court of the state of South Carolina.

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Mr. Justice BRADLEY delivered the opinion of the court.

In 1812, the legislature of South Carolina, by a legislative act, created a bank to belong wholly to the state, and the capital to consist of all the stocks, bonds and securities which belonged to the state. The president and directors were to be elected by the legislature, and were made a corporation and body politic. The faith of the state was pledged for the support of the bank, for the supply of any deficiency in the funds specially pledged, and for making good all losses arising from such deficiency. The usual powers were conferred upon the corporation—to purchase, hold, and transfer property of all kinds; to sue and be sued; to adopt its own rules and by-laws; to issue notes, and to make loans by way of discount, secured by mortgage; and to do all acts which might appertain to its functions as a bank.

In December, 1821, by another legislative act, the future profits of the bank were pledged and set apart for the payment of the six per cent. stock previously issued by the state.

In 1838, the city of Charleston suffered from an extensive fire, and the legislature passed an act entitled "An act for rebuilding the city of Charleston."

By the first section of this act the governor was directed and required, in the name of the state, to issue bonds or other contracts, not exceeding two millions of dollars, for the purpose of procuring a loan on the credit of the state to rebuild the burnt portion of the city of Charleston; and the faith and funds of the state were pledged for the punctual payment of the bonds or contracts, with interest.

By the third section the money, when realized in Charleston, was to be deposited in the Bank of the State of South Carolina, and become a part of the capital of the bank.

By the 10th, 11th, and 12th sections it was enacted as follows, to-wit:

Sec. X. "It shall be the duty of the president and directors of the Bank of the State of South Carolina to make proper provisions for the punctual payment of the interest of such loan, and also for the ultimate payment of the principal thereof."

Sec XI. "It shall be the duty of the president and directors of the Bank of the State of South Carolina to cause to be opened in the books of said bank an account in which they shall debit themselves with the *profits* arising out of the additional capital created out of the two millions loan aforesaid, for the year ending Oct. 1, 1839, and with the future profits of the said loan as the same shall hereafter be annually declared; which said fund, with its annual accumulations, shall be considered solemnly pledged and set apart for the payment of the interest on said loan and the final redemption thereof; and it shall be the duty of the president and directors of the said bank annually to report to both branches of the legislature the exact state of that fund."

Sec. XII. "When the *profits* of the said Bank of the State of South Carolina shall have paid the interest of certain stocks for which they have been heretofore pledged and set apart, the said profits shall also be considered solemnly pledged and set apart for the payment of the interest on the said loan and the final redemption thereof."

Under this act a large amount of bonds known as "fire-loan" bonds, were issued and negotiated, of which £109,000 payable in London, and due in 1868, are still outstanding in the hands of Barring, Brothers & Co. These bonds, by an endorsement thereon, were guaranteed by the bank.

Other certificates of state stock known as "fire-loan" stock, were also issued under the act payable at the state treasury, and not expressly guaranteed by the bank; of which $318,000 are still outstanding in the hands of the other plaintiffs in error.

At the close of the war the bank became insolvent, and the general assembly passed an act Dec. 21, 1865, entitled "An act to raise supplies for the year," etc.; by the 11th section of which it was enacted as follows:

"Sec. 11. That the president and directors of the Bank of the State of South Carolina be, and they are hereby, authorized and required to close the branches and agencies of said bank, and that the principal bank at Charleston shall cease to be a bank of issue, but shall continue to act as a bank of deposit until further action of the legislature; and the said president and directors are hereby authorized and required to collect the assets and property of the bank and hold the same especially appropriated; first, to the payment of the principal and interest of the bonds known as the "fire-loan bonds payable in Europe; second, to the payment of the principal and interest of the fire-loan bonds payable in the United States; and, third, to the redemption of outstanding notes hitherto issued by said bank."

In October, 1867, before the scheme provided in this act was carried out, Dabney, Morgan & Co., holding bills of the bank, filed the bill in this case in the chancery court of the state for Charleston district, on behalf of themselves and all other billholders of the bank, insisting that the fire-loan bondholders and fire-loan stockholders, were not creditors of the bank, and that the act of 1866 was unconstitutional in that by directing the property of the bank to be applied to the payment of the debts of the state, which were not debts of the bank, it impaired the obligation of contracts. The bill prayed that the bank might be restrained from carrying the act into effect, and that the plaintiffs and other billholders might be decreed to be paid out of the property and assets of the bank.

During the pendency of this suit the legislature of South Carolina, by an act passed September 15, 1868, entitled "An act to close the operations of the Bank of the State of South Carolina," amongst other things, repealed the 11th section of the act of December 21, 1865, above referred to.

On the 7th of May, 1870, it was decreed by the court of first instance, that the fire-loan bondholders and fire-loan stockholders be first paid *pari passu*, out of the assets of the bank, and that any surplus be applied *pro rata* to the billholders, depositors and other creditors, after adjusting the claims that arose during the war to the value thereof in United States currency. This decree ignored the 11th section of the act of 1865 altogether, as being unconstitutional, on two grounds: First, as disposing of property which the state did not own, and violating a solemn contract, on the faith of which the loan was taken; and secondly, as having no relation to the other matter of the act, and not being expressed in its title. The contract which the court held to have been violated by this section, was the pledge of profits contained in the 11th and 12th sections of the act of 1838, authorizing the fire-loan. The court held not only that the pledge of the profits was a pledge of the capital, but that the capital had all been drawn out by, and returned to, the state, and that the resulting fund now remaining consisted only of profits. The court further held that this pledge of profits related to both branches of the fire-loan alike, and that the fire-loan stock stood on an equal footing with the fire-loan bonds, although the latter only had been guaranteed by the bank.

The Supreme Court of South Carolina, on appeal, reversed this decree, placing the fire-loan bondholders on an equality with the other creditors, and holding that the fire-loan stockholders were not creditors of the bank at all, and not entitled to any participation in the fund; and directed the assets to be distributed among all the creditors of the bank in proportion to the amount of their claims, reducing those arising during the war to their value in national currency.

The grounds on which this decree was made were: First, that the pledge of profits in the act of 1838, expressly related to profits as distinguished from the capital; that no separate account of such profits had ever been kept; and that the result was, in fact, a loss instead of profit—the small residue of assets yet subsisting being the joint result of capital, deposits and moneys received from loans

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and discounts; and, therefore, that the pledge relied on by the fire-loan bondholders and stockholders had nothing specific and distinct on which to attach; and that, in fact, nothing was in existence on which it could attach. Secondly, that the fire-loan bondholders were to be admitted as creditors only by the express guaranty of the bonds of the bank; and that the fire-loan stockholders were to be excluded because the bank had never guaranteed said stock. Thirdly, that no claim could be sustained by either under the 11th section of the act of 1865, because that act did not amount to an assignment (which could only be made by the bank), but amounted only to a direction which was never carried into effect, which the state, as sole stockholder of the bank, could, at any time before its execution, revoke, and which, by the act of September, 1868, repealing the said section, it did revoke; and that if the act of 1865 had amounted to an assignment it could not have been sustained as to the fire-loan stockholders, because they were not even creditors of the bank.

This decree is brought here by a writ of error, under the 2d section of the act of 1867. The interposition of this court is invoked on the ground that the 11th section of the act of 1865 became a contract with the fire-loan bondholders and fire-loan stockholders, and that the validity of said contract was impaired by the act of 1868, which repealed said section, and which repealing act was sustained by the decree of the Supreme Court of South Carolina.

The first question for us to decide, therefore, is whether the 11th section of the act of 1865 did, as alleged, amount to, or did become, a contract with the appellants.

When that act was passed the bank was hopelessly insolvent. The section referred to was intended to prescribe the manner in which its assets were to be distributed and its affairs wound up. The state was the sole stockholder, and the bank, as a corporation, could not complain of any course of action which the legislature saw fit to adopt or prescribe. In relation to the state, it was *alter et idem*. In this respect its position was very different from that of private corporations. The action of the legislature could only be questioned by the creditors of the bank. As to the bank itself, the wishes of the legislature were commands. When, therefore, the legislature, by the 11th section of the act of 1865, declared that "the president and directors [of the bank] are hereby authorized *and required* to collect the assets and property of the bank, and hold the same specially appropriated, first, to the payment of the principal and interest of the bonds known as the fire-loan bonds, payable in Europe; second, to the payment of the principal and interest of the fire-loan bonds payable in the United States; and third, to the redemption of outstanding notes hitherto issued by the bank;" this declaration, if valid, was not only a direction, but a law. It was a law which the bank could not question; only creditors, whose interests were in conflict with it, could question it. As an enactment, it created, *ipso facto*, a trust, and made the bank a trustee for the parties provided for by it. It was a trust on which the bondholders, when made acquainted with its terms, had a right to rely. They became, if they assented to it, *cestuis que trust* with vested rights. Being made for their benefit, it will be presumed that they did assent to it if they expressed no dissent.

It is unnecessary to go into the learning of voluntary assignments for the benefit of creditors. It is clear law that such an assignment, if assented to by the creditors, or a considerable portion of them, becomes irrevocable; and in this country assent will be presumed if dissent is not expressed. The cases on this subject will be found collected in Burrill on Assisgnments, pp. 84, 309, 418.

In this case, it is true, no actual assignment was made. But for the purpose of creating a trust it was not necessary. The act was a law of the state making the corporation a trustee. What special rights were thus created in favor of the *cestuis que trust* will be noticed hereafter.

The creation of this trust in favor of the bondholders, if valid, was a contract with them. Confiding in it, they would desist from further efforts to secure the payment of their claims by adverse proceedings. It would be unjust to them to abrogate it and place them where they stood when the trust was created. The repeal of the section in question, therefore, did impair the validity of this contract, and, if the latter was valid, was a violation of the constitution.

This conclusion, however, is based on the assumption that the law itself, namely, the 11th section of the act of 1865, was a valid law. If it was not valid, its repeal cannot be questioned. It is contended before us that it is invalid because it appropriates the assets of the bank to persons who are not creditors of the bank, but creditors of the state only. The objection taken, if valid in fact, is a good one. It was expressly decided in Curran v. The State of Arkansas, 15 Howard, 304, that if the capital of a state bank, like the one in question, be withdrawn by the state, either for the payment of its own debts or for deposit in the state treasury, it is a violation of the pledges by which the capital of the bank, though derived from state resources or state obligations, was set apart and appropriated as the basis of the independent credit of the bank; and that a law passed to effect such a withdrawal or misappropriation impaired the validity of the contracts held by the creditors of the bank.

That case had in it many features of the present one. The legislature of Arkansas, amongst other things, required the bonds of the state held by the bank of Arkansas to be given up and canceled, and authorized the bank officers to receive in payment of debts due the bank bonds of the state issued to raise capital stock for the bank, notwithstanding the bills of the bank might not have been taken up. "We cannot attribute to this provision of the law," says the court, "any other meaning or effect than what is plainly apparent on its face. It authorizes and requires the assets of the bank to be appropriated to pay debts of the state; and we cannot conceive how this can be reconciled with the rights of creditors to those assets." p. 317. The bank in that case, as in this, was insolvent, and the court held that all its assets formed a trust fund for the payment of its creditors, and that a stockholder could not lawfully withdraw any part of this fund from appropriation to that object. and that a law passed for that purpose was unconstitutional. The majority of the court was clearly of opinion that a right on the part of the state to withdraw the funds of the bank for the uses of the state, or to pay the debts of the state, would render the bank itself obnoxious to the tenth section of the first article of the constitution, which prohibits a state from emitting bills of credit, inasmuch as it would destroy the distinctive existence and independent credit of the bank, which independent credit is founded on the inviolability of the capital pledged for the payment of its debts.

Now, in this case, the assets of the Bank of the state of South Carolina which still remained in 1865, where the resultant of all its capital and operations. We hold, with the supreme court of the state, that they were not profits, nor the subject of any previous pledge of profits, to any specific class of debts. Any question, therefore, arising upon any such previous pledge may be laid out of the case. The only question is, whether the appropriation by the state legislature of these assets to the payment, first, of the fire-loan bonds, and, secondly, of the fire-loan stock, was valid and effectual.

As to the latter, we think the supreme court was clearly right. The fire-loan stock was clearly not a debt of the bank, but a debt of the state alone, and the appropriation of the assets of the bank to its payment was directly within the case of Curran v. The State of Arkansas.

As to the fire-loan bonds there is more room to doubt. These bonds were the debts of the state, and not of the bank, it is true, but their payment was guaranteed by the bank; and it is strenuously insisted that this circumstance rendered them so far obliga-

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tions of the bank that the latter might be justified in providing for their payment in preference to their other creditors. Had the bank done this, the question as thus presented would have fairly arisen. But the bank, as a distinct entity, never did make such an appropriation of its assets. The appropriation which was made was an appropriation by law; and that law was made by the state itself—the principal debtor. The case was the same, in principle, as the Arkansas case. The legislature of South Carolina, by law, appropriated the assets of the bank to pay the debts of the state. This it could not do without violating the pledges made to the creditors of the bank, even though the particular debts thus preferred were guaranteed by the bank. The fire-loan bonds were not due by several years when this act of appropriation was attempted to be made. No claim had yet accrued thereon against the bank. So far as appears, there were not even any arrears of interest due. It did not then appear that the bank ever would be liable for the debt. It was the duty of the state to prevent such liability from ever arising. These special circumstances under which the law of 1865 was passed, bring it still more clearly within the decision of Curran v. State of Arkansas.

The decree of the Supreme Court of South Carolina must be affirmed.

STRONG, J.—I concur in the judgment given in this case, but not in all the positions taken in the opinion of the majority of the court. I cannot regard the eleventh section of the act of the general assembly of South Carolina, passed December 21, 1865, as amounting either to an assignment or a declaration of trust of the property of the bank in favor of the holders of the fire-loan bonds. In my opinion it effected no transfer, either legal or equitable, and vested no interest in the creditors. Hence, the repeal of the act by the legislature in 1868 was no disturbance of any vested rights, and it is not obnoxious to the objection that it impaired the obligation of any contract. For this reason, and for this reason alone, I think the judgment should be affirmed.

We concur in what is said by our brother STRONG.

MILLER, J.
DAVIS, J.
JUDGMENT AFFIRMED.

Removal of Causes from State to Federal Court —Act to Enforce Fourteenth Amendment.

THE PEOPLE OF THE STATE OF ILLINOIS v. THE CHICAGO AND ALTON RAILROAD COMPANY.

Circuit Court of the United States, for the Southern District of Illinois, June 18, 1874.

Present: Mr. Justice DAVIS; DRUMMOND, Circuit Judge, and TREAT, District Judge.

1. **Removal of Causes—Construction of Enforcement Act.**—The act of congress of April 20, 1871 (17 Stats. at Large 13, § 1), to enforce the 14th Amendment, relates to actions, suits and proceedings *originally commenced* in the district and circuit courts of the United States, and does not authorize the transfer of causes from the state to the federal courts, though brought under a state law which attempts to deprive persons of rights secured by the constitution of the United States.

2. ——. ——. The first section of the act of congress of April 20, 1871 (17 Stats. at Large 13), construed.

DRUMMOND, Circuit Judge.—The state commenced a prosecution in its own name against the railroad company, a corporation of this state, for a violation of the act of May 2, 1873, in the circuit court of Sangamon county. After the action was commenced the defendant, in vacation, filed a petition, verified by affidavit, with the clerk of this court, which alleged, in substance, that the railroad company claimed rights, privileges and immunities secured by the constitution of the United States, and that, under the color of the act of this state above mentioned, the company was subject to be deprived of the same, and asking for a writ of *certiorari* to the state court, where the action was pending. The clerk accordingly issued the writ of *certiorari*, requiring the state court to send to this court the record and proceedings in the cause. The question now made is whether the court has jurisdiction of the case. It is claimed to exist under the first section of the act of congress of April 20, 1871, which is as follows:

"Any person who, under color of any law, statute, regulation, custom or usage of any state, shall subject, or cause to be subjected, any person within the jurisdiction of the United States, to the deprivation of any rights, privileges or immunities secured by the constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage to the contrary notwithstanding, be liable to *the party injured, in any action at law*, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the 9th of April, 1866, and the other remedial laws of the United States which are in their nature applicable in such cases."

It is insisted by the counsel of the railroad company that the language of this section includes all persons of every class within the jurisdiction of the United States; that it comprehends any rights, privileges or immunities secured by the constitution, and any one of the amendments, and that the corporation is a person representing and acting for all the members of which it is composed, and for the rights, privileges or immunities secured to them as such. Now, if it be admitted that this is the true construction of the act of April 20, 1871, and if it be conceded, further, that the state was prosecuting an action of debt for a penalty which could not be imposed without causing the company to be subjected to the deprivation of rights, privileges and immunities granted by the constitution, the question is whether the *cause* could be removed from the circuit court of Sangamon county so as to authorize this court to take jurisdiction.

The reason urged is that the act of the legislature under which the penalty is sought to be imposed impaired the obligation of the contract which the state made with the company by its charter. If this were so, has congress authorized the transfer of a case from the state to the federal courts in such a contingency? It must satisfactorily appear that this has been done.

There can be no doubt that congress can vest any jurisdiction authorized by the constitution, in the federal courts, either originally or by transfer from the state courts. But prior to the act of April 20, 1871, that clause of the constitution which prohibits a state from passing any law impairing the obligation of contracts, when involved in a suit pending in a state court, and the decision of the court was in favor of the validity of the law, could only be construed by the federal courts by writ of error under the 25th section of the judiciary act. Has the act of April 20, 1871, changed this? If so, it must be by express words or by necessary implication. The first section of the act of 1871 declares that the person doing the injury under color of the state law shall be liable to an action at law, suit in equity or other proper proceeding for redress. It will be observed that then the words "action at law and suit in equity" are omitted, and the language is "such proceeding to be prosecuted in the several district and circuit courts of the United States."

There can be no doubt that the action at law and suit in equity referred to are *original actions* and suits to be commenced in the district or circuit courts, and it would seem not an unfair construction to hold that "other proper proceeding" should follow the principal words used, and should also be referred to any other original proceeding than such as might be properly termed an action at law or suit in equity; and when they were prosecuted in the district or circuit court they were to be subject to the same right of appeal, review upon error, and other remedies in like cases provided under the act of April 9, 1866, and other remedial laws in their nature applicable in such cases.

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Now the argument is because in some of the statutes here referred to, provision is made under certain circumstances named in each case, for a transfer of the case from the state to the federal court, that this cause can be transferred. We are not prepared to admit the conclusion. On the contrary, we think if the first section of the act of 1871 was intended to authorize the transfer, more explicit language would have been used. Undoubtedly that section in the case named intended to confer on the circuit and district courts original jurisdiction, but full effect can be given to the section by applying the words used to original "actions at law suits in equity, or other proper proceeding;" and "like cases," may well mean cases originally brought in such courts, namely, the district and circuit courts of the United States. The case not is then within the rule already stated. See Gaughan v. Northwestern Fertilizing Co., 3 Bissell, 485. The transfer of this case to this court is not authorized by express words or by necessary implication. We think, therefore, this court has no jurisdiction of the case, that the writ should be quashed, and the suit remanded to the Sangamon Circuit Court.

REMOVAL NOT GRANTED.

Bankrupt Act—Insolvent Corporations—Receiver's Power to Sue—Liability of Stockholder.

GEORGE CHANDLER, RECEIVER, ETC., v. A. SIDDLE.

United States Circuit Court, District of Iowa, May Term, 1874.

Before Mr. Justice MILLER.

1. **Bankrupt Act—Insolvent Corporations.**—The bankrupt act does not furnish the sole remedy for winding up insolvent corporations or companies.

2. **Power of a Receiver to Sue in the Courts of Another State** considered.

3. **Liability of Shareholders.**—A call or assessment, or some equivalent action, held essential to the liability of the defendant on his contract to purchase shares of stock in an incorporated company.

Action at law. The plaintiff alleges that he is the receiver of the Lamar Insurance Company of Illinois, appointed by a court of chancery, in Chicago, in a suit in which two persons who are named were plaintiffs, and the said insurance company was defendant—the exact nature of which does not appear. It is alleged that the said company had before said suit in Illinois was brought, became insolvent and ceased to do business.

The petition herein also alleges that on August 15, 1873, the said court of chancery in said cause made an order as follows: "And the said receiver is hereby authorized and empowered to compromise with any one or more of the stockholders of the said corporation defendant, and to take and receive from him or them such sum of money or such percentage on the amount due from such stockholders as in the judgment of said receiver will be just and equitable, and a fair proportion for such stockholder to pay toward discharging the debts of the corporation. And upon such payment and settlement said receiver is hereby directed to give up and surrender to the party or parties so paying, the stock, bond, or obligation of said parties, and to release and discharge the same. And it is further ordered, adjudged and decreed that in case said receiver shall bring any suit to enforce the payment of any stock or other obligation due to the said corporation, he shall bring said suit for and enforce such claim for the full amount of the debt or demand due, and the said decree of this court entered on the 18th January, 1873; and the matters therein contained, so far as the same relate to the assessment of twenty per cent., the call of fifteen per cent., and the collection of such per cent. and call, be and the same is hereby, as to all future and further proceeding, vacated and declared to be of no force or effect, and said decree shall not operate as a bar to such recovery, nor shall said decree or the matters therein contained, defeat or bar any suit which said receiver may hereafter bring to enforce payment of any debt due to said corporation."

The present suit is brought by the receiver to collect 80 per cent., the balance alleged to be due from the defendant on a contract to purchase ten shares of stock in the said insurance company. The contract is in writing, and is in substance that the defendant promises to pay for said stock, $1,000 in this manner: five per cent. down, and three installments of five per cent., in three, six and nine months. "The balance being subject to the call of the directors as they may be instructed by majority of the stockholders represented at any regular meeting." It is this balance that the receiver now seeks to recover. The charter of the company is not set forth in the pleadings, nor the powers and authority of the receiver, otherwise than as appears above.

The defendants demurred to the petition, and, on assignment, the points below mentioned were ruled.

Parker & Twomly, for the receiver; *James T. Lane, Gatch, Wright & Kennedy*, for the defendant.

Mr. Justice MILLER orally delivered the opinion of the court, holding, in substance,

1. That proceedings in bankruptcy are not an exclusive method of winding up insolvent corporations or companies. The bankrupt act does not, *ipso facto*, suspend state laws for the collection of debts. The act of congress of February 13, 1873 (17 Stats. at Large, 436), is a complete answer to the position that the sole remedy against an insolvent insurance company is in the bankruptcy court.

2. It is perhaps true that, where duly appointed and authorized, a receiver may, ordinarily, sue in another state. This power, when it exists, arises from county, in the absence of special statute regulation, and it is, in general, subordinate to the right of local creditors as respects property within the jurisdiction where such a suit is brought. The effect of the bankrupt act on the general doctrine does not arise on the record before me. And in view of the uncertain nature of the proceedings in which the present plaintiff was appointed, I give no definite opinion concerning his powers in respect of suits brought in this district. See Booth v. Clark, 17 How. 322.

3. In this action *at law*, in which neither the corporation nor its stockholders other than the defendant are before the court, and in which the suit is on the contract of subscription for the entire 80 per cent. alleged to be due, I am of opinion, considering the terms of that contract, and that no call or assessment is alleged, either by the company before the insolvency or by the court since, that the petition does not state a cause of action. In other words, in this action at law on the contract, there must be a call or assessment, or something standing in the place thereof, and equivalent thereto, either by the company or by a proper court, in order to make the defendant liable. This does not appear either by the averments of the petition or on the exhibits thereto, and hence the demurrer must be sustained, but the plaintiff may amend, and, in doing so, I advise him to set forth the charter of the company and the nature of the chancery proceeding in Illinois.

ORDERED ACCORDINGLY.

Correspondence — An American Lawyer in London — More About the English Judiciary and Practice.

LONDON, May, 1874.

EDITORS CENTRAL LAW JOURNAL:—I am pleased with the good-sense-like way in which the counsel here present their cases to the judges, and the no less good-sense-like way in which the judges deal with the cases at and after such presentation. Aside from this generally good-sense-like way, I have heard but one argument which struck me as notable. That one was made in the Exchequer, and was every way excellent, close, clear and strong, yet in no wise tedious. The question argued had reference to the form and subject of patents, and more immediately concerned patentable matter. Some difficulties in the case were suggested by the judges, all of which difficulties were promptly met and apparently overcome by the counsel. I like also very much the openness and sincerity between the judges and counsel. If the former interpose, as they often do in the course of the

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argument, it is never, so far as I have seen, to embarrass, but only the better to understand the case, and to notify the counsel when the point under discussion is, or is not, altogether clear, or is immaterial. One of the judges of the Queen's Bench in an argument made a few days ago, said to counsel: "I see no difficulty on that point; suppose you proceed on the next. And if, before you conclude, we deem the point you are now arguing material, and it is not clear to us, we will then call your attention to it again." Without hesitation and without remark, except, perhaps to thank his honor, counsel adopted the suggestion, and went on to argue the other parts of the case. In this way court and counsel soon come to understand each other, and both better to understand the case. It is not merely a saving of time. It is the practice of fair dealing. If counsel should conduct themselves in their office as such, with "all good fidelity to the court," as they most certainly ought, so also should the court deal openly and ingenuously with counsel. To deal otherwise is not honest. Then the practice here is for the judges to give their opinions immediately upon the conclusion of the arguments. The opinions are given orally, *seriatim*, beginning with the chief justice. I think there are great advantages in this practice—not the least of which, to a person of sensibility, is, there is a fragrance about the opinions which is not to be found in one written under the smoke of an offensive cigar, at some leisure hour, after the papers have all been laid away in some musty pigeon hole, in some badly ventilated room, six months or more, and when, as Lord Ellenborough once said of like papers, one cannot open them without endangering one's health. Not only is the determination more intelligent, when made on the spot, at the time, but more just. It not unfrequently happens, when the case is so delayed, and an opinion is afterward written by one judge for the court, in the absence of counsel and of the other judges, that important and, perhaps, decisive points taken at the argument are altogether overlooked or forgotten; whereas, when each judge gives his separate opinion in the presence of the others and of the counsel on either side, and when the matter is fresh in the recollection of all, no such mistake could be made.

To give your readers an idea of the amount of law business done here, let me state: In the Court of Queen's Bench there are five puisne judges—Sir Colin Blackburn, Sir John Mellor, Sir Robert Lush, Sir John Richard Quain, and Sir Thomas Dickson Archibald. There is also an associate, Hon. H. G. Campbell, who has his office in Chancery Lane. The chief justice has three clerks; each of the puisne justices two, and the associate one. Then there are masters whose office is in the Temple. The jurisdiction of this court is defined by act of Parliament, 1870, 33 and 34 Vict. chap. 6.

The Lord Chief Justice of the Court of Common Pleas is the Rt. Hon. Sir John Duke Coleridge. There also five puisne justices on this court—Hon. Sir Henry Singer Keating, Sir William Baliol Brett, Sir William Robert Grove, Hon. George Denman, and Sir George Honyman. Each justice has two clerks. There is also an associate juistice of this court, whose office is in Chancery Lane, and who has one clerk. Then there are five masters, with comfortable salaries, and chief clerks, judgment clerks, writ clerks, and record clerks. The salary of the chief justice is £7,000; each of the puisne justices has £5,000.

The Lord Chief Baron of the Exchequer is the Rt. Hon. Sir Fitzroy Kelly. There are five puisne barons—Sir Samuel Martin, Sir George William Wilshere Bramwall, Sir Gillery Pigott, Sir Anthony Cleasby and Sir Charles E. Pollock, each of whom has two clerks. Then there is an associate justice—Hon. Henry Pollock, whose office is in Chancery Lane. There are also five masters, with salaries of £1,500 each; a taxing department, a judgment department, a rule department, a bail department, and a sealer of executions.

The Court of Appeals in Chancery consists of the lord chancellor and two judges styled "Lord Justices of the Court of Appeals in Chancery." Any judge of the superior courts of common law may also sit as assistant. One of the lords justices, sitting with the lord chancellor, may form a court. There is an appeal to this court from the orders of the chief judge in bankruptcy; and an appeal lies from this court to the House of Lords.

The judges of the "Crown Cases Reserved Court" are, the justices of the Queen's Bench, of the Common Pleas, and of the Exchequer. Of the Rolls Court, Hon. Lord Romilly is the master or keeper.* The court sits in the Rolls Yard, Chancery Lane. The Rt. Hon. Sir James Hannen is the judge of the Court of Probate and Divorce and Matrimonial Causes. The courts are separate, but the same judge sits in both. The judge of the High Court of Admiralty is Sir Robert Joseph Phillimore; salary £4,000. The Vice Chancellor's Court sits at Lincoln's Inn. Vice Chancellor, Sir Richard Malins, with associates Bacon, Hall and others. The chief justice of the London Bankruptcy Court is Sir James Bacon, with senior and other registers, comptroller, and taxing masters, official assignees and receivers in insolvent estates, and the like. There are also local bankruptcy and other minor courts and inns of courts, with deans and masters, vicar generals and treasurers, not to mention the city and metropolitan courts, the powers of all which are regulated by acts of Parliament, and between whom there never is, so far as I can learn, any conflict of authority. While there is much to be done through so many agencies and by so many persons, all seems to be done well. And, on the whole, I doubt if there is any place on this planet where the subject, by recourse to the laws, finds right and justice more promptly or completely than in England.

PELHAM.

* Unless we are mistaken, Sir George Jessel, the former solicitor general, is now master of the rolls. See *ante* p. 159.—EDS.

Book Notices.

THE COMMENTARIES OF GAIUS, AND RULES OF ULPIAN. Translated with notes, by J. T. ABDY and BRYAN WALKER. New edition. 12mo. pp. xxvii, 479. Cambridge (Eng.) 1874.

There is no better evidence of the growing interest of English lawyers in the Roman law than the eagerness with which the booksellers turn out treatises of all kinds upon the subject. Some of them are mere booksellers' work, made to sell, and very poorly made at that; others are of real merit. This book belongs to the latter class.

It contains the Latin text of the two treatises mentioned in the title, with a translation, rather close than elegant, on the lower half of the same pages. The notes cover some thirty-five pages of fine type at the end, and are evidently intended for careful students of the *minutiæ* of Roman law. We miss the free handling and the comparative notices of English law, which make Mr. Poste's edition of Gaius attractive to the professional student. But any one who wishes to study accurately the Roman law as presented in its most interesting and valuable remains, will find this edition convenient and useful.

It is a little singular that of three treatises which have been preserved to us in their original form, out of the "twenty camel-loads" that formed a Roman law library, two owe their preservation each to a single manuscript. The recovery of the original text of Gaius so late as the year 1816, from a Verona palimpsest, is a chapter of the romance of literature, as will readily be admitted by any one who has read the account of it in Goshen's interesting preface, which ought to be translated, or at least reprinted in the English editions, if only for the light it throws upon the many obscurities of the text. Of the MS. to which we owe the fragment of Ulpian a sufficient account is given in the present volume—preface, p. xxiv.

The prefaces also contain a succinct account of the contents and supposed purpose of both works, and there occurs a remarkable contradiction between the two prefaces that forms a striking exception to the general accuracy and care of the editorial work. In the preface to the first edition (p. ix) we are told that "What Gaius really had in view was not the publication of a systematic treatise upon private law, but the enunciation, in the shape of oral lectures, of matter that would be serviceable to those who were studying with a view to practice." Whether this is a true view to be taken of the Commentaries we cannot stop here to discuss, only remarking that no edition of Gaius' seems to us so thoroughly to have mastered the true intent and purpose of Gaius as Bocking, whose theory makes it a treatise even more systematic than the Institutes of Justinian, and whose analysis of its contents appears unanswerable. Some such view seems to have occurred to the present editors between the two editions; for in the preface to the second (p. xxvi) we find it said of Gaius: "His object was not so much to enter into details of practice as to present his readers with a comprehensive outline of the Roman law as a system. On the other hand, Ulpian's aim was, we venture to think, enterely different. He wished to draw up a hand-book for the use of practicing lawyers." That in this case "the sober second thought" (if the learned English editors will pardon us for applying to them such an American phrase) was altogether the best, we have already intimated as our opinion; and the retention of several pages of remarks founded upon the other view can only confuse the student. If

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Bocking is even probably right, the space might be much better occupied with his excellent statement of the plan on which Gaius wrote, especially as this has an independent value in its bearing on the much-discussed division of Persons, Things, and Actions. W. G. H.

MEASURE OF DAMAGES. By THEODORE SEDGWICK. Sixth edition, edited by HENRY D. SEDGWICK. New York: Baker, Voorhis & Co.

The first edition of this well-established treatise appeared in 1874. The only work on the Law of Damages then in existence was that of Sayer, a London lawyer, which was published in 1770, and of which a second edition appeared recently (1872), after the lapse of more than a century. The treatise of Mr. Sedgwick was so philosophical, as well as so practical, that its merits were at once recognized in this country, and shortly afterwards in Great Britain. By its preparation the author rendered a substantial service to the law, and, more than any other writer, has insisted upon the necessity of having, as far as practicable, known, fixed and certain rules to measure the extent of the recovery of damages in civil actions. When he first wrote, the amount of damages in many cases where the measure is now fixed by rule or principle, was left to the arbitrary and uncertain discretion of the jury. Whoever has read the treatise under consideration knows how often and how earnestly the author has inveighed against this and insisted upon certainty and precision in the principles which govern the amount of pecuniary compensation in courts of justice.

Mr. Sedgwick combined, almost as successfully as any legal author we know of, the faculty of condensed philoshphic discussion, with that of presenting enough of the details of adjudged cases to illustrate his views and to exhibit the actual state of the law upon the topic under his consideration. The result is that his work on damages at once took, and to this day has kept the field. It has no American rival, and the only specific English treatise, except that of Sayer above mentioned, is Mr. Mayne's Law of Damages, which appeared in 1856, and which presents the subject almost exclusively from an English standpoint, and for the benefit of English practitioners. Mr. Mayne avows that he has "only resorted to American decisions where none of our own were in point." Not so with Mr. Sedgwick. The field of adjudication in Great Britain has been as carefully explored as the same field in this country; and in this edition, which is the most complete and in every way the best of any that has yet appeared, it is not too much to declare that the combined industry of the author and the successive editors has gathered together, so far as it is practical to do so, whatever is worth the attention of the profession concerning the law of damages. It would be easy to point out here and there some developments of single points connected with the subject which have not been as satisfactorily presented as the state of the decisions would permit, but this would be to us an ungracious task, for our deliberate judgment is, and long has been, that this is one of the very best law books ever published, and it gives us sincere pleasure to record our sense of its merits and usefulness, and to welcome the appearance of this full and enlarged edition.

FAMOUS CASES OF CIRCUMSTANTIAL EVIDENCE. Second edition. Revised and enlarged. New York: James Cockcroft & Co. 1874.

The title of the book correctly indicates its character. The cases have been selected so as to give variety and interest to the work, and its popularity has been such as already to call for a second edition. To us, one of the principal attractions of the work, and a leading element of value in it, is the introduction of about 40 pages on the Theory of Presumptive Proof, by S. M. Phillipps, author of "Phillipps on Evidence." Others, however, will prize the work for the remarkable cases which it contains, and these have a value, at least an admonitory value, which the conscientious judge and lawyer cannot overlook.

Summary of Our Exchanges.

Sale of Stock for Unpaid Assessments.—The Daily Register for July 1, publishes a long opinion of VAN VORST, J., in the case of Ann Eliza Mitchell, executrix, etc., of Samuel L. Mitchell, deceased, against the Vermont Copper Mining Company, Smith Ely, and Joseph J. Bickwell, which relates to the validity of a sale of stock by the directors, of a corporation, for unpaid assessments.

Criminal Procedure—Exceptions.—New York Supreme Court, General Term? Slatterly v. People, Daily Register for July 1 contains the ruling under the New York practice. In cases punishable by death, or imprisonment for life as a minimum punishment, an exception is not required in order to present a legal proposition for review upon writ of error after conviction, but where the maximum term of imprisonment is less than during life, an exception is required to be made.

Alimony Pendente Lite—Dispute as to Marriage.—In Humphreys v. Humphreys, New York Supreme Court, Special Term, Daily Register, June 29, the plaintiff, who had brought an action for a limited divorce on the ground of desertion and abandonment, applied for alimony pending the suit; but the court, VAN VORST, J., refused to grant it on the ground that there was no proof of marriage. Subsequently to the cohabitation with the plaintiff the defendant had been lawfully and publicly married to another woman, and the court held that there could be no presumption in support of the validity of a prior secret marriage, when it would operate to make the subsequent open and formal marriage a crime.

Official Character of the Person before whom Title Papers are Acknowledged.—In the New York Marine Court, Part 1, before Judge MCADAM, Daily Register, June 29, the point was ruled that where an officer signs his name, with the title of his office, that is *prima facia* evidence that he holds such office; and, where he signs his name alone, evidence *aliunde* may be given to prove the fact that he was an officer authorized to do the act he assumed to perform.

Right to File Supplementary Petition.—Soher v. Fargo, New York Supreme Court, General Term, Daily Register for June 26, rules the point of practice that the right to serve a supplemental complaint is not absolute, but rests in the sound discretion of the court. See Beach v. Reynolds, 53 N. Y. 1.

Mechanic's Lien Notice.—The Pittsburgh Legal Journal for July 1 publishes a *nisi prius* decision—The First National Bank, etc. v. Childs, holding that mechanics, miners, laborers and others claiming under the act of April 9, 1872, must give notice in writing to the officer executing the process before the actual sale of the property; in default of this notice, no lien. Construction of said act and its requirements.

The Washington Law Reporter for June 30 publishes the recent act of congress relating to the government of the District of Columbia; also the case of United States v. Barney Wood, Supreme Court, District of Columbia, relating questions of local jurisdiction, and also to the doctrine of new trials in criminal cases.

Northern Pacific Railroad Company—Change of Line—Rights of Settlers.—The Washington Law Reporter for June 30 also publishes a decision of the Secretary of the Interior in Engerbretson v. Northern Pacific Railroad Company.

The Daily Register of July 3d and 5th contains an able and exhaustive discussion of the Law of Bailments by Chief Justice DAILY, of the New York Common Pleas, in the case of The First National Bank v. Ocean National Bank, in which he holds that a bailment in which the trust is for the benefit of both parties is not such an one as, in the event of loss (unless occasioned by gross negligence, or wilful neglect equivalent in its nature to a breech of faith, or in practice equal to a fraud), will exempt the bailor from liability to make the same good. We shall endeavor to notice this case more at length hereafter.

The Albany Law Journal for June 27, contains an editorial article on Good Faith in Guardians and Trustees of Infants; also an elaborate article by John Proffatt, Esq., on The Liability of a Master for the Wrongful Acts of his Servant, in which he examines many cases, and concludes as follows: "In closing this subject we cannot help observing the adaptability of the common law to meet the varying relations and exigencies of social life; and, perhaps, in its whole domain, no subject better illustrates its exhaustiveness and adaptability than the law of master and servant, which gradually expanding from the fixing of the liability of one for the acts of those in his own immediate charge and control, has authoritatively and precisely fixed on one who works by an agent at any distance, in any concern or through any number of transactions, and which, while holding employees to a strict accountability, reasonable and adequate to protect the public, has not so stringently fixed a liability as to dissuade them from acting by agents." The Journal also publishes an interesting article on the Criteria of Negligence, by John F. Baker, Esq., and also reports the important case of Hime v. The Levee Commissioners, delivered recently in the Supreme Court of the United States, upon the jurisdiction in equity to enforce payment of corporate bonds.

The Legal Gazette for June 26, published Chaffee v. United States, Supreme Court of the United States, which was a prosecution under the internal revenue laws. The facts of the case are set out at great length, but only the points ruled by the court are given, instead of the full opinion. In The Diligent Fire Insurance Company v. Lehman, published in the same number, the Supreme Court of Pennsyvania, hold that a contributing member of an engine company has not such a legal status as entitles him to invoke the

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action of the court to reinstate him as a member. In Northampton County v. Lehigh and Susquehanna Railroad Company, published in the same number, the same court hold that the words "real estate" in a statute exempting all real property from taxation, do not include the track, etc., of a railroad company. In Watt's appeal, which the same journal publishes, the same court holds that the assets within the jurisdiction of the forum of the testator's domicil in another state, cannot be marshalled with the assetts of the estate in Pennsylvania—affirming Freeman's Appeal, 1 Leg. Gazette, 322.

Notes of Cases.

Foreign Corporation—Where it may be Sued.—In Lathrop v. Union Pacific Railroad Company, Supreme Court, District of Columbia, General Term, September, 1873, it is ruled on the authority of Bank of Augusta v. Earle, 13 Peters, 519; Marshall v. B. and O. R. R. Co., 16 How. 328; Lafayette Insurance Co. v. French, 18 How. 404, and Ohio & Miss. R. R. Co. v. Wheeler, 1 Black. 297, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created, and can only be sued in a different state by express legislation authorizing such suits against foreign corporations having agents within the state, conducting the business for which it was organized; and that for the purpose of litigation, a corporation is to be considered an inhabitant of the state under whose laws it exists. In this case it appeared the act of congress incorporating the Union Pacific Railroad Company, extended the privilege of certain land grants and other subsidies to the Union Pacific Railroad Company, Eastern Division, upon the same conditions as are imposed on said first named company, and said act also provided that said first named company can sue and be sued in all courts of law and equity within the United States; held that although the Union Pacific Railroad Company, Eastern Division, accepted the aid of the statute, its capacity for suing and being sued was not thereby enlarged, and being a corporation of the state of Kansas, could not be sued in this jurisdiction.

Keeper of Attached Property—Right of Compensation.—Connors v. Parker, Supreme Judicial Court of Massachusetts, was an action of contract for services as keeper over certain goods which the defendant, as deputy sheriff, had attached. At the trial it appeared that the defendant signed and gave to one Savage a paper in substance as follows: "Middlesex, Malden, May 20, 1871. To W. H. Savage *or bearer*—I hereby appoint and constitute you keeper of all the goods, etc., situate, etc., and you are authorized and required to safely keep the same in custody until otherwise ordered by me. Luther L. Parker, deputy sheriff." Savage, with the consent of defendant, delivered this paper to one Bartlett, who was already employed in the factory where the goods were situated. The defendant agreed with Bartlett that he should retain the custody of the goods without compensation. Bartlett, however, without the knowledge of the defendant, gave the paper to the plaintiff Connors, without notifying him of the agreement not to charge for custody. The defendant offered to show the agreement between himself and Bartlett, but the presiding judge excluded the evidence, and ruled that if Bartlett held the property by authority of the defendant under this agreement, and gave the agreement and custody to the plaintiff, without notice of his agreement in respect of compensation, with the plaintiff, and the defendant thereafter kept the property, then he was entitled to a reasonable compensation for his services as such keeper. The case was argued at the March sitting. Rescript by DEVENS, J. Exceptions sustained. "The authority given by Parker to the keeper of the property attached was not indefinitely transferrable by whoever might hold the same, by delivery so as to give the party receiving it a right to charge the defendant with services rendered to him. Even if Bartlett could have transferred it so as to give such right, he could transfer no more than the benefit of his contract. The evidence, therefore, of what was to be paid to Bartlett by Parker was admissible."

The error at the trial seems to have been in giving undue weight to the addition—"or bearer."

Will—Foreign Probate—Objection, When Taken.—In Robert S. Bartlett, executor's, etc., *et al.* v. Henry Rogers, executors, etc., *et al.*, recently decided by the U. S. Circuit Court for California, SAWYER, Circuit Judge, has re-affirmed the proposition that the probate of a will and the issue of letters testamentary in one state, do not authorize the executors so appointed to maintain an action as such in another state. Doolittle v. Lewis, 7 John. Ch. 46; Morrill v. Dickey, 1 John. Ch. 156; Williams v. Storrs, 6 John. Ch. 352; Brown v. Brown, 1 Barb. 195; Vroom v. Van Horne, 10 Paige, 536; Mellus v. Thompson, 1 Clif. 127; Caldwell v. Harding, 5 Blatch. 501; Kerr v. Moon, 9 Wheaton, 566; Armstrong v. Lear, 12 Wheat. 169; Vaughan v. Northrup, 15 Pet. 1.

And in the same case he also held that the objection may be taken at the hearing, when it does not appear on the face of the complaint where letters are issued, and issue has been joined on the allegation of the complaint that letters testamentary have been duly issued to the plaintiffs.

Fraudulent Conveyance—Bill in Equity to Compel Reconveyance.—Supreme Judicial Court of Massachusetts. Hassam v. Barrett. Bill in equity against the heirs at law of George Barrett, deceased, to compel the reconveyance of a certain parcel of real estate conveyed by the plaintiff to said George Barrett by a deed absolute in form, but which, it is alleged, was intended only as a mortgage, the plaintiff offering to pay such sum as shall be found to be due.

MORTON, J., reported the case.

At the hearing the following facts appeared: On January 8, 1856, the plaintiff was the owner of the premises described in his bill, subject to a mortgage for $1500. He had a partner in business who, for his private speculations, issued the notes of the firm to a large amount, rendering the firm and the partners insolvent. George Barrett was a creditor of Hassam, individually, to the amount of $2250. For the purpose of securing Barrett and of preventing the creditors of the firm from reaching this property by attachment or proceedings in insolvency, Hassam made a deed, absolute in form, of the premises, to Barrett, and caused it to be recorded without Barrett's knowledge. Afterwards, within a month, he informed Barrett of the fact, and the following oral agreement was then made: Barrett was to pay the $1500 mortgage, and to hold the property as security for the amount paid and his debt of $2250, with interest at the rate of seven per cent. per annum. Hassam was to pay Barrett $315 a year in the form of rent for the premises. As this amount exceeded the interest agreed on, it was agreed that upon a settlement the excess should be allowed to Hassam, with interest at the same rate of seven per cent.; and upon such settlement and the payment to Barrett of the amount found to be due, he was to convey the estate to Hassam.

Hassam occupied the estate under this arrangement, paying taxes and repairs, and paying the yearly sum of $315 in the form of rent, until the death of Barrett. In July, 1866, the parties accounted together orally, and it was found that, allowing for the excess of yearly payments over interest, and some other payments made by Hassam, there was then due Barrett $3000. Barrett soon after became insane, and remained insane until his death in 1869.

It also appears that Hassam has, since this deed was given, settled with his creditors.

The court had previously decided in this case, on demurrer, that it was open to the plaintiff to show, if he could, that this deed, absolute in form, was, nevertheless intended by the parties to be a mortgage. Upon the strength of this determination, the plaintiff now claimed that, upon these facts, he had a right to redeem. The defendant contended, first, these facts disclosed an agreement made after the deed was executed and put on record, touching the way the parties were to treat a conveyance already then made, and nor any verbal agreement under which the deed was in fact made; second, it is well settled that where the plaintiff cannot make out his case without showing an illegal act on his own part, he cannot maintain his action; and since the plaintiff's case proceeds upon the ground that the transaction in respect of which he complains was something else than it appears on its face to be, and he is constrained to show what that something else is—in showing which his own fraud necessarily appears—he cannot succeed; and his having settled with his creditors afterwards does not change the quality of his act. The court has now ordered bill dismissed with costs.

Rescript by WELLS, J.—One who conveys property to defraud his creditors has no standing in a court of equity to require its reconveyance after having accomplished his fraudulent purpose.

Rights of Escaped Convicts.—An interesting question relating to the rights of escaped convicts has recently been before the Supreme Court of New York, in General Term, in the case of The People v. Sharkey, who, it will be remembered, escaped from the Tombs while under sentence of death for murder, and has not been recaptured. Writs of error and of certiorari had been issued by the Supreme Court to the Court of General Session, in which Sharkey had been tried; and a motion being now made to dismiss these writs, DAVIS, presiding justice, said:

"The affidavit in this case shows that after judgment, and prior to the escape from jail of Sharkey, a writ of error with stay of proceedings was duly allowed by one of the justices of this court, and that subsequent to the escape a writ of certiorari was allowed to bring up mattters *dehors* the record. In the case of the application of Henry W. Genet for a mandamus, this court has come to the conclusion that the convict who thus escapes and remains a fugitive cannot require at the hands of the court or judges any proceeding in his favor, or insist upon any steps adverse to the prosecution; but that his rights to act adversely to the People are waived and suspended by his own criminal conduct. The effect of this rule is to leave the case in *statu quo*, so far as action of the convict is concerned. The court would not, therefore take any action on his motion or behalf. But it does not follow that the court

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may, on motion of The People, deprive him of the benefit of proceedings already taken before his escape. We think, therefore, that the writ of error should not be quashed. The certiorari might properly have been denied; but as it is ancilliary to the writ, and as the court below will not be compelled to make return to either writ until Sharkey shall be again in custody, within the jurisdiction of the court, we think the better course is to deny the motion in both its aspects.

"Motion denied."

Bankruptcy—Fraudulent Preference.—In the United States Circuit Court, Western District of Pennsylvania, Circuit Judge McKENNAN has recently rendered an interesting decision, in the case of Zahm, assignee v. Fry, (31 Legal Intelligencer, 25) in which the following points are ruled:

1. Confession of judgment, and execution under it, where it must necessarily stop the debtor's business, is a void transfer and preference within the meaning of the bankrupt act, as of the date of the entry of judgment.

2. The court can decree a restoration to the assignee of the fund realized, although it may be in the custody of a state officer.

3. Without *actual* fraud a creditor so preferred, will be allowed, upon surrender, to participate in the bankrupt's assets.

Life Insurance—Insurable Interest—Father and Son.—In Kane v. The Reserve Mutual Life Insurance Company, (31 Legal Intelligencer, 196) the District Court of Pennsylvania, (BRIGGS, J.) rules that the relation of father and son is sufficient to establish an insurable interest in the life of the father. Compare Loomis v. Eagle Life and Health Ins. Co., 6 Gray, 399; Forbes v. American Mutual Life Ins. Co., 15 Gray, 254.

Liability of Husband for Necessaries Furnished Wife—Feme Sole Trader.—The same court (MITCHELL, J.) holds, in Markley v. Wartman (31 Legal Intelligencer, 196), that the husband is liable for necessaries furnished to the wife for the support of herself and family, although she has been declared a *feme sole* trader. The question, of course, rests on a Pennsylvania statute, but it is interesting from the fact that there are similar statutes in many other states (see *ante*, p. 137–9). No authorities are cited for this ruling. The learned Judge says; "The precise point involved in this case does not appear to have been decided by the supreme court, but it is necessarily involved in the decision of the converse proposition, that the wife is not primarily liable, made by this court in Sheetz v. Cleaver, 8 Phila. 3, affirmed by supreme court in 20 Smith, 496."

Promise to Pay in Event of Future Contingency.—The case of Tyng v. The United States Submarine and Torpedo Boat Co., New York Supreme Court, General Term (5 Daily Register, No. 148), furnishes a brief discussion of the effect of a promise to pay merely on the happening of a future contingency. The defendant company, it seems, agreed to purchase certain patents and pay for them "as soon as any money was received into the treasury." The court (DANIELS, J.) say: "Before the plaintiff could recover on such a promise he should show that the contingency on which it depended had arisen, for in no other way could he put the defendant in default. In Scouton v. Eislord, 7 John. 36, the detendant promised to pay a debt, from which he had been discharged under the insolvent laws, provided he could do it without distressing his family; and the court held that no recovery could be had without proof of his ability to pay without distressing his family. It was also held, in Cartledge v. West, 2 Denio, 377, that a promise by an assignee to pay when he should receive funds from the assigned property would not sustain a recovery without proof of the receipt of such funds; and in Johnson v. Plowman, 49 Barb. 472, the same principle was acted upon. There the defendant purchased goods under an agreement that she was to make payments from time to time as she could, out of her business and from the proceeds of the sales of the goods; and she was only held liable becouse she was shown .o have received from those sources money enough to pay the plaintiff's demand. These authorities are sufficient to warrant the conclusion that a promise by the defendant to pay as soon as any money was received into its treasury, could not be made the ground for a recovery when the proof was that no money had ever been received in the company's treasury."

Criminal Law—Prisoner Turning State's Evidence—What Agreements not to Prosecute are Binding.—In The People v. Indian Peter, 7 Pacific Law Reporter, 197, Supreme Court of California, June 8, 1874, the court passed upon the interesting question, what agreements between officers of the state and a prisoner who becomes the state's witness and thereby criminates himself, not to prosecute the prisoner, are binding and obligatory upon the court:

The defendant was indicted for the crime of murder, and being put upon his trial, moved the court to direct his discharge, and in support of the motion, read to the court the following stipulation of facts, signed by the district attorney: "Defendant was arrested on said charge (the charge upon which the indictment proceeds) and taken before a committing magistrate, without counsel or knowlege of his rights. He was by said magistrate, informed and made to believe that if he would become a witness for the People against two persons charged with the same offense, to-wit: The People v. John Benoist, and The People v. Frank Page, the defendant would thereby be acquitted of any crime therein and that not a hair of his head should be harmed. The district attorney, with knowledge of that fact, used defendant as witness for the People in said two cases. That in said cases the defendant fully testified for the People, at the request of the district attorney, and in said testimony implicated himself. That he thereby destroyed the value of his testimony, and effectually shut out any defence he might have had to such charge."

This motion was refused, and the prisoner was convicted of murder in the second degree. He then moved in arrest of judgment on these grounds, and this motion having been overruled, he appealed. The supreme court *hold* that this not being one of the grounds of arresting a judgment enumerated in the penal code, the motion was for that reason properly denied. But they also say:

"Nor was there any error in denying the motion of the prisoner, made during the progress of the trial, that he be discharged from further prosecution The understanding had between the committing magistrate and the prisoner, and the acquiescence of the district attorney therein, furnish in themselves no reason, in point of mere law, for the dismissal of proceeding against the prisoner. Those officers had no authority to promise the accused a pardon or, what is the same thing, immunity from punishment, if he would testify against the others. The English practice of admitting accomplices to give evidence against their associates, under an implied promise of pardon, on condition of their disclosing the whole truth, had reference to persons already under indictment, as well as in costody. It was done only upon motion of the prosecutor made to the court, and in the exercise of a high judicial discretion.

"But with us the proceeding is regulated by statute, which provides that when two or more persons are included in the same indictment, the court may, at any time before the defendants have gone into their defenee, on the application of the district attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the People, and that the order of discharge shall be a bar to another prosecution for the same offence. Penal Code, sec. 1,099; id. 1,101. So upon its own motion, or upon the application of the district attorney, the court may in furtherance of justice, order an action or indictment to be dismissed—the reasons of such dismissal being entered of record (id., 1,385); and such order is a bar to another prosecution for the same offence, if it be a misdemeanor, but not a bar, if it be a felony. Id 1,387.

"The statute having thus designated the cases in which, and the proceedings by which, an indictment may be dismissed and a discharge awarded the accused without actual trial, must be taken to exclude all other cases, or cases not provided for by its terms.

"It results that the judgment must be affirmed, and is so ordered."

Mr. Chief Justice WALLACE, delivered the opinion—RHODES, NILES, CROCKETT and MCKINSTRY, JJ., concurring.

This is evidently a hard case. The defendant appears to have been an ignorant Indian, and was no doubt shamefully imposed upon.

Usurpation of Office.—In most of the states there are, no doubt, statutes punishing criminally the usurpation of, or wrongful continuing in, a public office. Obviously the most important question which can arise under such statute is, what degree of bad faith or guilty knowledge is necessary to bring the wrongful holder of the office under the penalty of the statute? It is manifest that a person holding an office in good faith, under a mistaken belief of his right to hold it, ought not to be punished criminally for so doing. It is accordingly ruled in Kreidler v. State, 24 Ohio State, 22, Supreme Court of Ohio, December Term, 1863, that an officer legally appointed and qualified, continuing to act as such officer after the expiration of his term, in good faith, reasonably believing it to be his duty to discharge the duties of the office until his successor is qualified, is not to be regarded as criminally usurping the office, within the meaning of section 13 of the act of March 8, 1831, "for the punishment of certain offences therein named." The Ohio statute under which this ruling was made simply enacts: "That if any person shall take upon himself to exercise or officiate in any office or place of authority, in this state, without being legally authorized," the person so offending shall, upon conviction thereof, be fined or imprisoned as therein stated. In expounding this statute the court (DAY, Ch. J.) says: "To constitute the offence, a person must do something more than merely discharge the duties of an office without legal authority. He must 'take upon himself' official functions in such sense as implies an *assumption* of the office without color of right. Therefore, to 'take upon himself' the exercise of an office without being legally authorized, within the meaning of the section, is such an assumption of

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official authority as imports a willful usurpation of an office. This is what was intended to be punished, and nothing short of it comes within the strict sense of the statute. Otherwise, an officer, *de facto*, acting in good faith, under color of right, not designing to 'take upon himself' an office without legal right, unconciously commits a crime in doing what the law would recognize as a valid act. Nor does it follow that an officer who may be ousted from an office by proceedings in *quo warranto* is guilty of the criminal offence of usurping the office. It was held in Ohio v. Alling, 12 Ohio, 16, that two common pleas judges who continued to officiate after their office was terminated by legislative enactment, which admitted of a reasonable doubt whether that was its legal effect, were *de facto* judges, and could not be regarded as 'usurpers and intruders,' and their acts were held to be valid. It is clear, therefore, that they could not have been regarded as guilty of the crime of usurpation of office."

Liability of Attorney for Stenographer's Bill.— In Bonyng v. Hatch, at *nisi prius* in the New York Supreme Court, which was an action against an attorney, by a stenographer for the value of his services rendered in a certain case, Judge VAN VORST charged the jury that unless the attorney, when he employed the stenographer, gave the latter notice that he, the attorney, was acting for others, to whom the stenographer must look for his pay, the attorney would be personally liable for the same. The learned judge says:

"Ordinarily, the stenographer looks to the person who employes him for payment; and it would be very hard upon him to turn him over to the parties; because, very often, the parties themselves are irresponsible, and the stenographer rarely ever sees them. When he is employed to render service, he is commonly employed by the attorney, and unless the attorney discloses to him, or states to him: 'If you render these services, you are to render them to the client and not to me,' he is the party to whom the stenographer may look for payment. Unless he says something to the stenographer to induce the belief that he is not to look to the attorney for his pay, but must look to the party; then, I say, the stenographer can recover against the attorney himself, as the person who employs him. A person who employs another to render service is the person who must pay, except he discloses at the time that he is an agent or acting for somebody else, and that the principal is the one who must pay and not himself. I believe that to be the law upon this subject and so I charge you. You are to find, therefore, whether the defendant employed the plaintiff in the way in which the plaintiff has testified he was employed, and did not disclose the fact that he was acting for somebody else, or was the authorized agent for some other person, who was to be charged with the expense.

Legal News and Notes.

—IT is said that our government had made a demand, more peremptory and decided than that of Great Britain, for indemnity on account of our citizens who were murdered at Santiago de Cuba.

—HON. JAMES H. HARDY, formerly district attorney of Sacramento county, California, and judge of the 16th judicial district of that state, died at his residence in San Francisco on the 11th of June.

—THE Scotch Court of Session has just arrived at a rather important decision in reference to the marriage laws. An English court submitted the question whether a marriage entered into in Scotland by a man who had obtained a decree of divorce from his former wife, but before the period of this decree had expired, is valid according to the law of Scotland. The court of session has answered that it is.

—THE examination of the senior class of the Union College of Law, preparatory to conferring the collegiate degree of bachelor of laws, occured at the lecture room of the college, No. 77 Clark street, Chicago, on Friday the 26th and Saturday the 27th ultimo. It was conducted by the presidents of the University of Chicago, and the Northwestern University; by Judge Booth, the Dean, Hon. Lyman Trumbull, Hon. James R. Doolittle, Hon. J. B. Bradwell, and Profs. V. B. Denslow and Philip Myers.

—TWO of the New York city police commissioners, Oliver Charlick and Hugh Gardner, have been convicted of a misdemeanor in violating the election law of 1872, and sentenced to pay a fine of $250 each. The charge against them was the removal of inspectors of election who had been regularly appointed and sworn into office, without a notice setting forth clearly and distinctly the reasons for such removal, as required by law. It seems that Mayor Havemeyer resorted to the trick of accepting their resignations and re-appointing them in each other's places, but Governor Dix has disregarded this and declared their offices vacant.

—ON the 30th of last month, James P. Sanders, Esq., a prominent lawyer of Yonkers, West Chester county, New York, was, while discharging his duties in the county court in a courteous and unoffending manner, shot twice and, it is supposed, mortally wounded by one August Lechaum, a Frenchman, who was the principal litigant in the opposite side of the case which Mr. Saunders was prosecuting. Mr. Saunders was an old lawyer, and universally respected in the community where he lived. Unless the public press has grossly belied this assassination, it was, should death result, murder in the first degree, cowardly and wicked, and without a shadow of mitigation. We shall see what a New York jury will do in this case. Unless this vile murderer is speedily and publicly punished with the full measure of the law, the administration of public justice will become still more a mockery and a reproach, and the system of trial by jury will deserve the execration and contempt of all good men.

—AT the graduating exercises of the Iowa State University Law School, the somewhat novel feature was presented of addresses and debates by the graduating students. The following was the programme:

The Civil Law—Joseph C. Helm, Arkansas.

Liberty and Law—Alanson Clark, Newton.

Law, Its Divine and Human Element—Michael Austen, Belchertown, Massachusetts.

American Jurisprudence—James K. P. McCallum, Eldorado, Kansas.

Tendencies of Class Legislation—Ellison G. Smith, Hopkinton.

The Rights of Persons—David A. Myers, Ohio.

Debate on the following question:

Is there Danger in an Elective Judiciary?—Affirmative, Cyrus Beard, Washington county; negative, Abraham E. Swisher, Johnson county.

The Feudal System, with the Valedictory Addresses—Jesse McD. Freels, Carrollton, Illinois.

—THE Daily Register, continuing its discussion of the question of Legal Education, throws out the following valuable suggestion: "We want legal societies (or clubs analagous to the "Inns of Court" of London) where our students of law, of both classes, shall have ample opportunity to practice forensic eloquence and the management of actions at law. Our bar association is not intentended to promote this object, although it could, by its large influence, insure success to a project or projects of this nature. The law institute could open the door to its vast collection of law books to such societies, and feed their members to satiety upon the pure milk of the law undefiled. In connection with each society, or club, a moot court should be organized, and some capable jurist be employed to preside over its deliberations, whose learning should be extensive, and whose dignity should give character and order to it meetings. We commend this subject to the careful consideration of our younger members of the profession, and to students of the law."

—THE Daily Register says: "A few days since it was announced that Mr. Austin Abbott, having completed the sixth and last volume of his new Digest of New York Statutes and Reports, had now returned to practice his profession at the bar. While we congratulate the bar of again more frequently meeting this genial gentleman, we consider it a great public loss to have his labors withdrawn from the field of authorship in the various departments of the law, which has become richer and better understood by his labors, and also with those of his brother, Benjamin Vaughn Abbott. The first edition of Abbott's New York Digest was the joint work of these two brothers, but the new edition, just completed, and entirely rewritten, is the work of Austin Abbott alone, the first volume of which appeared in February, 1873. The rapidity of his labors are no more astonishing than the industry and accuracy which characterize them." It has always been a marvel, to those who are familiar with legal book-making, how the Abbott brothers contrive to grind out digests, and these of the better sort, with the rapidity with which they do. If their books were mere scissorings from the reporters' head-notes, we could understand it, but they are something more than this. No digests which have been published have surpassed theirs in practical usefulness, and very few have equalled them. Perhaps the highest compliment that can be paid to their books is that they serve as models, in many important particulars, for most of the digests compiled by other hands that have followed them. If the Messrs. Abbott would advertise for sale the secret which enables them to produce such good books with such astonishing rapidity, no doubt many a weary bookmaker would bid high for it.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JULY 16, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

We have received through the courtesy of Mr. Justice BRADLEY his able opinion in what is known as the Grant Parish case, in which he expounds the act of 1870, to enforce the right of citizens to vote. The question passed upon is of great importance to the people of the South. We shall either publish it or advert to it fully hereafter.

MURDER—CIRCUMSTANTIAL EVIDENCE—UDDERZOOK'S CASE—Some months ago (*ante*, p. 50), we published the main facts of this remarkable case. We now publish the opinion of the Supreme Court of Pennsylvania, affirming the judgment of the Oyer and Terminer of Chester county, and directing the sentence of death to be carried into execution. We could have wished to accompany the report with a full summary of the evidence, but it has not been practicable for us to do so. The chief point ruled will, however, be sufficiently understood without a statement of the facts in proof. It is, that a photograph likeness is admissible in evidence on the trial of an indictment for murder, for the purpose of identifying the person from whose features it is proved to have been taken, without further proof (as in case of paintings) of its being a correct likeness. The court, in the case of photographs, supply this necessary proof by taking judicial notice of the fact that photography is a means of producing correct likenesses. This conclusion accords with common knowledge and common sense; but a narrow and technical court could not have brought themselves up to it.

RETROACTIVE SCOPE OF LATE AMENDMENT TO THE BANKRUPT ACT—IMPORTANT DECISION.—The United States Circuit Judge for the Eighth Circuit on a petition for review brought under section 2 of the Bankrupt Act, in the cases of E. G. Obear and James S. Thomas, has recently made an important decision touching the scope and effect of the retrospective clauses of the recent amendment to the Bankrupt Act. The opinion will be given to our readers in full, but we mention at this time that the judge holds that while the amendatory act is retroactive in its operations, so as to bring within it all cases commenced since December 1, 1873, and in which, at the time of the taking effect of the amendment, June 22, 1874, the petitions for adjudication remained undetermined, yet it does not annul or disturb adjudications of bankruptcy actually made and in force at the time of the taking effect of the amendment. The case differed from that of Scammon (CENTRAL LAW JOURNAL, *ante*, p. 328), decided by Judge BLODGETT, as in this last case there had been no adjudication of bankruptcy when the amendatory act went into force.

Admissions to the Bar.

We ask attention to an exceedingly well written and sensible letter from a rising young lawyer of Alabama, which we print in another column. His suggestion of a lawyer's state convention to devise means of remedying the evils complained of, is an admirable one. This is substantially what has been accomplished in Iowa under the name of a State Bar Association. We quite agree with "JUVENIS" that "the young and active members of the bar must take the initiatory steps" in this movement. They are the real sufferers and are the ones most interested. The old members of the profession, whose fame is established, and who have at their backs an army of wealthy clients, are not directly affected by a general deterioration of the bar. But the young lawyer, however excellent his attainments and brilliant his prospects may be, must bear for a time the humiliation and shame of being classed by the public with the multitude of ignorant, incompetent and unworthy persons who are crowding into the ranks of the profession. Obviously the assistance of the older members of the bar should not be despised, but should be courted; but nothing should deter the young men from taking hold. They have more leisure, more energy, and a far greater interest at stake. Besides, the young men of to-day are the middle-aged men twenty years hence; and forty years hence, they are the veterans of the bar. The history of the Crown Law League is a striking example of the fact that there is nothing in the way of a needed and reasonable reform which a few determined and capable men combined together, cannot, by perseverance, accomplish. The motto of certain revolutionists may well be applied to every combination which is made to uproot old abuses:

"The patient dirt and powd r shock
Will blast an empire like a rock."

Power of State to Tax Land Grant of Union Pacific Railroad Company, and Burlington & Missouri River Railroad Company.

The Circuit Court of the United States for the District of Nebraska recently (July 6), made two important decisions in respect to the right and power of the state of Nebraska to tax the *lands* of the Union Pacific and Burlington companies. We have not space at present for the opinions in full, which were delivered by the circuit judge, but give a brief statement of the points decided. The case which involved the right of the state to tax the *lands* of the Union Pacific Railroad Company, was entitled the Union Pacific R. R. Co. v. McShane *et. al.* The court in this case ruled the following points:

1 Lands for which a *patent* has issued to the Union Pacific Railroad Company are taxable by the authorities of the state of Nebraska, notwithstanding the proviso in section 3, of the act of July 1, 1862 (12 Stats at Large, 489), which subjects lands not sold or disposed of by the company within three years from the completion of the road to settlement and pre-emption at $1.25 per acre. Case distinguished from The Railway Co. v. Prescott, 16 Wall. 603.

2. Said proviso construed and the respective rights of the company and persons proposing to settle and pre-empt the lands of the company stated.

3. A bill by the railroad company joining as defendants the various counties through which this railroad runs, is not multifarious where the question on which the case turns is common to all, and the counties are agencies of the state as that part of the taxes which they must pay into the state treasury.

4 Where in addition to the illegality of the tax the bill shows that if not enjoined a multiplicity of suits will arise, and a cloud be cast upon the owner's title, and that he has no adequate remedy at law, it presents a case of equity cognizance.

It will be remembered that the same court heretofore held that the road-bed and other property of the Union Pacific Railroad Company was taxable by the state, and that its judg-

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ment was affirmed last winter by the United States Supreme Court. Union Pacific R. R. Co. v. Peniston, not yet reported. (See Central Law Journal, *ante*, p. 58.)

In the case of Horatio H. Hunnewell, suing for himself and others v. The Burlington and Missouri River R. R. Co. in Nebraska, the County of Cass and other Counties, the circuit court ruled the following propositions:

1. The land grant to the Burlington and Missouri River Railroad Company (act of July 2, 1864, sections 17, 20; 13 Stats. at Large, pp. 356, 364,) is not subject to the proviso in section 3 of the original act of July 1, 1862 (12 Stats at Large, 489), giving to the public the right of settlement and pre-emption if the lands granted be not sold or disposed of within three years after the entire line of the road is completed.

2. Where the lands had been fully earned by the railroad company in 1871, and the cost of surveying paid as required by section 21 of said act of July 2, 1864, before the period for assessing lands for 1872 had passed, it was held that the lands were taxable, although the company did not pay the local land-officer's fees until a few days after the period for making the assessment for 1872 had expired.

The views of the court in respect to the right of the public to settle upon and pre-empt the lands of the Union Pacific Railroad Company are of great moment and will be adverted to separately.

Railway Tariff Regulation—The Potter Wisconsin Law.

The *constitution* of Wisconsin contains a provision that the charter of railroad corporations may be *altered* or *repealed* at any time by the legislature. The meaning and effect of this provision have recently been considered by the United States Circuit Court for the Western District of Wisconsin, at Madison (present Mr. Justice DAVIS, and Circuit Judge DRUMMOND), in a suit by the bondholders of the Chicago and Northwestern Railroad Company for an injunction to restrain the state attorney general and the railroad commissioners from enforcing the (Potter) law of last winter regulating railway tariffs. The injunction was denied, and in view of the broad reservation of power over corporations contained in the Wisconsin constitution, it seems to us that there can remain but little doubt as to the correctness of this conclusion. What the word *repeal* means is clear, and if the legislature may absolutely repeal charters, it would seem difficult to fix any practical limits to the *alterations* it may make in charters.

The result to which the court came was drawn up by Judge DRUMMOND and stated as follows:

1. **Jurisdiction of the Federal Court.**—On the assumption that the act of the 11th of March, 1874, relating to railroad, express, and telegraph companies in the state of Wisconsin, is invalid, we think the court has jurisdiction of the case. The bill as filed by the bondholders, citizens of Europe, and of other states, seeks to enforce equitable rights, and to prevent action by the railroad commissioners, which may result, as alleged, in serious injury to these rights. It was not necessary to wait until the commssioners had put the law in full operation, and its effects upon the railway companies had become complete, before the application against them was made to a court of equity, as a very important function of that court is to prevent threatened wrong to the rights of property.

2. **The Potter Law still in force Unrepealed.**—We are of opinion that the act of the 11th of March, mentioned above, was not repealed by the act of the 12th of March, 1874, the second section of which declared that all existing corporations within the state shall have and possess all the powers and privileges contained in their respective charters, and the act of the 12th of March, 1874, the ninth section of which imposes a penalty for exorbitant charges. There are apparent inconsistencies between the last two named acts and that of the 11th of March; but it becomes a question of intendment on the part of the legislature. On the same day a joint resolution was passed—March 12—directing the secretary of state not to publish the act of 11th March until the 28th of April. Acts of 1874, pp. 599, 693, 758, 773. In this state no general law is enforced till after publication. We think we may consider the joint resolution in order to determine whether the legislature intended that the two acts passed the same day should repeal the act of the 11th of March, and from that it is manifest that such was not the intention of the legislature.

3. **Constitutional Provision Construed and Applied.**—The charters of railroad corporations, under the constitution of Wisconsin, may be altered or repealed by the legislature at any time after their passage. In legal effect, therefore, there was incorporated in all the numerous grants under which the Northwestern Railway Company now claims its right of franchise and property in this state, the foregoing condition contained in the constitution. It became a part by operation of law, of every contract of mortgage made by the company or by of any its numerous predecessors, under which it claims. All share and bondholders took their stock or their securities subject to this paramount condition, and of what they in law had notice. If the corporation, by making a contract or a deed of trust on its property, could clothe its creditors with an absolute, unchangeable right, it would enable the corporation, by its own act, to abrogate one of the provisions of the fundamental law of the state.

4. **Same—Consolidation.**—This principle is not changed by any authority from the legislature of the state to a corporation to consolidate with a corporation of another state. The corporation of this state is still subject to the constitution of Wisconsin, and there is no power anywhere to remove it beyond that authority.

5. **Power of Legislature within State Limits.**—As to the rates for the transit of persons and property exclusively within the limits of this state, the legislature had the right to alter the terms of the charter of the Northwestern Railway Company, and the fact that such alteration might affect the value of its property or franchises, cannot touch the question of power in the legislature. The repeal of its franchises would have well-nigh destroyed the value of its tangible property; and while the latter, as such, could not be taken, still its essential value for use on the railroad would be gone.

6. **Grants by Congress do not Limit State Power.**—The fact that grants of land were made by congress to the state cannot change the rights of the corporators, or of the creditors. If the state has not perfected the trust, it must answer to the United States.

7. **As to State Power over Inter-state Commerce.**—The act of the 11th of March, 1874, while not interfering with rates of freight of property transported entirely through the state to or from other states, includes within its terms property and persons transported on railroads from other states into Wisconsin, or from Wisconsin into other states. This act either establishes or authorizes the commissioners to establish, fixed rates of freight and fare on such persons and property. The case of the state freight tax, reported in 15 Wallace, 232, decides that this last described traffic constitutes commerce between the several states, and that the regulation thereof belongs exclusively to congress. It becomes, therefore, a very grave question whether it is competent for a state arbitrarily to fix certain rates for transportation of persons and property of this inter-state commerce. As the right to lower rates implies also the right to raise them, there may be serious doubts whether this can be done. This point was not fully argued by counsel, and scarcely at all by the counsel of defendants; and, under the circumstances, we do not at present feel warranted, on this ground alone, to order the issue of an injunction. If desired by the plaintiffs it may be further considered at a future time, either on demurrer to the bil or in such other form as may fairly present the question to our consideration. The motion for an injunction is overruled.

Upon the conclusion of the reading of the above, Mr. Justice DAVIS remarked: "In view of the decision just rendered, we trust it will not be considered out of the line of our duty to make a suggestion concerning this litigation to the counsel for the defendants. It is manifest that the questions involved are grave ones, and that the court of last resort will ultimately have to pass on them. It is equally manifest that a speedy decision, in which all parties are vitally interested, cannot be obtained unless there is harmony of action on the part of both the complainants and defendants. In the meantime, and while this litigation is in progress, would it not be better for defendants, as far as lies in their power, to have the prosecutions for penalties suspended? These prosecutions are not required to settle rights. They are attended with great expense, and, if enforced while an effort is making in good faith to test the validity of this legislation, must cause

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serious irritation, and cannot be, as it seems to us, productive of any good result."

One point having been left unsettled—that of the effect of the law in question on inter state commerce—Mr. Stoughton, for plaintiffs, expressed great anxiety for further argument and an early decision on that question, and considerable conversation followed between him, the court, and Attorney General Sloan.

Judge DAVIS thought the decisions and suggestions of the court would enable the parties to come to some arrangement which would render it practicable to get the matter before the supreme court at the October term, where a speedy hearing and determination might be had.

It was finally agreed that in case no such arrangement was made mutually satisfactory, the application for an injunction should be further argued on the question of the effect of the law on inter-state commerce, at Chicago, before the same judges, on Thursday or Friday of next week.

Are the Lands of the Union Pacific Railway Company Subject to Pre-emption by the Public?

This question, so important both to the public and to the company, was incidentally before the supreme court in what is known as the Prescott case (16 Wall. 603). It was recently before the United States Circuit Court for Kansas in a case in which the company sought to restrain the sale of its lands for taxes. For a synopsis of what the court decided see *ante*, p. 106

The question as to the right of pre-emptiom by the public arises upon section 3 of the charter of the company (12 Stats. at Large, 489). This section is the one which makes the grant of lands to the company within a specified distance of its line of road, and it concludes with this provision: "And all such lands so granted by this section, which shall not be sold or disposed of by the company within three years after the entire road shall be completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding $1.25 per acre, to be paid to the company."

Section 4 directs patents to issue for lands on each side of the road from time to time on the completion of sections of forty (afterwards reduced to twenty) consecutive miles, which patents it is enacted shall "convey the right and title to said lands to said company."

The road was completed may 10, 1869. In 1867 the company mortgaged its lands for about $10,000,000.

"Under this legislation, and upon this state of facts," says the circuit judge in delivering his opinion, "the ground taken by the company upon which it insists that the state of Nebraska has no right to tax any of its lands, whether patented or not patented, is, that by the provision in section three above mentioned, these lands are 'subject to settlement and pre-emption like other public lands, at a price not exceeding $1.25 per acre, to be paid to the company.' In support of this proposition the counsel for the company rely upon the case of The Kansas Pacific Railway Co. v. Prescott, 16 Wall. 603.

"I confess to some difficulty in distinguishing that case from the one now before the court, but upon the best consideration I have been able to give to the subject, I am of opinion that that case does not control this one, so far, at least, as regards the lands to which this company holds the patent of the United States.

"There are two elements in that case which, in material respects, distinguish it from the present one so far as the plaintiff company has received a patent for its lands: the first is that in that case the taxes were assessed before any patent had been issued; and the second is that they were assessed at a time when by reason of the non-payment of the costs of surveying, etc., required by section 21 of the act of 1864, the company was not entitled to a patent.

"If, in that case, the cost of surveying the land had been paid, and a patent for the land there in question had actually been issued before the taxes were assessed, it would seem that a different result would or might have been reached.

"It is not my purpose to discuss at length the respective rights of the general government and of the railroad company in the lands after the lapse of three years from the completion of the road, nor whether a mortgage of the lands is such a 'disposition' of them as would defeat the right of settlement or pre-emption. The proofs show that the company has dealt with these lands, and is now dealing with them, as if they were, in all respects their absolute property. They are advertising and selling them at their own prices and upon their own terms, and they do not recognize the right of the public to settle upon and pre-empt them, and to buy them at $1.25 per acre. On the other hand, neither congress nor the interior department has taken any steps to subject these lands to settlement and pre-emption, and the public are denied the right to the benefit of the privilege or reservation in their favor.

"I am inclined to think the true meaning and effect of the provision in question to be this: While the road is being constructed, and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after the three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding $1.25 per acre, being payable to the company instead of the government.

"This view harmonizes and gives effect to all the different provisions of the act. The right of the company to the lands granted is a substantial one. The title passes to the company. Patents are required to be issued to the company conveying the 'right and title to the lands.' During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but 'subject' to the right of any person possessing the qualifications of a pre-emptor to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured, and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction—which recognizes the right of the actual settler to pre-empt

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the lands, and thus destroy the monopoly, and also the right of the company, actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation.

"If this be a correct view of section 3 of the act of 1862, it results that the lands of the company, so far as they are patented, are subject to taxation by the authority of the state, and this privilege reserved in favor of the actual settler, and of which he may never wish to avail himself, which is contingent in its nature and subject to be defeated by a sale of the lands by the company, is not inconsistent with and will not defeat the rightful authority of the state to tax the lands.

"As to lands which have been patented to the company, I am of opinion that it is the the substantial owner, and that equity should not relieve it from taxation in respect thereto, because it may be compelled to sell particular tracts here and there to actual settlers at a dollar and quarter an acre."

Contracts in Restraint of Trade.

THE OREGON STEAM NAVIGATION COMPANY v. HENRY WINSOR, *et al.*

Supreme Court of the United States, No. 222, October Term, 1873.

1. **Contract in Restraint of Trade.**—Whether a contract is in restraint of trade is void as being against public policy can not, in this country, be tested by the fact that it restrains the exercise of a particular trade within the limits of a particular state. Such a contract may be valid, although it restrains the exercise of a particular trade in another state.

2. ——. **Divisible.**—A contract in restraint of trade may be divisible; so that a part will be held valid as being beneficial to the obligee, and not injurious to the public, and a remaining part void as against public policy.

3. ——. **Case in Judgment.**—In 1864, the California Steam Navigation Company, which was engaged in navigating the waters of California, sold to the Oregon Steam Navigation Company, which was engaged in navigating Columbia river and its tributaries, in Oregon and Washington, one of its steamers, the vendees stipulating that they would not employ the said steamer on the waters of California for ten years, after the first day of May, 1864. Three years later, the vendees sold the said steamer to third persons, who were engaged in navigating the waters of Puget Sound in Washington Territory, and the latter vendees stipulated, that they would neither employ the said steamer on the Columbia river or its tributaries, nor on the waters of California, for the period of ten years thereafter. Upon these facts it is *held*:

(1) That the first contract between the California and the Oregon company is presumed to have had a good consideration in the price paid for the steamer by the latter company, and was not such a contract in restraint of trade, as is void as being against public policy

(2) That the second contract is divisible: (*a*) That part of it by which the last vendees agreed not to employ the steamer on the Columbia river or is tributaries, was not, for the reasons applicable to the first contract, void as against public policy. (*b*) That part of it which restrained the last vendees from employing the said steamer on the waters of the California was likewise valid, so far as it was necessary to enable the Oregon company to keep its covenant with the California company—that is to say, it was valid for the space of ten years, from the first day of May, 1864, but as to the last three years covered by it, it was not beneficial to the last vendor, and was void as against public policy.

In error to the Supreme Court of the Territory of Washington.

Mr. Justice BRADLEY delivered the opinion of the Court.

This action was brought in a district court of Washington Territory to recover $75,000 as stipulated damages for the breach of a certain agreement between the parties. The complaint was demurred to, and the demurrer was sustained, and the action dismissed. The plaintiff brought a writ of error to the supreme court of the territory, which affirmed the judgment. This is a writ of error to the judgment of the supreme court, and brings up for consideration simply the sufficiency of the complaint.

The principal facts set out in the complaint are the following: It states that in 1864, the California Steam Navigation Company being engaged in steam and other transportation on the several routes of travel on the rivers, bays, and waters of the state of California, sold to the plaintiff, being a company engaged in the like business on the Columbia river, and its branches, in Oregon and Washington, the steamer "New World," for $75,000, subject to a stipulation, amongst other things, that the plaintiff should not run or employ, or suffer to be run or employed, the said steamer upon any of the routes of travel, rivers, bays, or waters of the state of California for the period of ten years from the 1st day of May, 1864; that on the 18th day of February, 1867, the plaintiff sold the same steamer to certain of the defendants for the sum of $75,000, subject to a stipulation and covenant that the said steamer should not be run or employed upon any of the routes of travel, or the rivers, bays, or waters of the state of California, or the Columbia river and its tributaries, for the period of ten years from the 1st day of May, 1867; and that for a breach of said covenant the defendants, to-wit, the vendees of the vessel as principals, and the other defendants as sureties, should pay $75,000 as actual liquidated damages. The complaint further averred, that at the time of the second sale of the steamer, and up to the commencement of the suit, the California Steam Navigation Company were engaged with numerous steam and other vessels in navigating the waters of the State of California; and that the Oregon company, the plaintiffs, were likewise engaged in the navigation of the Columbia river and its branches; and that at the time of said sale to the defendants, the latter were engaged in navigating the waters of Puget Sound, and were in no wise engaged in the navigation of the waters of Oregon or California, or of any of the waters described in the stipulation. The breach complained of is, that the steamer has been engaged from the 1st of November, 1868, to the commencement of the suit, in the transportation of passengers and freight from the city of San Francisco to Vallejo, in the state of California, being a route of travel on the waters of the state of California embraced in the stipulation and convenant.

The case turns mainly upon the question, whether the covenant entered into by the defendants, whereby they agreed "not to run or employ, or suffer to be run or employed, the said steamboat 'New World' upon any of the routes of travel, or the rivers, bays, or waters of the state of California, or the Columbia river and its tributaries, for the period of ten years from the 1st day of May, 1867," etc., is valid. The objection urged against it is, that it is a contract in restraint of trade, and as such, contrary to public policy.

It is a well settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable, and there be a consideration to support it. Chitty on Contracts, 576, 8th Am. Ed. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. Ib. TINDAL, C. J., in Horner v. Graves, 7 Bing. 743. A contract even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade; but a contract not to use a trade at a particular place, if it be founded on a good consideration, and be made for a proper and useful purpose, is valid 2 Wms. Saund. 156, note 1. Of course, a contract not to exercise a trade generally would be obnoxious to the rule, and would be void.

The application of the rule is more difficult than a clear understanding of it. In this country especially, where state lines interpose such a slight barrier to social and business intercourse, it is often difficult to decide whether a contract not to exercise a trade in a particular state is, or is not, within the rule. It has generally been held to be so, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to persue his avocation. Taylor v. Blanchard, 13 Allen. 375; Dunlop v. Gregory, 6 Selden, 241.

But this mode of applying the rule must be received with some caution. This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases

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may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to seperate, and one of the terms of the separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business Can there be any doubt that such an agreement would be valid and binding? Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered.

There are two principal grounds on which the dictrine is founded, that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to persue one's trade at all, or not to persue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced.

In accordance with these principles it is well settled that a stipulation by a vendee of any trade, business or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he i himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not persue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint only to such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions.

To apply these principles to the case before us: The California Steam Navigation Company, being engaged in the business of transportation on the rivers, bays, and waters of California, was willing to sell one of their steamers to the Oregon Steam Navigation Company, which was engaged in a similar business on the Columbia river and its tributaries, provided the latter company would agree that the steamer should not be used in the California waters for the period of ten years from the 1st day of May, 1864. This stipulation was necessary to protect the former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another situated and doing business in another state. It involves no transfer of residence or allegiance on the part of the vendee in order to persue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce on the Pacific coast. Again, the Oregon company were afterwards willing to dispose of the same steamer to the defendants, who were engaged in the like business of transportation in the waters of Puget Sound, Washington territory, provided that the latter would agree that the steamer should not be run or employed upon any of the routes of travel or rivers, bays, or waters of California, or the Columbia river and its tributaries for the period of ten years from the 1st day of May, 1867. This stipulation excluded the steamer from the territory covered by the former stipulation exacted by the California company, and also from the territory occupied by the Oregon company itself. The latter portion of the stipulation stands on the same ground and reason as did the first stipulation between the California and Oregon companies. The former portion was necessary in order that the Oregon company might faithfully keep its covenant with the California company. It is true that the stipulation in question covers a period of time which extends three years beyond the period for which the Oregon company is bound to the California company. The latter would expire on the first of May, 1874, and the stipulation in question extends to the first day of May, 1877. This extra period of three years in reference to the waters of California is not necessary to the protection of the Oregon company. That company is under no obligation with regard to those three years. But the suit is brought and the breach is alleged for a portion of time during which the Oregon company is bound to protect the California company from the interference of said steamer. And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, "that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being constructed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not; the court will give effect to the latter, and will not hold the agreement to be void altogether." The cases cited in support of this proposition are Chesman & ux. v. Nainby, 2 Strange, 739; Wood v. Benson, 2 Cr. & J. 94; Mallan v. May, 11 Mees & Welsb. 652; Price v. Green, 16 Mees. & W. 346; Nichols v. Stretton, 10 Q. B. 346 In Price v. Green the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisable and good for London only. This case was carried through all the courts. In Nichols v. Stretton the stipulation was that an attorney's apprentice, who was to serve five years, should not, after his term expired, be concerned as an attorney for any persons who had, previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the Exchequer Chamber in Price v. Green, held the contract divisible, and sustained the action. We see no reason why this principle should not be followed in the present case. The line of division between the period which is properly covered by the restriction and that which is not so, is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it.

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Regarding this objection, therefore, as removed, the covenant made by the defendants seems to stand on the same ground as that made by the plaintiffs with the California company. The same observations may be made with reference to it. The public was not injured by being deprived of any of the business enterprise of the country. The vendees did not incapacitate themselves from carrying on business just as they had previously done, and in the same locality. Their business was rather facilitated by the arrangement. Finally, the stipulation, it will be presumed, was founded on a valuable consideration in its influence upon the price paid for the steamer; its object and purpose was simply to protect the vendors, and if we except the three years before considered in its relation to California, its restraining effect extended no farther than was necessary for their protection.

We are unable, therefore, to see anything in the contract, so far as it is now in question, which militates against public policy.

There are no other points adverted to which demand the serious consideration of the court.

The judgment must be reversed, and the case remanded to be proceeded in according to law.

Dissenting, Justices CLIFFORD, SWAYNE and DAVIS.

REVERSED AND REMANDED.

Murder — Circumstantial Evidence — Photograph Likenesses, Etc.

WILLIAM E. UDDERZOOK v. THE COMMONWEALTH.

Supreme Court of Pennsylvania, in Banco, Philadelphia, July 2, 1874.

Present: Hon. DANIEL AGNEW, Chief Justice,
Hon. GEORGE SHARSWOOD, " HENRY W. WILLIAMS, " ——— ——— MERCUR, } Associate Justices.

1. Murder—Circumstantial Evidence.—A conviction of murder in the first degree, upon circumstantial evidence as to the identity of the deceased, and the defendant's connection with the crime, affirmed on an examination of the evidence.

2. ———. Evidence--Photographs.—A photograph taken from life, and proved to resemble the person photographed, fills the same measure of evidence as a portrait painted from life by an artist. It is admissible, subject to disproof or doubt, and its effect is to be determined by the jury.

3. ———. ———. ———. Judicial Notice.—The court will take judicial cognizance of the fact that photographs are a proper means of producing correct likenesses. It follows that photographs are admissible in evidence for purposes of identification, although proof of their correctness has not been made by experts.

4. ———. ———. Habits of Intoxication.—Evidence of habits of intoxication is competent upon a question of identity.

5. ———. Practice--Papers Introduced in Evidence may be Taken to Jury Room.--Where, on a trial for murder, the jury have retired, and returned for additional instructions, it is not error to permit them to take with them to the jury room papers which have been introduced in evidence and commented upon on the trial.

Opinion of the court by AGNEW, Ch. J.

This is indeed a strange case, a combination by two to cheat insurance companies, and a murder of one by the other to reap the fruit of the fraud. Winfield Scott Goss, an inhabitant of Baltimore, had insured his life to the amount of $25,000. He was last seen at his shop on the York road a short distance from Baltimore, on the evening of the 2d of February, 1872, in company with William E. Udderzook, his brother-in-law, the prisoner, and a young man living near. They left him to go to the house of the young man's father.

In a short time the shop was discovered to be on fire. After it had burned down a body was drawn out of the fire, supposed to be that of Goss. Claims were made upon the insurance companies, the prisoner being active in prosecuting them. On the 30th of June, 1873, the prisoner and a stranger, a man identified as Alexander C. Wilson, appeared at Jennersville, in Chester county, this state, and remained over night and the next day. In the evening, July 1, the prisoner and this stranger left Jennersville together in a buggy. Next day, on being met and asked what had become of his companion, the prisoner said he had left him at Parkersburg. On the 11th of July, the body of a man, identified on the trial as W. S. Goss, or A. C. Wilson, was found in Bear's woods, about ten miles from Jennersville; the head and trunk buried in a shallow hole in one place and the arms and legs in another. The stranger who was with the prisoner at Jennersville, identified as A. C. Wilson, was traced from place to place, living in retirement, from June 22, 1872, up to within a day or two of the time when he appeared with the prisoner at Jennersville. During this interval the prisoner and Wilson were seen together several times under circumstances indicating great intimacy and privacy. Wilson has not been seen or heard of since the evening of July 1, 1873, when he left Jennersville in company with the prisoner. The great question in the case was, the identity of A C. Wilson as W. S. Goss. This was established by a variety of circumstances, and many witnesses, leaving no doubt that Goss and Wilson were the same person, and that the body found in Bear's woods was that of Goss.

All the bills of exceptions, except one, relate to this question of identity, the most material being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore on the same plate with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of this photograph, the chief being to the admission of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or a miniature painted from life and proved to resemble the person, may be used to identify him cannot be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life and to resemble the person photographed, should not fill the same measure of evidence. It is true the photographs we see are not the original likenesses, their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sun-light through the camera. It is the result of art, guided by certain principles of science.

In the case before us such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but had seen a man known to him as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photographs as an established means of producing a correct likeness. The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses.

But happily the proof of identity in this case is not dependant on the photograph alone. Letters from Wilson identified as the handwriting of Goss; a peculiar ring, belonging to Goss, worn upon the finger of Wilson; the recognition by Wilson of A. C. Goss as his brother: packages addressed to A. C. Goss and envelopes bearing the marks of the firm with which W. S. Goss had been employed coming and going to and from Baltimore, and

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many other circumstances following up the man Wilson, leave no doubt of his identity as Goss, independently of the photograph.

The objection to the proof of Goss' habits of intoxication is equally untenable. True the habit is common to many, and alone would have little weight. But habits are a means of identification, though with strength in proportion to their peculiarity. The weight of the habit was a matter for the jury.

It is unnecessary to follow the bills of exception in detail. They all relate to facts and circumstances bearing on the question of identity. If the bills of exception are many, they only denote that the circumstances were numerous, and in this multiplication consists the strength of the proof.

They are many links in a chain so long it encircles the prisoner in a double fold. The question put to G. P. Moore, A. H. Barintz, and A. R. Carter, were unobjectionable. Whether they really could not identify the dark and swollen face of the corpse it was not for the court to decide; its weight belonged to the jury.

There was no error in permitting the jury, after their return into the court for further instructions, to take out with them, at their own request, the letters, check, due-bill, and application for insurance papers which had been proved, read in evidence and commented on in the trial. The appearance, contents, and hand-writing of these documents were no doubt important, and to be inspected by the jury, who would not be expected to carry all these features in their minds. It is customary in murder cases to permit the jury to take out for their examination the clothing worn by the deceased, exhibiting its condition, the rents made in it, the instrument of death, and all things proved and given in evidence bearing on the commission of the offence.

We discern no error in this record, and therefore affirm the sentence and judgment of the court below, and order this record to be remitted for execution.

JUDGMENT AFFIRMED.

Correspondence — An American Lawyer in London — The New Judicature Act

LONDON, May, 1874.

EDITORS CENTRAL LAW JOURNAL:—The new judicature act, as you are aware, comes into operation here on the second of November next. Before I came here, or had examined the act, I heard it spoken of in Boston as a revolutionary measure—a very dangerous experiment. The chances are, I think, that they who thus spoke had never read the act at all. The The act consolidates the courts of Chancery, Queen's Bench, Common Pleas, Exchequer, High Court of Admiralty, and the Courts of Probate and of Bankruptcy into one Supreme Court, but with two divisions, a High Court and a Court of Appeal. Nominally it sweeps away all the first above named courts, but, in truth nothing but the name is swept away. The old judges all remain, with some new powers. Apparently appeales to the privy council are abolished, and yet hardly that, because the privy councillors are still to be employed under the new organization. No judge of the new court can, at the same time, be a member of the House of Commons; but this operates no change, since, I believe, that not one of the judges of the courts abolished is a member of the House of Commons. They are all or nearly all in the House of Lords; and there they may remain and be the judges of the new court as they now are of the old ones. The High Court is broken into five divisions, and these divisions correspond, very nearly at least, to the five or six courts abolished. The same judges are to be the judges still, not relieved from their old duties, and with few new ones imposed. Appeal to the House of Lords is abolished; but I believe on all questions of law, certainly in, and since, the trial of Mr. Hastings, the lords have taken the advice of the judges, and in most cases decided in conformity to such advice.

The division of the legal year into terms is abolished. Choses in action are made assignable. It is said the distinction between equity and law is abolished; but this is not so. Equitable jurisdiction is conferred upon the courts sitting in the trial of common-law cases; and where there is conflict between the rules of equity and the rules of the common law, the equity rule obtains. The rule in the Admiralty Court as to collisions, when both are at fault, is to be the admiralty, and not the common-law rule, wherever there is a variance. The judges have power to sit and act at any time, and at any place, for the transaction of business. It is in the discretion of the court to appoint referees in certain cases to try matters of fact. No judge of the Court of Appeal is to sit on the hearing of an appeal from any judgment or order made by himself, or any divisional court, of which he was a member. All writs at common law, bills, or informations in chancery, causes in admiralty, or citations in the Court of Probate, are to be instituted in the High Court by a proceeding called an action. The facts of the case are to be briefly stated, and the nature of the relief asked stated. To such action there is to be an answer. Exceptions and writs of error are abolished. Causes are to be re-heard on motion. There has not been, so far as I can learn, for years any demand for ampler, but only for speedier justice. It is said this act is a lawyer's measure; and I believe it. But I believe the interest of lawyers is identical with the public interest. Except only in very extraordinary cases, no lawyer can ever get rich in the conduct of a case which is very long delayed. It is as much for his interest as for the interest of his client that a case should be disposed of within some reasonable time. This measure was reported upon by commissioners some years since. The bill was introduced by Lord Selborne, the chancellor, who, however, was largely indebted to the chief justice of the Queen's Bench for some of the best provisions. The bill was recodified by lawyers, and supported, as it passed, by them; and but for their co-operation and support it could not have been passed. It ought to be understood, if it is not, that the 3,000 attorneys, and 3,900 barristers in London, all of whom are made simply solicitors by this act, are, nevertheless, a power in London—in Parliament and out of it; nor can it be denied, they are a power productive of great good. He who says or supposes they worked only to their own interest and comfort in supporting this measure, knows neither these lawyers nor understands the case. I am sure London and the British Empire owe their greatness in very great part to their lawyers.

PELHAM.

Admissions to the Bar.

SELMA, ALA., July 6th, 1874.

EDITORS CENTRAL LAW JOURNAL:—I am a constant reader of your live, interesting, and useful journal. I admire its high tone, and the alacrity with which its editors condemn that which is pernicious. Your approbation of that which tends to establish a higher standard of legal ethics, and to promote the interests of our profession, deserves more than our thanks—you ought to have the earnest co-operation of the lawyers of the land. Permit me to express my thanks for your article in number 27, entitled "Admissions to the Bar."

I was not aware, before I read it, that this subject was receiving, in so many states from and so many journals, the serious consideration which it deserves. The carelessness with which candidates are admitted even in the supreme court of our state (Alabama), has already worked serious mischief, and can but be regretted by those of the profession who have a proper regard for its welfare. It is true that the ignorant, unskilled and immoral attorney soon loses whatever business he may at first receive, but he has time and opportunities to bring disgrace upon the profession.

We have a rule of our supreme court, not only permitting persons to practice, having a license from the highest court of the state whence they come, but also admitting any one who "has a diploma from any respectable (?) law school," etc. Some of these diplomaed gentlemen are too ignorant to draft an ordinary power of attorney, deed of conveyance, or a plea of *non assumpsit*. Do not understand me as decrying a proper course of training in a law school; my regret is that my struggle in life begun too early to enable me to receive the benefits of a thorough education. If, however, with my experience, I had the choice of a course of study at a law school, or a clerk's place in an office where there was a good library and plenty of work, I should choose the latter.

The legal profession of our state are greatly to blame for admitting to the bar persons who have neither a common school education, a knowledge of the law, nor "a good moral character." The fault is not in our laws—they are probably stringent enough. Candidates are required to be examined by a committee on *seven* different branches of the law. So indifferent are the committees to these requirements, however, that a casual *private* examination of five or ten minutes suffices to get the requisite certificate. Several years ago an applicant for law license in one of *our cities* in this state was unable to answer the question "what is a bill of exchange?"

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Yet this man was admitted to practice in "the several courts of this state."

The only remedy I can see for the existing evil is a *lawyers' state convention*. In such a convention this and many kindred irregularities and hindrances might be brought to the attention of the bar, and such steps taken as would redound to its honor. Such a convention was recently advocated by one of our leading daily journals at the suggestion of a prominent member of The Bar Association of Dallas County. I regret to say that there was no general response to this call. We hope, however, that the subject will be again agitated, and that it will eventually lead to such a convention from which great good may result. The medical profession of this and many other states have for years enjoyed the advantages of their state conventions. Are there not many good reasons why our lawyers should have a state convention? Let us then have it, and let the lawyers and judges by their action, so far as in their power lies, take steps to prevent improper "admissions to the bar." If such a convention is ever held, the young and active members of the bar must take the *initiatory* steps—the older ones have, we fear, neither the time nor inclination to engage in the work necessary to bring about its proper organization. We hope to have the benefit of their wisdom in its deliberations. JUVENIS.

[Communicated.]

Section 14 of the Bankrupt Law as Amended.

Some doubts having been created by contradictory constructions placed upon the 14th section of the bankrupt law, Congress passed the amendment, which was approved March 3d, 1873. The constitutionality of that amendment has been questioned, and it becomes an interesting subject of investigation to the profession and to the public.

What was the true meaning of that part of section 14, as passed and approved March 2d, 1867, adopting the exemptions of the several states, in each state respectively? It seems to have been considered that the words "at the time of the commencement of the proceedings in bankruptcy," etc., in the sentence, qualified the expression "as is exempted," and also qualified the words "by the laws of the state;" and, therefore, it was supposed by some that the amount exempted by the laws of a state at the *time* bankruptcy proceedings begin should be exempted to the bankrupt; while others thought the original act exempted all the state exemptions of 1864. By the former it is held that the intention of congress was to confine and limit the operation of the law to such property as legal process from the state courts could have subjected at the time proceedings in bankruptcy were begun by or against the individual. See Bump on Bankruptcy, p. 129, citing *In re* Askerr, 3 B. R. 142. But referring to the punctuation of that part of the 14th section, we find that the words "at the time of the commencement of the proceedings in bankruptcy" are disconnected by a comma from that part of the sentence wherein is used the words "*as is* exempted from levy and sale," and grammatically they only qualify the words "has his domicil." If congress had intended that the words "at the time of commencement of proceedings," should be a clause qualifying either of the expressions "as is exempted from levy and sale," or "by the laws of the state," then it should have been punctuated with a comma after the word "state," and after the word "domicil" another comma, so as to read "by the laws of the state, in which the bankrupt has his domicil, at the time of commencement of proceedings," etc. It is evident that the use of the present tense in the expression "*as is exempted*," etc., refers to the time of the approval of the original act, March 2d, 1867. A little further reflection will tend to satisfy any one of the correctness of this view.

That congress had a constitutional right to prescribe a reasonable exemption of property for each bankrupt, we have never seen questioned. And that, too, without reference to the inhibition of section 10 of article 1 of the federal constitution against impairing the obligation of contracts; for it is aimed only at state legislation. But congress could delegate none of its constitutional power over this subject to a state legislature. If congress could refer to a state legislature the power to amend or change one of the sections of the bankrupt law, so it could almost any other. If, therefore, it is held and construed that the exemptions to a bankrupt in any state should vary or be changed by any and every expression of the law-making power of the state, regulating and changing its exemption laws, even while congress is not in session, and without any amendment passed by congress, is not that virtually referring to the states the power to fix the amount of exemptions the bankrupt shall retain? We think congress could not do this. No principle of law is better settled than this: When a legislative act is susceptible of two constructions, one of which is constitutional and the other not, then the former must be held to be the one intended by the legislature. And hence we say that it was not the intention of congress to fix so variable and varying a standard of exemptions for bankrupts. Another reason for our conclusion is that in the next preceding sentence of section 14, Congress, in adopting the exemptions by the laws of the United States, uses this language: "And such other property *as now is, or hereafter shall be*, exempted," etc.

Did congress, by thus adopting the exemptions of the several states, destroy the uniformity of the law? That the original act was not wanting in uniformity for this reason, seems to be conceded, and it was so decided in the case of *In re* Beckerford, 4 B. R. 59. In that case Judge KREKEL and Judge MILLER, in the Circuit Court for the Eastern District of Missouri, so decided. *Ex parte* Appold, 16 Am. L. R. p. 624. The amendatory act, approved 3d of March, 1873, has recently passed under the criticism of Chief Justice WAITE, sitting at Richmond. And it is reported that he declared it unconstitutional because not uniform. If its lack of uniformity is to be attributed to the fact that under its operation different amounts are exempted in the different states, then the same objection would apply with equal force to the corresponding part of the original act adopting the various state exemptions. Hence, if the original act did not lack uniformity, neither does this amendment of it. That uniformity in the original act was not destroyed by the fact that it adopted the various state exemptions, we think the cases of *In re* Beckerford, 4 B. R. 59, and *Ex parte* Appold, 16 Am. L. Register, 624, heretofore referred to, sufficiently show. SUBSCRIBER.

Revision of the Statute Law and Codification of the Common Law.

The revision and codification of our law are scarcely less important to the profession and the public than the Judicature Act. It is fitting that these great changes should be as nearly contemporaneous as possible. We apprehend that in 1876 every lawyer of eminence or in practice will have in his study a complete edition of the statutes at large, consisting of about twenty volumes in all; a code of the common law, consisting of about five volumes; a code of equity, consisting of about three volumes; and a book of practice. These twenty-eight or thirty volumes will, in all probability, supersede the three or four thousand volumes of statutes, books of reports in law and equity, text-books on practice and miscellaneous subjects, which now encumber the shelves of many a law library. The lord chancellor has just passed the bill through its second stage, which contains the revision of the statute law down to 1837. In 1868 a commission was appointed to revise and publish an edition of the statutes down to that year. Of this revised edition five volumes have already been published, and are in the hands of the profession, and contain all the statutes passed down to the year 1824, and which are still in force. These five volumes have superseded forty-three volumes of the octavo, or twenty-six and a half volumes of the quarto edition of the Statutes at Large. Along with them a chronological table and complete index of the statute law down to the year 1872 has been published. The bill proposed by the lord chancellor sanctions a sixth volume, which will contain the acts which were passed between 1824 and 1837, and which are still in force. It is calculated that the revised edition of the statutes, passed between 1837 and 1868, will occupy something like nine or ten volumes more. During this session the lord chancellor does not intend to touch the question of codification of the common law and we highly approve of his abstention. The Judicature Act will blend the systems of common law and equity to such an extent as materially to affect the rules laid down by the judges during the period when the two branches were distinct. Many of these rules would never have been propounded but for the existence of the two separate systems in this country. As an example we need only refer to Lord Hardwicke's observations in Wortley v. Birkhead, 2 Ves. 571. When speaking of the equitable doctrine of tacking mortgages, he says: "It could not have happened in any other country but this, because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates, and, therefore, as courts of equity break in upon the common law where necessity and conscience require it, still they allow a superior force and strength to a legal title to estates." If the lord chancellor should proceed with the codification of the common law during the next session, as he proposes, we will then have the

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three new systems simultaneously established, which will alter the entire administration of the law in all its branches—expediting, simplifying, and contracting its rules, enactments, and procedure, and effecting a revolution which will be unprecedented in its nature and extent.—*Irish Law Times.*

Notes and Queries.

KIRKSVILLE, Mo., July 3, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. has a judgment against B. B. has a homestead, which is occupied by him as such at the rendition of the judgment. Shortly afterwards he leases his homestead out for two years and goes to another state, but with the intention of returning at the end of the two years and again occupying his homestead as such. Is it liable to sale under execution while thus leased out. ADAIR.

ANSWER.—There have been within the last ten years numerous decisions in the Western and Southern states upon what constitutes an abandonment of a homestead. If the *animus revertendi*—the intention of returning—can be proved as our correspondent states it, we think it probable that the homestead right was not abandoned. See Mills v. Van Boskirk, 32 Tex. 360; Cross v. Evarts, 28 Tex. 523; Shepherd v. Cassiday, 20 Tex. 29; Gouhenant v. Cockrell, 20 Tex. 96—cases which embody the rule that the abandonment of a homestead can only be established "by the most clear, conclusive and undeniable evidence." In Shepherd v. Cassiday, *supra*, Chief Justice HEMPHILL, a very able judge, whose mind had been enlarged by the study of the maxims of the civil law, and whose learning adorns and elevates the jurisprudence of Texas, declared that "the homestead is not to be regarded as a species of prison bounds which the owner cannot pass over without pains and penalties. His necessities or circumstances may frequently require him to leave his homestead for a greater or less period of time. He may leave on visits of business or pleasure; for the education of his children; or to acquire in some more favorable location means to improve his homestead; or for the subsistence of his family; or he may intend to abandon provided he can sell. But let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption cannot be regarded as forfeited." "It must be undeniably clear," said the same learned judge in Gouhenant v. Cockrell, *supra*, "and beyond almost the shadow, at least all reasonable ground of dispute, that there has been a total abandonment with an intention not to return and claim the exemption."

It has, however, been decided in Illinois that, while in case of the death of a husband, or of both parents, and the children are of tender years possession by a tenant may protect the property from sale on execution (Brinkerhoff v. Everett, 38 Ill. 263), yet, *when the husband is living*, the family must reside on the homestead. Cabeen v. Mulligan, 37 Ill. 230; Titman v. Moore, 43 Ill. 169. And see Walters v. People, 21 Ill. 178; Kitchell v. Burgwin, 21 Ill. 40.

The question could be pursued at great length through a list of varying decisions, but we have not space to devote to it. The question will be found in some states settled by the terms of the statute, as in Michigan, where actual occupancy is required in order to preserve the right. That the question of intent to abandon is one of fact for a jury, see Gibson v. Robbins, 10 Watts, 156; Goodman v. Losey, 3 Watts & Serg. 526.

CARTHAGE, Mo., July 3, 1874.

EDITORS CENTRAL LAW JOURNAL:—Suppose A. sues B., C. and D. jointly. B. files an application for a change of venue in his own behalf, which application is sustained. C and D file no such application, and are anxious to have the case tried in the court where the suit is brought. How will the court proceed in the case, in this state? Please answer through the LAW JOURNAL and oblige a CARTHAGE SUBSCRIBER.

ANSWER.—The only possible doubt in the matter is raised by the use of the words "any party" in the Missouri statute, 2 Wagn. Stat. p. 1356, § 3. But notwithstanding this, it is manifest that *one* defendant will not be permitted to drag after him his *two* co-defendants to another county, if they object to it, and if their rights would be prejudiced by the change. They are "parties" as well as he, and clearly have as strong a right to stay as he has to go; and if the case is one which does not admit of a severance, the rights of the one must yield to those of the two, rather than permit the rights of two to be subordinated to those of one. Under the facts stated, we should suppose, then, that it would clearly be the duty of the judge to refuse to take jurisdiction, and to send the case back to the court from whence it came. That this is the correct view, we think is inferable from the following cases: Sailly v. Hutton, 6 Wend. 508; Legg v. Dorsheim, 19 Wend. 700; Welling v. Sweet, 1 How. Pr. 156; Simmons v. McDougal, 2 How. Pr. 77. See also Mairs v. Remsen, 3 Code R. 138; Job v. Butterfield, 1 Eng. Law & Eq. 417.

SPRINGFIELD, Mo., June 22, 1874.

EDITORS CENTRAL LAW JOURNAL:—If you have space in your valued paper I would like to ask a few questions. A. sues B., an absentee, by attachment, and gets a special judgment. A. is absent, himself, and his attorney neglects to follow up with execution. So it stands for *four* years, when A. at last looks the matter up. He finds that after the attachment, during trial, and before judgment, the seven years' presumption as to B.'s life expired, and that no attorney or administrator was appointed to represent B. As the original demand is barred by limitation, what shall he do?

Is the judgment good, void, or voidable? Supposing it good, how can it, a special judgment, be revived? STUDENT.

ANSWER.—Our answers to questions of this character must be understood as conjectures merely. We think the judgment is valid. The law raises presumptions to supply the absence of proof, and out of convenience and necessity. Unless we are greatly mistaken, presumptions of law, such as the presumption of death after seven years' absence, will not be raised to unsettle rights which have been acquired, or to overturn the solemn judgment of a court of record, regular on its face. In such a case the presumption of death would be met and overturned by the stronger presumption which courts always indulge in favor of the regularity of judicial proceedings. After final judgment has been rendered and time has elapsed, rather than presume that the defendant was dead when judgment was rendered, simply on the supposition that he had been absent seven years, a court would presume that the court rendering the judgment had evidence before it that he was alive. Assuming the judgment to be good, we suppose it may be revived by *scire facias* and publication, if the defendant is still a non-resident, but this may be a matter of more doubt.

Book Notices.

THE FORUM, a Quarterly Law Review, April, 1874. Baltimore. Edited by Atkinson Schaumburg, Esq.

The Bench and Bar Review of Baltimore, conforming to a suggestion made by us at the time, has changed its name to "The Forum," and the second number is before us. It is embellished with a portrait of the venerable Reverdy Johnson, and contains a brief sketch of his life. The contents of the number are as follows:

Article I. Amendments to the Federal Constitution.—The constitutional convention, its history, powers, and modes of proceeding. By Hon. John Alexander Jameson, Chicago. II. War Claims and Claims of Aliens. By Hon. Wm. Lawrence, Ohio. III. The Forum and its Chances.—The public and private life of Lord Chancellor Eldon, with selections from his correspondence. By Horace Twiss, Esq., one of her majesty's counsel. IV. The Civil Law—Its Origin, Growth and Mutations.—1st. Sources of the Roman Civil Law, by William Grapel; 2d. Compendium of Civil Law, by Ferdinand Mackeldey. By Prof. George Fred. Holmes, University of Virginia. V. Parol Evidence in Explanation of Contracts, from Albany Law Journal. VI. Valid Voluntary Settlement of a Chose in Action. VII. Reverdy Johnson. VIII. Tappan v. Merchants' National Bank of Chicago. IX. Decisions in United States, for February, March and April, 1874. X. Abstract of the English Reports, for February and March, 1874. XI. Red Tape. XII. Book Notices.—1. The Spirit of Laws; 2. The Doctor and Student; 3. A Manuel of Medical Jurisprudence; 4. Civil Liberty and Self-Government; 5. An Exposition of the Constitution of the United States; 6. Trodden Down, and Other Novels; 7 and 8. Our Exchanges. XIII. The Green Bag.

LAW OF THE DOMESTIC RELATIONS. By JAMES SCHOULER, author of the Law of Personal Property. Second edition. Boston: Little, Brown & Co. 1874.

This is an excellent treatise and deserves the favor it has met, having reached a second edition in about four years after the appearance of the first. The classification of subjects embraced in the general title of Do-

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mestic Relations, as treated by the author, is the same substantially as that of Kent and Reeve. Accordingly, five leading topics are considered: *First*, Husband and Wife; *Second*, Parent and Child; *Third*, Guardian and Ward; *Fourth*, Infancy: *Fifth*, Master and Servant.

Although the author has precedent for including in the scope of his work the relation of Master and Servant, yet it is our opinion that logically and properly it does not belong there, at least in modern times. The brief discussion given to this topic shows that the author, in reality, regarded it a foreign graft. The domestic relations sprung from the marriage relation or *status*, and philosophically Mr. Bingham was right in dividing, in his treatise, the subject into Infancy and Coverture.

Confessedly the most important topic is that of Husband and Wife, and accordingly the author has purposely devoted quite one-half of his work to marriage, and the effects of coverture on the powers and rights of the wife as respects herself, her husband and third persons, and growing out of this the right of the wife in equity, to separate estate, and the nature and effect of marriage settlements, both ante-nuptial and post-nuptial, and the general doctrine of separation and divorce.

We cannot in the limits of an ordinary notice follow the author into the detail of his treatment of the various topics embraced in his volume. It is written in a clear and succinct style, and the effect of the English and American adjudications is satisfactorily presented. A careful examination of the book justifies us in saying that it deserves a very high rank among recent text-books in the law, and we confidently recommend it as being, in our judgment, for an American lawyer, the best treatise on the subject now before the public.

The book is intended to exhibit the marriage *status* and its effects as viewed in England and in the states of this country, and is strictly a *legal* treatise on the Domestic Relations.

The mode of treatment is well indicated by the author, who, in concluding his introductory chapter, reminds the reader "that the office of the text-writer is to inform rather than invent; to be accurate rather than original; to chronicle the decisions of others not his own desires; to illumine paths already trodden; to criticise if need be, yet always fairly and in furtherence of the ends of justice; to analyze, classify, and arrange; from a mass of discordant material to extract all that is useful, separating the good from the bad, rejecting whatever is obsolete, searching at all times for guiding principles; and, in fine, to emblazon that long list of judicial precedents, through which our Anglo-Saxon freedom 'broadens slowly down.'"

It is quite obvious, we think, that the author entertains indulgent, if not favorable, views of the common-law doctrines concerning the effect of the marriage relation upon the wife. His treatment of these doctrines is conservative, and, as his book is intended for practicing lawyers rather than legislators, he keeps, it may be said wisely, close in sight of the coast of judicial precedents. We need not deny that in the state of society in which the common law originated, its rules in respect to the disabilities of the wife, and the property rights of the husband, *may* have then been wise, but they have, at all events, long since ceased to be so. It is our judgment that, as respects *property*, whenever or however acquired, there should be absolute equality between husband and wife. His property before marriage, should remain his, and the wife's should remain her's, and in each case be beyond the control of the other. On the death of either, their rights in respect of dower, or the equivalent substitute, should be the same. If there are no children, she should have one-half of all property of which the husband died seized, and if children, say one-third in fee. The husband to have the same rights in respect of all property of the wife. The separate property of each to be in no event liable for the separate debts of the other, but liable for family expenses.

It is our judgment, also, that most of the *common law disabilities* of coverture are absurd in themselves and pernicious in their operation. As to all domestic or family matters the legal relation between husband and wife should be that of absolute equality. The husband, simply as husband, should have no more right to the control of the children than the wife. But as respects the relations of the family to the outside world, a few prerogatives or superior rights must, ordinarily, be conceded to the husband. He, in general, represents the family in its legal relations to the world. On him devolves, usually, the duty of making provision for their support. In case of a conflict of views as to domicile, and in general as to matters connected with the husband's business, his will should be the law, and should prevail over the wife's. The marriage relation can, in our judgment, be more safely rested upon the basis of intelligent, equal companionship, than upon the dependent and unequal condition of the wife which the common law imposed as the result of marriage. We have perhaps already said enough on this subject. We close by adding that, although many of the modern "married women's acts" are crude, and, in some instances, unjust to the husband and to creditors, yet the necessity for them has long been seriously felt, and they mark a steady progress in the right direction. The pioneers in this line of advance in the common law countries were the equity judges of England—SOMERS, COWPER, HARDWICKE, and their successors, who, without legislative aid, constructed a system of rules which shielded the wife from the many oppressive consequences of the common law doctrines, and who in this instance anticipated the more tardy legislative relief.

We should have been glad to have seen from so competent a person as the author, more original discussions and practical suggestions; for the law of husband and wife is in a transition period—but others will prefer the work as it is, and it is, indeed, one in which much can be found to praise and little to criticise.

DIGEST OF THE DECISIONS OF THE SUPREME COURT OF IOWA, from the organization of the court in 1839 to 35th Iowa, 1873. By THOMAS F. WITHROW, late reporter of said court and editor of American Corporation Cases, and EDWARD H. STILES, present reporter of the court. Vol. 1. Chicago: E. B. Myers. 1874.

The first volume of this long-expected work lies upon our table, and if we are indebted to the delay for its excellent qualities, the profession will overlook the disappointment which its non-appearance at an earlier day has from time to time occasioned. By reason of its comprehensive plan, and extending to date, and giving the text of statutes whenever they have been deemed essential to understand the statement of the decisions, the present work will supersede in practice the digest of Dillon, which comes down only to 1860 (7th Iowa), and Hammond, which comes down to 1866, and Lacy, a supplement which ended with 27th Iowa. The decisions between 27th and 35th Iowa have not before been digested. Lord Macaulay, speaking of Fox and Mackintosh's fitness for the work of writing their histories, says: "They had one eminent qualification for writing history—they had spoken history, acted history, lived history." The same may be said of the authors of the present Digest. Mr. Withrow was reporter to the court from 9th to 21st Iowa, inclusive, and Mr. Stiles has been the reporter from that time to the present, and we but record the verdict of all who are familiar with the Iowa Reports when we say that, perhaps, no state in the Union has had reporters in any respect more capable than these gentlemen. We do not hesitate to pronounce the present to be, in our judgment, a model digest. Whoever thinks it an easy work to prepare a good digest of judicial decisions is greatly mistaken; and the author of such a work as this, while certain not to receive full credit for the talent, skill and industry required, and to fall short of the deserved pecuniary reward, ought to receive the grateful thanks of the profession whose labors are thus made lighter and easier. When we receive the 2d volume, which will soon appear, we design to notice the work more at length. Whoever is gratified in seeing a handsome, and even elegant, law-book, will not fail to thank the enterprising publisher for the style in which he has produced this work. It is a real pleasure to look upon it.

MEMOIRS OF WESTMINSTER HALL. With an Historical Introduction by EDWARD FOSS, F. R. S., author of The Lives of the Judges of England. New York: James Cockcroft & Co. 1874.

This enterprising firm is reproducing in an elegant style some of the best *quasi* legal works which have appeared in Great Britain. The "Adventures of an Attorney in Search of Practice," by Samuel Warren, is followed by the "Memoirs of Westminster Hall," in two volumes. This work gives the history of this famous structure from the date of its erection in the reign of William II to the present time—a period of nearly 800 years, and presents the reader with a plan of the Hall and the Judicial Courts, and with illustrations of its interior and exterior appearance. It also contains plates showing the appearance of the lord chief justice and the lord chancellor in their robes of office, and portraits of Lord Brougham, Lord Thurlow, Lord Eldon, Lord Erskine, Lord Denman, and the famous Littleton. The rest of the work consists in a collection of historical sketches of the famous judges in law and chancery who have had seats in Westminster Hall, and incidents and anecdotes concerning them.

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It is very interesting reading, *not unprofitable withal*, and, judging from our experience, we venture to say that whoever takes it up will not leave it until he finishes it.

Summary of Our Exchanges.

The American Law Times and Reports for July contains, besides the usual excellent digest of cases from the law journals, the amendatory bankrupt law, with an index. This was also published by us in our issue of July 2. It also contains, Dingee v. Becker, a case decided in the District Court of the city of Philadelphia, by PLAYER, J., holding that the proof of a debt in a bankrupt court does not extinguish it, and discussing the rights of a creditor who has thus proved his debt, in respect of his prior remedies, and also the right of a party who has not been before the bankrupt court, to sue the bankrupt in a state court. It also publishes the important case of Underwood v. McVeigh, to appear in 24 Grattan, which relates to the question of fraud in judicial sales. This was a painful case, in which a defendant, whose property had been libelled under the confiscation act of congress, and who had appeared by an attorney, was refused a hearing on the ground that he was "within the Confederate lines and a rebel," and his property was thereupon condemned and sold, and bought *by the wife of the district judge*, the latter not being ashamed in his judicial capacity to confirm the sale and direct the divestiture and investiture of title. A more questionable proceeeing does not occur in our judicial annals, and the only obligation to silence on the part of the public now is, that the grave has lately closed over the earthly remains of the judge who was guilty of it. We shall notice this case more at length hereafter. The Law Times also reports Heaton v. Fryberger (published in the Western Jurist for May), which relates to the effect of mistakes in the deed of a married woman; also Rees v. Watertown (municipal bonds) published in this journal for April 2. It also publishes a charge to the jury by District Judge LONGYEAR, in the United States Circuit Court for the Eastern District of Michigan, upon the construction of the words, "die by his own hand" in a policy of life insurance, and which also discusses the presumptions as to death and sanity of the deceased, and the degree of derangement necessary to avoid a policy of life insurance containing a provision that the insurer shall not be liable in case of suicide. It also publishes the opinion of the Supreme Court of the United States in *ex parte* Robinson (power to disbar attorney for contempt) published in the CENTRAL LAW JOURNAL for June 4.

The Western Jurist for July contains the tenth installment of an article on tax titles in Iowa. We hope these papers will be collected in a book when they are completed, as they will be of much use to those investigating such titles in other states. It also prints an elegant and readable address of Hon. John W. Campbell to the graduating class of the Albany law school, which has previously appeared in the Albany Law Journal. Also the opinion of Mr. Justice NOTT, in the case of Mrs. Lockwood in the Court of Claims, with a note from this journal; also two decisions of the Supreme Court of Iowa, which we shall notice in our Notes of Cases, next week. But the feature of the Jurist which renders it most valuable to the practitioner, and indispensible to him if he lives in Iowa, is its very full digest of the current decisions of the Supreme Court of that state; being, in the present number, forty pages in length. We shall take the liberty of selecting from these for our Notes of Cases.

The Chicago Legal News for July 4, publishes Kerr v. Smith, Superior Court of the United States, on bankruptcy, articles of separation, subsequent reconciliation, and effect of voluntary conveyance by husband to wife. Also Harris v. Hatfield, Supreme Court of Illinois, action for damages resulting from defendant's owning and having in his possession within the state of Illinois, certain Texas or Cherokee cattle, in violation of the act of April 16, 1869. Also Chicago, Rock Island & Pacific R. R. Co. v. Town of Lake, asserting the power of a town corporation to open a street through a block of land purchased and owned by a railroad company, and used for railroad purposes. Also Lull v. Chicago, same court, holding and applying the familiar doctrine that, in the ascertainment of boundaries, fixed monuments will prevail over a printed or written plat. Also Van Namee v. Bradley, same court, a case of replevin by a wife, of property which had been siezed by a sheriff, where one of the defences was that the property belonged to the husband. Also *re* Scammon, published in our issue of July 2. This case was furnished to the News by Mr. Bissell, the official reporter of the court, and is much fuller than that as given by us. The Legal News also publishes an opinion of the Supreme Court of Illinois in Lewis v. D'Arcy, on the right of a mortgagee of (personal) property to take possession when levied on by a sheriff under an execution against the mortgager.

The American Law Record for July prints an exceedingly interesting article on "Trial by Jury, and the Public Prosecutor System in Germany," by Edward Zimmerman, LL. D., solicitor and foreign jurisconsult, from which it appears that trial by jury exists in Germany only in name, and that the jury is systematically and legally packed, and its powers so essentially curtailed that it is the mere agent and tool of despotic government. Those who talk about abolishing the jury in this country would do well to read it. As illustrating the fact that, in Germany as elsewhere, the jury is a recognized agent of liberty against despotism, we find that the German people are strongly in favor of the trial by jury, while the government is equally opposed to it. The Law Record also publishes the important case of The Newport and Cincinnati Bridge Company v. The United States, heard in the United States Circuit Court for the Southern District of Ohio, before Mr. Justice SWAYNE, involving questions as to the rights of this company, which had commenced the erection of a bridge over the Ohio river upon specifications approved by congress, and which had partly completed the bridge when congress prohibited its completion except upon a different plan. The case goes to the Supreme Court of the United States. The Law Record also prints the New Jersey Pavement Case, as published in this journal with a note (*ante*, p. 252). Also, Lasly v. Phipps, Supreme Court of Mississippi, published in the American Law Register for April, and noticed in this journal for May 21 (*ante*, p. 249), the question discussed being the effect of retroactive homestead laws upon the obligation of contracts. Also the excellent observations of Dr. Hammond, of Iowa, on "Legal Education and the Present State of the Literature of the Law," published in this journal for June 11 (*ante*, p. 292). Also an opinion of the Court of Appeals of Virginia, in Ould & Carrington v. City of Richmond, holding that a municipal corporation may constitutionally tax lawyers as such. We shall publish or notice this case hereafter. The contrary has been decided by the Circuit Court of St. Louis County, Missouri, and by the Supreme Court of Tennessee. The Record also publishes notes of a number of interesting cases from the Supreme Court of Ohio, and Court of Appeals of Kentucky.

So far as our other exchanges, received this week, contain matters of interest, they will be noticed next week.

Legal News and Notes.

A bill to abolish imprisonment for debt in England has been defeated by a vote of 215 to 72.

—THE president has appointed General Fagin, of confederate fame, and lately commander-in-chief of the Brooks forces, United States marshal for Arkansas.

—THE appointment of judge for the western district of Arkansas, in place of Judge STORY, resigned, will not be made till next winter. In the meantime Judge CALDWELL will, under the law, hold court in that district.

—G. VAN HOOREBEKE, Esq., who recently brought to a successful termination, in the Supreme Court of Illinois, the great constitutional case known as the "Grab law case" (published in our issue of July 2), has settled in Denver, Colorado.

—MISS LAVINIA GOODELL, of Janesville, Wisconsin, has been admitted to the bar. The Chicago Legal News vouches for her as "a young lady of good education, fine appearance, modest bearing," and has no doubt that she will succeed well at the bar and receive, as she deserves, the good will and respect of her brethren in the profession.

—JUDGE T. J. MACKEY, of South Carolina, has returned to his home from a visit to Washington, where he had a conversation with the president. He says General Grant asked him sharply, "Why don't you convict Moses?" and when he replied that he could not get him into court, the president denounced the assumption that a president or a governor is above the law as monstrous.

—A CANADA barrister has placarded public places in a historic city of the Dominion with notices that he gives special attention to marine protests. Our excellent contemporary, the Canada Law Journal, questions whether he has thereby developed a purity of taste in matters professional at all worthy of imitation. This is not quite so bad as the St. Louis shyster who advertises anonymously "divorces obtained without exposure, and money advanced on lawsuits."

—OUR excellent contemporaries, the Albany Law Journal and the Canada Law Journal, are engaged in a discussion about the treatment of Dr. Kenealy, the solution of which seems to hinge on the question whether it is proper to spell judicial with a capital J, according to the latter, or whether it is proper to spell "her majesty, the queen," with small letters, according to the democratic ideas of the former. We suggest that they call in a printer's devil and let him settle it.

—THE Khedive of Egypt has, by treaty which has received the sanction of this government, agreed to establish a supreme court, which, as we understand it, shall have jurisdiction of all private controversies and criminal accusations affecting the subjects of the Christian powers assenting to the arrangement. This abolishes in the Khedive's dominions, the jurisdiction of our consuls, who have hitherto exercised jurisdiction over criminal accusations against our own citizens in that country. The court is to be composed in part of subjects of the

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Khedive (or of the Sultan, whichever is sovereign) and in part of foreign representatives, of which England, France, and the United States are entitled to nominate one each. The president has nominated as the American member of the court, the Hon. Victor Barringer of North Carolina.

—A. H. GIDDINGS, of Newaygo, Mich., for many years a circuit judge in that state, attempted to commit suicide in Chicago, on Wednesday, by jumping into the river off Clark street bridge. Instead of falling into the water, as was evidently his intention, he fell upon the dock below, broke his right leg and seriously injured his head. He was removed to the county hospital, where he now lies in a precarious situation. Judge GIDDINGS was a man of fine natural powers, good education, and an able lawyer, but, unfortunately, for several years he has indulged to such an extent in the use of intoxicating drinks as to be almost entirely unfitted for any kind of business. There is no doubt but at the time of this attempt on his life he was insane.—*Chicago Legal News.*

—WE learn from the Canada Law Journal that the number of capital convictions in the Dominion of Canada since July 1 1867 were 69, of which 42 were for murder, 20 for rape, 4 for piracy, 1 for wounding with intent to murder, 1 for stabbing with intent to murder, and 1 for levying war against the Queen. Of these, in 40 cases the sentences were commuted to different terms of imprisonment. One was pardoned. In the remaining 28 cases the sentences were carried into effect. We are struck by the unusual number of convictions for rape; and considering that this crime remains *capital* in the Dominion, as at common law, it is hard to account for it. We may indulge in the supposition that not even the sub-Arctic climate of the Saint Lawrence has sufficed to modify the ardent habits of the French, "that dissipated nation," as a great English poet, referring to this subject, expressively pronounced them.

—NOTWITHSTANDING our judges, both state and federal, are miserably paid, yet it may be said to their great credit, and the great credit of the bar, that the occasions have been rare where judges have incurred even the suspicion of being corrupted with money. To say that they are not often governed by preconceived bias; by the pride of individual opinion; and even at times by political prejudices, would be to say that they are more than human. But it may be said to the high honor of the bench, and of the bar which surrounds the bench and fortifies and upholds its honor and integrity, that there are few, if any, instances in our history, where judges have been convicted of receiving a direct pecuniary bribe, intended to influence their official conduct. So universal is the faith of the people in the integrity of the judiciary that we believe the occasions are extremely rare where attempts have been made through the influence of money, to tamper with the integrity of a judge. A ludicrous instance, however, of an attempt to bribe the Chief Justice of the Supreme Court of Wisconsin, has just been made public. On Wednesday morning, July 9, at the opening of the Supreme Court, Chief Justice RYAN said he had received with his mail a letter enclosing $100, which he read as follows:

"RICHFIELD, June 30, 1874.

"E. G. RYAN:

"*Dear Sir*:—Please du for me what you can. If I will win the case I give you a hundred dollars more. "LUDWIG HENRY ZAUN

"Richfield, Washington county, Wisconsin.

"I vot for Mr. Taylor."

The Chief Justice said he had no means of judging whether the letter was really written and signed by the party whose name appeared on it; but, on consultation with his associates, he felt it to be his duty to make the matter public, that it might be investigated. He had, therefore, requested the presence of the attorney general, and his assistant being present, he referred the letter and its contents to him for such action as should seem best. He remarked, with much feeling, that he did not know what he had ever done to subject himself to such a gross insult, and expressed his certain conviction that the attorneys for the applicant had nothing to do with the matter. Zaun is a defendant in a suit pending in that court for the possession of some land.

Notes of Cases.

Power of Towns to incur debts to defend their existence.—The Supreme Court of Massachusetts in the case of Cooledge v. Brookline, has just decided that a town in that state has no *corporate duty* to defend its *boundaries or existence* as a town before the legislature, and therefore no right to incur a debt therefor, or to tax the inhabitants to pay a debt thus incurred. The court in a valuable opinion by ENDICOTT, J. cites the following authorities: People v. Morris, 13 Wend. 325; State Bank v. Knoop, 16 How. 369, 380; Riddle v. Props. Locks and Canals, 7 Mass. 187; Warren v. Charlestown, 2 Gray, 104; Eastman v. Meredith, 35 N. H. 284; Dillion on Mun. Corp. sec. 23 and following sections; Att'y Gen. v. Norwich, 2 Myl. & Cr. 425; and it refers to the case of the Queen v. Sheffield, 6 Q. B, 652, in which it was held that the expense incurred for the benefit of the inhabitants by the mayor and aldermen of Sheffield in offering in Parliament a bill introduced in relation to a supply of water to the town cannot possibly be an expense necessarily incurred in carrying the act (6 Wm. 4 ch. 76) into execution. No duty in that respect being imposed by the act, no power to use borough fund followed.

Partition Fences.—In Bobb v. Brachman, 24 Ohio State, 3, Supreme Court of Ohio, December Term, 1873, the following points are ruled:

1. In an action brought under the act of May 3, 1859, (S. & C. 81, 648) to recover one-half the value of a partition fence, the appraisal of the township trusteees duly made, in pursuance of the provisions of the act, is, unless impeached for mistake or fraud, conclusive with respect to value, and of the fact that the fence, in character and quality, meets the requirements of the statute; but such appraisal is not evidence of any other fact.

2. The plaintiff in such action is not precluded from recovering, by the fact that the fence is a better or more expensive one than would have satisfied the requirements of the statute.

3. Nor does the fact that the fence does not conform to the boundary line between the lands of the respective parties necessarily constitute a defence to such action It is sufficient upon this point if it was constructed and maintained as and for such line fence, and was recognized and acquiesced in as such by the defendant.

Devise—Election.—In Huston v. Cone, 24 Ohio State, 11, Supreme Court of Ohio, December Term, 1863, it is held:

1. Where a will assumes to give to one of its beneficiaries property of another person for whom provision is likewise made in the will, the latter cannot take the provision made for him in the will, and also hold the property, but must elect which he will take.

2. In order to put the party to such election, it must plainly appear that it was not the intention of the testator to give him the provision made in the will in addition to the property, except where the property in question is the widow's right of dower, as to which the rule has been reversed by statutory provision.

3. A court of equity has jurisdiction to compel the party to make such election, or to abide by an election already made.

4. Such election, in order to make it binding upon the party, must be made understandingly, that is, with a knowledge of the facts, and of the party's rights under the will

———. **Money Borrowed by Husband from Wife.**—In the same case the following point is also ruled:

Money borrowed by the husband from the wife, and secured to her by the note of the husband, given to her at the time of receiving the money, will, after her death, and as between the husband and her estate, be regarded as an equitable claim against the husband; and, therefore, a provision in her will releasing such claim, is a provision beneficial to the husband.

Restitution of Money Collected on a Judgment which is afterwards Reversed.—Where property is sold under execution and the proceeds paid over to the execution plaintiff and the judgment in pursuance of which the execution was issued is afterwards reversed, the plaintiff may (in New York) demand restitution of the money, although an agent may have stipulated otherwise, if such stipulation amounts to an agreement, transferring the principal's property to the agent. Holloway v. Stevens, New York Supreme Court, General Term; 5 Daily Register, 147.

Release of Sureties on Tax Collector's Bond.—In Johnson v. Hacker, Law Department of Nashville Com. Reporter, June 22, the Supreme Court of Tennessee (NICHOLSON, Ch. J., delivering the opinion) rule that the giving of time to a tax collector by an act of the legislature to collect and account for his liabilities as such tax collector, operates as a release of the securities on his bond. The learned judge quotes in support of this rule from United States v. Simpson, 2 Penn. 437, and says: "The exact question involved in this case was determined in two cases in Illinois—one of Davis v. The People, 1 Gilman 409, the other The People v. McHatton, 2 Gilman, 638. In both it was held that the giving of time to a tax collector by an act of the legislature, was a release of their sureties. We concur in the correctness of these decisions, and hold that in the present case the demurrer was properly overruled." [NOTE.—We learn from a subsequent number of the same journal that a rehearing has been granted in this case. EDS.]

Agent of Common Carrier—When Risk Commences.—In Watson v. The Memphis & Charleston Railroad Company, reported in the Law Department of the Nashvill Com. Reporter, the Supreme Court of Tennessee (MCFARLAND, J. delivering the opinion), ruled:

1. A depot agent in charge of the business of receiving and forwarding freight, in the absence of special instruction, made known to the public would have the power to bind the company to receive and forward freight, and such contract may be made before the goods are actually tendered and delivered.

2. The risks of the common carrier, commences on the delivery and acceptance of the goods.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JULY 23, 1874.

SUBSCRIPTION:
$8 PER ANNUM, in Advance

AMENDMENT TO BANKRUPT ACT—REDUCTION OF FEES—FEES OF CLERK OF DISTRICT COURT.—Section 18 of the amendment to the bankrupt act approved June 22, 1874, provides that after its passage "the fees, commissions, charges and allowances, excepting actual and necessary charges and allowances, of, and to be made by the *officers*, agents, marshals, messengers, assignees and registers in bankruptcy, shall be reduced to one-half of the fees, commissions, charges and allowances heretofore provided for or made in like cases." In *re* Hunt, bankrupt, it was held by the circuit judge of the 8th circuit in a case recently before him, that this reduction applied to the fees of the *clerk* of the district court as well as to the fees, etc., of the other officers therein mentioned for services since June 22, 1874.

TEXAS CATTLE—POWER OF STATE TO PREVENT THEIR INTRODUCTION.—A statute of Iowa prohibits the introduction into the state, at certain periods, of Texas cattle—not diseased Texas cattle, or Texas cattle with the so-called Spanish fever, but all Texas cattle. In a recent important case in the United States Circuit Court for the District of Iowa, Mr. District Judge LOVE held that an act in this broad scope was unconstitutional, as in his judgment one state cannot by statute prohibit the citizens of another state from introducing into, for sale or other purposes, what is by universal law recognized as property. The learned judge did not deny that, as a public regulation, the state could prevent the introduction of cattle diseased in fact. It is understood that his ruling will be carried for review to the supreme court; and in view of the known fact that cattle from Texas are apt to have or to be infected with a contagious disease, the question is one of some difficulty as well as of great moment.

Those who have had experience in correcting proof for the press will scarcely expect us to state that the words "*Crown* Law League" in our editorial on "Admissions to the Bar" in our last number, involved a printer's error. It should have read "Corn Law League." We may add that in the couplet of poetry which we quoted the printer reduced the expression "patient *dint*" to "patient *dirt*." We hasten to make this last correction, fearing that the young lawyers of Alabama will hardly feel complimented by the allusion. If Cardinal Wolsey had been an editor, the great dramatist would have made him say—

> ——"O, how wretched
> Is that poor man that hangs on printer's favors!
> There is betwixt that smile he would aspire to,
> That sweet aspect of printers, and their ruin,
> More pangs and fears than wars or women have;
> And when he falls, he falls like Lucifer,
> Never to hope again."

KANSAS MUNICIPAL SECURITIES—LATEST PHASES OF THE ADJUDICATIONS.—We publish in this number the rulings of the United States Circuit Court for Kansas, respecting municipal securities. The opinion of Mr. Justice MILLER in the principal case, asserts an important doctrine of general interest, and holds that there is no presumption in favor of the power to issue such securities, and that to constitute a good declaration it must appear on the face thereof, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. The importance of this principle is manifest, for if bonds issued by counties contain no recital, it would seem to follow that there would be no presumption in favor of their validity, and it would devolve on the holder, though he were such *bona fide*, and for value, to aver and show by evidence *aliunde*, that the bonds were issued for some purpose authorized by statute. This view has much to support it in one of the latest cases on the subject in the Supreme Court of the United States—Nashville v. Ray—in which the leading opinion was given by Mr. Justice BRADLEY, and to which it is our purpose to make, in a short time, a special reference.

Municipal Bonds—Injunction to Restrain—Submitting Several Propositions at once—Nebraska Statute Construed.

In the Union Pacific Railroad Company v. Merrick County (Nebraska), which was a bill in equity in the United States circuit court for that district, by the railroad company as the owner of a very considerable portion of the taxable property within the county of Merrick, to restrain the county commissioners from issuing $125,000 of the bonds of the county to the Midland Pacific Railroad Company pursuant to the vote of the people of the county, at an election held on the 30th day of August, 1873. The principal ground relied on by the complainant was that "the proposition or question submitted involved three distinct subjects to be passed on, and consequently the submission was illegal. First, the construction of the railroad to Lone Tree. Second, the establishment of its depot at a particular place. Third, the construction of a wagon bridge over the Platte river." In support of this position, counsel relied upon Lewis v. Bourbon County, decided by the Supreme Court of Kansas, November 15, 1873, and reported in this journal, *anti*, p. 16, and upon Supervisors v. Railroad Company, 21 Ill. 1873; People v. Tazewell County, 22 Ill. 147; Clark v. Hancock County, 27 Ill., 310, and McMillan v. Lee County, 3 Iowa, 311.

But the court held the case before it did not fall within the principle of those cases, as there were not three distinct propositions submitted or three separate projects sought to be aided. On the contrary only one proposition was submitted, viz.: to vote aid to the extent of $125,000 to the Midland Pacific Railway Company; but this aid was to be upon condition that the depot of the company should be located within one-fourth mile of the court-house of the county, and upon the further condition that the company would so construct its railroad bridge over the Platte river, that it might be used as a wagon bridge, and would agree that it might be so used for ten years, and to that end would keep it in repair during that period.

"These conditions," says the court, "are reasonable in themselves, and such as the county authorities might, in their judgment, require. They are conditions obviously in the in

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terest of the county, and if the vote would have been valid without them, we cannot see why they render it illegal. Railroad Company v. Leavenworth, 1 Dillon, C. C. 394, 398; Railroad Company v. Baltimore, 21 Md. 93; Phillips v. Albany, *et al.*, 28 Wis. 340; Lawson v. Railroad Company, 30 Wis. 597; Rhey v. Railroad Company, 28 Penn. 261; ib. 318."

Sale of Unclaimed Packages Without Opening Them.

It is well known that express companies are in the constant habit of selling unclaimed packages which have remained in their hands uncalled for during the time provided for by contract or by law, *without opening them*, under the pretence that better prices are obtained where the bidders are kept ignorant of their contents. That this mode of sale, if fairly pursued, would operate as a fraud upon the owners of valuable packages in most instances, cannot be questioned. But it operates a double fraud; for it is not to be expected that dishonest agents will not find means to open the packages before the sale, and ascertain the value of their contents, and by so doing, procure the valuable packages to be bid in for a small sum, for themselves or their friends. We are not surprised, therefore, to learn that under the Pennsylvania statute (Purdon's Dig. 220) providing that express companies may, after holding unclaimed packages a certain length of time, "expose" them to sale, etc., the supreme court of that state has held that selling the packages unopened and describing the contents as unknown is a fraud upon the rights of the owner, and the company is liable for the value of the goods. The case in which this ruling is made is Adams Express Co. v. Schlesinger, 6 Legal Gazette, 191.

In delivering the opinion of the court, MERCUR, J., said: "The first and second sections of the act of 14th December, 1863. Pur. Dig. 220, pp. 6 and 7, under which the plaintiff in error proposed to sell the property authorized the company to "expose" it to sale at public auction. The fair meaning of "expose" in this statute obviously is "to exhibit," "to bring into view," "display," to "point out or show to the bystanders." Selling the trunks with the goods locked up in them, and describing the contents as unknown, withholds from the bidders all knowledge of the character or value of the contents, and clearly was not within the meaning of the law which directs the manner of sale. This manner of selling goods of any value is unjust to the owner. It is no answer for a corporation to say that by this method its sales in the aggregate produce quite as large a sum as if the articles were exposed to view. The company may not suffer, yet great injustice be done to the owner of valuable goods. There is no just reason why his goods should be sold at a sacrifice, to enable the almost worthless property of another to be sold for more than its value. Such a mode of selling is unjust to the bidders, generally they will not stand upon equal ground. The strong probability is, that the contents will be known to one or more of the agents, and all packages that are really valuable, will be struck down at low prices to some one acting in the interest of the knowing agent. In this very case, the evidence shows that the contents of the trunks were actually examined by one of the agents of the company before the sale, yet each was sold as contents unknown, for a few dollars."

Rights in Literary Property.

A motion was argued in the Supreme Court Chambers in New York, before Judge LAWRENCE, on the 26th of January last, for an injunction on behalf of Mr. Bret Harte, to restrain R. M. De Witt from publishing a book, the authorship of which was attributed to Mr. Harte. It appeared the defendant had published four chapters of a story written by Mr. Harte about ten years ago, and that the remaining ones, making up the volume, were written by some unknown person. To the whole story Mr. Bret Harte's name was prefixed, and at the end of his portion of the work appeared an explanatory note. An injunction, granted on this statement of facts, was on Friday ordered to be continued by Judge LAWRENCE.

In delivering his opinion, the learned judge said:

"I think that the plaintiff has such an interest in his name and reputation as an author as entitles him to invoke the aid of a court of equity in restraining the defendant from falsely representing that a literary production, published and sold by the defendant, is the work of the plaintiff. On the papers it seems to me that the act of the defendant is calculated to mislead the public and to induce the purchase of the work referred to in the complaint, under the impression that the same was wholly written by the plaintiff. The case seems to me to be analogous to that of a trade-mark. The principle upon which relief is granted in such cases is that the defendant shall not be permitted, by the adoption of a trade-mark which is untrue or deceptive, to sell his own goods as those of the plaintiff, thus injuring the latter and defrauding the public. Newman v. Alvord, 51 N. Y. 189. Now in this case the general public would, it seems to me, be misled, from the title-page of the book in question, into supposing that the whole of the book was the production of the plaintiff, and certain facts seem very strongly to point a conclusion that it was the design of defendant to thus mislead the public. There would have been no difficulty in printing the note, which is to be found upon page 34 of the book, upon the title-page, where it could be seen and read by everyone applying to purchase the book. The fact that the note does not appear upon the title-page, where it would be likely to be seen by the party intending to purchase, coupled with the fact that the title-page represents, or certainly conveys the impression, that the whole book was written by the plaintiff, some of whose other works are also there referred to, is pretty conclusive evidence that the defendant intended to mislead every person, who should become a purchaser of the book, into the belief that the same was the exclusive production of the plaintiff. I think it no answer to these observations to say that every one who reads the book must necessarily read the note at page 34. That note is better calculated to call the attention of the purchaser to the fact that he has been deceived than to prevent his deception. It is not likely to be read until the wrong has been done—*i. e.*, until the book has been sold. Entertaining these views I shall direct that an order be entered continuing the injunction until the cause can be tried. Plaintiff to have $10 costs of motion."

Municipal Indebtedness in England.

The practice of contracting municipal indebtedness evidenced by bonds and payable in the future, prevails in Great Britain as well as in this country, though not to the same ex-

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tent, nor for purposes so distinctly *extra* municipal as here. The following article from the London Pall Mall Gagette, on the subject, will interest our readers, as showing the extent of municipality debts in England, and the general purposes for which they were contracted:

"It appears from a parliamentary paper just delivered that the total amount of unliquidated loans chargeable against the county and borough authorities of England in 1872 was £33,406,000, and that the original sum borrowed was £41,907,000; therefore, £8,500,000 had been paid off. The unpaid county loans were rather less than £3,000,000; those of the boroughs amounted to £30,440,000, or more than ten times the former. The loans raised by the counties were chiefly effected for the purposes of building prisons and lunatic asylums, but minor wants have been occasionally met by loans—such as the erection of police stations, militia depots, etc. The town requirements have been naturally heavier and far more diversified than those of the rural districts. To the ordinary loans of the municipal corporations the moneys which the town councils have raised as improvement commissioners or as sanitary authorities are added. Thus, the city of Bristol, for example, whose indebtedness is stated to be £1,181,647, has it thus divided in the return: The corporation bond debts, £61,350; debt of the Bristol docks, £716,781; debt under the provisions of the Local Government Act, £323,515. The more usual period for which the counties have borrowed money are twenty and thirty years. There are numerous instances, however, of shorter terms, especially in Lancashire. The rate of interest usually ranges between 4 and 5 per cent., occasionally under 4 per cent. Middlesex, whose earliest loan within the scope of this return dates forty years back, has in all borrowed £1,008,600, and paid off rather more than one-half, or £508,000. In the boroughs, loans for twenty and thirty years, as well as for briefer terms, are common; but they are frequently contracted for fifty years, and in certain cases for one hundreds or even more. Thus Rochdale, under its Waterworks Act, has one hundred years, commencing in 1876, to pay off a loan of £196,000. Oldham took a loan in 1853 of £250,000 for gas and Waterworks, repayable in one hundred and twenty years, with 4 per cent. interest. The rate paid by the towns appears to have been about the same as in the counties. Oldham raised some money at 3 1-2 per cent., and Middlesborough is stated to be subject for some of its loans to 6 1-2 per cent. interest. In certain of these Middlesborough cases the 6 1-2 per cent. "includes interest and redemption," probably it does in all. The heaviest loans raised for a single purpose are, apparently, by Manchester, £3,000,000, for waterworks and improvements; by the city of London, £2,475,000, for Holborn Valley improvements; and by Liverpool, £2,204,000, for waterworks. Some of the moneys borrowed by the city at rates exceeding 4 per cent., the corporation, on renewal, reduced to a lower rate. Sometimes the town debts are extinguished by equal annual instalments of principal and interest; sometimes that end is provided for by the creation of a sinking fund, through a specified yearly per centage on the original loan."

The Publication of Legal Notices.

A bill has recently been in the hands of Governor Dix, of New York, establishing what is known as a "legal paper" in New York city, which was to be a medium of legal advertising, and which was to be paid $15,000 a year for publishing court calenders. We have not heard whether the governor approved it or not, but we noted the fact that the daily papers were greatly opposed to it on grounds of principle as well as of interest. It would have diminished their advertising patronage. They asserted that legal advertisements, by being published in such a paper, would be hid away from the public eye, but they did not tell us that they are already hid away by being divided between the twenty-five or thirty papers whose columns receive such advertisements in that great city. The New York Council of Political Reform, however, took the matter up and gave some show of respectability to the opposition to the bill. If anything could properly characterize the newspaper opposition to it, it would be an assertion made by the New York Evening Post that the daily papers of that city publish the court calenders gratuitously. Unless we are greatly mistaken there is no daily paper in that city which publishes full and trustworthy court-calenders, except the Daily Register, a legal journal.

Upon the subject of the sustentation of legal journals (if we might borrow a word from our Presbyterian friends) it may be observed that nearly all the *weekly* law journals in the United States appear to owe their support largely to legal advertising. The Chicago Legal News and Philadelphia Legal Intelligencer are conspicuous examples of this, although the former unquestionably has a great circulation. These journals carry enormous lists of legal advertisements compactly printed in fine type. If we mistake not, the Albany Law Journal, the Philadelphia Legal Gazette, and the CENTRAL LAW JOURNAL are the only weekly law journals whose subsistence is not derived in part from this source. Most of the American weekly law journals have either been made mediums of legal advertising by rules of court, as in Pennsylvania, or by special statute, as in case of the Chicago Legal News. In Missouri every *newspaper* may be a medium for the publication of legal notices. 1 Wagn. Stat. p. 609–10, § 42; 2 Ibid. p. 1009, § 17. And it was held in Kellogg v. Carrico, 47 Mo. 157, that a paper devoted exclusively to the dissemination of *legal* intelligence is a "newspaper;" so that where a deed of trust provided that notice of the sale should be given in some St. Louis "newspaper," a notice in the *St. Louis Legal Record and Advertiser*—a daily law journal—was good. The court said: "It is not the particular kind of intelligence published that constitutes one publication a newspaper rather than another. Newspapers are devoted to the dissemination of intelligence on a great variety of subjects, such as politics, commerce, temperance, religion, and so on; and the law and legal topics and occurrences are not excluded from the range of newspaper enterprise. A paper devoted to the gathering up and dissemination of legal news among its readers, is, or at least may be, a "newspaper." We suppose the court mean that if it is something more than a mere advertising sheet or a court calender, it is a newspaper. The Missouri statute which regulates the publication of notices to non-resident defendants in the commencement of suits, is as follows: "Every order against non-resident, absent or unknown defendants, shall be published in some newspaper published in this state, which the court, judge or clerk making the order, may designate as most likely to give notice to the person to be notified; the publication shall be for four weeks, successively, the last

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insertion to be at least four weeks before the commencement of the term at which the defendants are required to appear." 2 Wagn. Stat. p. 1009, § 17. By the statute relating to execution sales it is provided that notice shall be given "by advertisement in some newspaper printed in the county, if there be one regularly published, *weekly* or *daily*, and if not, by at least six printed or written handbills," etc., 1 Wagn. Stat. p. 609-10, § 42. Under these statutes and the foregoing decision, there would seem to be no doubt that a law journal "weekly or daily," which is not a mere advertising sheet, may be a legal and proper medium for the publication of legal notices. It is, however, provided by a statute applicable to St. Louis county, in regard to *sheriff's sales*, that the sheriff of St. Louis county shall advertise all sales made by him under execution or other lawful process from the courts of said county, for twenty *consecutive* days previously to the day of such sale and publication. This would prohibit the sheriff of St. Louis county from advertising judicial sales in a *weekly* journal of any kind. The general statute above quoted, in regard to the publication of non-resident notices, appears, however, to be in force in St. Louis county as well as elsewhere throughout the state.

The advantage and proprety of concentrating all legal advertising in one journal in each county are so obvious that none except certain newspaper publishers can fail to see it. The policy of the law is, to give notice to the absent or unknown defendant, if possible; or, in case property is to be sold under judicial process, to notify the largest number of those who will be interested in purchasing. Where the legal advertising of a county is distributed among a large number of journals, neither of these objects is attained. To attain the desired object such notices ought either to be published in *all*, or else concentrated in *one*. To publish them in all is beyond the question. It would in many instances make litigation so expensive that litigants would seek their rights *vi et armis*, rather than in a court of justice. The only objection which could be urged to thus concentrating them in one journal is that it would savor of monopoly. To this it may be answered that the object of publishing such notices is not to feed and support newspapers, but to protect the rights and interests of litigants. While such an arrangement might very likely benefit the particular journal which should do the advertising, it would be a much greater benefit to the litigating parties; because the expense of publishing such notices, if all were published in one journal, could be greatly reduced below what is at present paid. As it is now, under the Missouri law, it is clearly a monopoly—not in a particular newspaper, but in the clerk or sheriff to whose discretion is left the distribution of these favors. If so disposed, he turns it into a matter of personal revenue by contracting with certain journals to publish these notices at prices less than allowed by law, and pocketing the surplus. There is good reason to believe that this is frequently done in this state; and that litigants, instead of having such advertising done at the lowest competing rates, are thus compelled to pay a premium to dishonest and corrupt officials.

—THE court of commissioners for the distribution of the Geneva Award will meet at Washington on the 22d inst.

—GEN. WILLIAM S. HILLYER, the last of General Grant's original staff, and a well and favorably known member of the legal profession, died in Washington on the 12th inst., of congestion of the lungs.

Bankrupt Act—Retroactive Operation of Amendment of June 22, 1874.

I. *In re* OBEAR AND *In re* THOMAS.

United States Circuit Court, Eastern District of Missouri, July 8, 1874.

Before DILLON, Circuit Judge.

1. Bankrupt Act—Retroactive Operation of Amendment of June 22, 1874.—While the late amendment to the bankrupt act is retrospective in its operation so as to bring within it all cases commenced since December 1, 1873, and in which at the time of the passage of said amendment (June 22, 1874), the petitions for the adjudication remained to be acted on, yet it does not annul or disturb judgments rendered or adjudications made and in force at the time of the taking effect of said amendment.

These are petitions for review under section 2 of the bankrupt act.

Facts in the case of E. G. Obear: On the 4th day of May, 1874, a creditor's petition was filed against Obear in the District Court for the Eastern District of Missouri, stating that, being a broker and trader, he did, on the 28th day of May, 1873, suspend, and did not within fourteen days, nor at any time thereafter, resume payment of his commercial paper. To an order to show cause Obear appeared on the 13th day of May and admitted the petition, and he was thereupon, *on that day*, by the court, *adjudicated and declared a bankrupt*, and subsequently, June 22d, an assignee was elected, to whom a deed of assignment was made, and was regularly proceeding in the discharge of his duties until June 30th, when the district court, *on its own motion*, made the following order: "It is ordered that the petitioning creditor amend his petition within thirty days so as to conform to the 12th section of the act of Congress, approved June 22d, 1874, in the following respects, to-wit:

"1st. By alleging that the number of unsecured creditors who have joined therein, constitute, at least, one-fourth in number, and that the aggregate of their debts, provable under this act, amounts to, at least, one-third of all the debts so provable.

"2d. Said amended petition shall be signed and verified by the first five signers thereof, if so many there be, in the manner and form required by said act.

"3d. The allegation in the original petition of the suspension of the debtor's commercial paper for fourteen days, shall be so amended as to aver the suspension and non-resumption thereof within a period of forty days before the filing of the original petition of his commercial paper made or passed in the course of his business as such broker or trader.

"And it is further ordered that all other proceedings in the case be stayed until said amended petition is filed."

To this order the petitioning creditor, the bankrupt and certain secured and unsecured creditors excepted; and it is to have the same reviewed that the petitioning creditor has brought the present petition.

Facts in the case of James S. Thomas: In this case a creditor's petition was filed against Thomas on the 25th day of April, 1874, duly charging as an act of bankruptcy the suspension of his commercial paper on the 15th day of November, 1873. Such proceedings were had that Thomas was regularly adjudicated a bankrupt on the 25th day of April, and his case referred to a register. Creditors met on May 30th, and resolved to proceed under section 43 of the bankrupt act, and appointed a committee of one, John G. Priest, as trustee, to whom all the property of Thomas was conveyed, and who has since then been engaged in winding up and settling the trust. On the 30th day of June the district court, on its own motion, entered an order similar to the one in Obear's case, above given, and which was excepted to in like manner, and is now here for review at the instance of the petitioning creditor, the bankrupt and other creditors.

J. B. Woodward, for Obear's creditors; *Hill & Bowman*, for Thomas' creditors.

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No appearance *contra*.

DILLON, Circuit Judge.—In both the cases before me the proceedings in the district court were commenced after December 1, 1873, and the adjudication of the debtors as bankrupts was made before the late act amending the bankrupt act took effect, and in neither of the cases had the estates then been fully settled.

The recent amendment to the bankrupt law makes several important changes in respect to involuntary bankruptcy, and among other changes it requires that at least one-fourth in number of the creditors, representing one-third in amount of the provable debts, shall petition for the adjudication; and the time of the suspension of the payment of commercial paper, constituting an act of bankruptcy, is extended from fourteen days to forty days, and it prescribes and limits what shall be considered such paper.

The amendatory act approved June 22d, 1874, is made retroactive in the following language:

"The provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the 1st day of December, 1873, as well as to those commenced hereafter. And in all cases commenced since the 1st day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court, if satisfied that the admission was made in good faith, shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and in cases hereafter commenced, with costs," etc.

Undoubtedly the new act is retrospective in its operation so as to bring within it all cases commenced since December 1st, and in which, at the time of its passage, the petitions for the adjudication remained to be acted on.

Without entering upon the enquiry as to the competency of Congress to annul by mere legislative declaration prior adjudications of bankruptcy, regularly made, in pursuance of laws in force at the time, and the conveyance and acts thereunder, I am of the opinion that Congress did not intend by the amendatory act to overturn or disturb adjudications then already made and in force. The arguments in support of this view are derived from the language of the amendment; from the accepted principle of construction that statutes are to have no further or greater retrospective operation than plainly appears to have been the legislative intention, and from the failure of Congress to make any provision for the necessary consequences of setting aside all adjudications in bankruptcy, and all acts done under them throughout the United States for the seven preceding months.

While the language making the law retroactive as to cases commenced since December 1st is very broad and applies to "all cases" commenced since that day and prior to the passage of the amendatory act, yet it is obvious that the purpose of Congress was to put such cases upon the footing of new cases so as to enable them to participate equally in the benefits of the new provisions. But it is implied from the nature of the proceedings and the steps that are prescribed to be taken in respect to both old and new cases, that by the language quoted, Congress contemplated pending cases in which no adjudication had yet been made. The law requires the adjudication to be made upon the *petition* of creditors, and as amended, requires a given proportion of the creditors to concur, and limits the time within which, both as to old and new cases, the requisite number and amount must join in the petition. The court determines whether the requisite number and amount have or have not petitioned—if they have, the matter proceeds and the adjudication will or will not be made, depending upon whether the alleged acts of bankruptcy are or are not established. On the other hand, if the statutory requirement as to the number and amount of creditors is not met, the provision is that the proceedings shall be dismissed. All this clearly shows that Congress had in contemplation cases in which no adjudication had been made, for these steps are all preparatory to an adjudication, and this view is further confirmed by the provisions of section 13 amending section 40 of the original act.

Besides, it is impossible to suppose that Congress overlooked the fact that throughout the United States, between December and June, there were many hundred cases in bankruptcy in which adjudications had been made and which were in various stages of progress, some in which little had been done, others in which property had been sold, suits decided, and dividends made, but which were not yet entirely closed. If it had been intended by Congress to annul all that had been done under the bankrupt act since the first day of December, overturning adjudications, and disturbing settlements, payments, dividends, conveyances, etc., it is quite incredible that provisions would not have been made for this extraordinary and confused state of affairs. The amendatory act is silent as to the rights and remedies of the various parties who would be affected by legislation having this grave and extensive retrospective operation. The argument, then, is a strong one that no such consequences were intended; and the more so since the retroactive provisions may have full effect given them by holding them as intended to apply to all cases commenced since the 1st day of December which had not progressed to an adjudication at the passage of the amendatory act.

I am of opinion, therefore, that the orders of the district court in each of the cases under review were erroneous, and they are accordingly reversed. These orders were purposely made as they were, not as necessarily embodying the opinion of the district court, but that they might present for review cases which would measure the scope of the retroactive operation of the amendatory act. And what I hold is that it does not affect decrees or adjudications then made, while conceding that its remedial provisions do in many respects apply to cases brought since December 1st, and which were pending when it went into operation.

ORDERS REVERSED.

II. *In re* ANGELL.

United States District Court, Eastern District of Michigan, July 9, 1874.

Before LONGYEAR, District Judge.

1. **Bankrupt Act of 1874—Retroactive Provisions.**—The provisions of § 12 of the Amendatory Bankrupt Act of 1874, which relate to the number and value of petitioning creditors apply only to cases where the petition for adjudication is still pending, and not to cases in which adjudications had passed upon the petition before the approval of the act.

This was on the motion of the bankrupt to dismiss the proceedings unless the petitioning creditor shall procure other creditors to join with him in the petition for adjudication, so that at least one-fourth in number of all the creditors, and whose aggregate debts shall amount to at least one-third of the debts provable, etc., as required by the act of Congress approved June 22, 1874, entitled

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"An act to amend and supplement an act entitled 'An act to establish a uniform system of bankruptcy,'" etc.

The case is one of compulsory or involuntary bankruptcy. The petition for adjudication was filed on the 28th day of May, 1874, by a single creditor; and, having been filed before the recent act, it of course contains no allegation as to number and amount of creditors and debts; and it is conceded that the number and amount are less than one-fourth and one-third, as required in those respects by said act. The debtor failed to appear, and on the 8th day of June, 1874, the return day of the order to show cause, he was duly adjudicated a bankrupt, and the usual warrant was at once issued and was executed. All of which proceedings took place, as will be observed, after the first day of December, 1873, and before the recent act.

No objection, whatever, is taken, nor does any exist to the sufficiency of the petition to the jurisdiction of the court, or to the regularity of the proceedings, as the law then was; and it is fully conceded that but for the said act of June 22, 1874, the proceedings and adjudication are unimpeachable.

The provisions of the act upon which this motion is founded are contained in section 39 of the original act as amended and re-enacted, being section 12 of the amendatory act, and they are as follows (the portions here involved being in italics):

"Section 39. That any person residing and owing debts as aforesaid, who, after the passage of this act, shall" (commit certain specific acts), "shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, *who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts, provable under this act, amounts to at least one-third of the debts so provable:* Provided, that such petition is brought within six months after such act of bankruptcy shall have been committed. *And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December*, 1873, *and prior to the passage of this act, as well as to those commenced hereafter*," etc.

LONGYEAR, J.—That the provisions of the recent act requiring one-fourth in number and one-third in amount of the creditors to join in an involuntary petition for adjudication of bankruptcy, were intended to apply, and can and must be applied to all cases commenced between December 1, 1873, and the passage of that act, in which there has been no adjudication, I entertain no doubt; and it has been so held by the District Court for the Northern District of Illinois. *In re* Scammon, 6 Chi. Leg. N. 328; 1 Cent. Law J. 328. But the question here goes beyond that. It is whether those provisions were intended to apply, and can be applied, to cases so commenced, *which had passed into judgment* before the passage of the act.

The act cannot be given the application and effect contended for, because it involves the vacating and annulling the judgment of the court, and granting a new trial. No rule of constitutional law is better settled than that, in a constitutional government, with a division of powers, like that of the United States, no legislative enactment can have the effect and operation to annul the judgment of a court already rendered, or grant a new trial, especially as it respects adjudications upon the private rights of parties. "When they have passed into judgment," says Justice NELSON, in State v. Wheeling Bridge Company, cited below, "the right becomes absolute, and it is the duty of the court to enforce it." (Cooley's Const. Lim. 93-95 and cases cited; The State v. The Wheeling, etc., Bridge Company, 18 How. 421, 431; and see also the dissenting opinions of Justices MCLEAN, GRIER and WAYNE, at pages 437, 449; Mason v. White, decided by the Supreme Court of Michigan at the January term of 1874, not yet reported.)

Courts will not presume that Congress intended to exceed its powers, or in any manner to invade the domain of the judiciary, unless such intent is clearly expressed by the words used, or by necessary implication. The words used in a statute may be broad enough, and they probably are in the statute under consideration, to admit of such a construction; but the courts will in no case give them a construction that involves the exercise of an excess of power, where, by a more limited application of them, such exercise of power is not involved.

In the present instance the enactment in question is given full effect, and in my opinion all the effect Congress intended it should have, by applying and limiting it to cases still pending, and undisposed of by adjudication. It is abundantly evident that Congress did not intend these provisions to apply to cases already adjudicated, for the following reasons:

1. It was not in their power to do so, as already shown.

2. They did not so expressly enact.

3. The provisions can have full and consistent effect without giving them such application.

4. They made no provision for the saving of rights accrued or acts done under adjudications in cases where the proceedings might, under the provisions in question, eventually fail and be dismissed. And this has still greater force from the further fact that they did make such saving provision in case of a discontinuance of proceedings as provided by section 14. Other reasons will readily suggest themselves, but the foregoing I consider conclusive.

I hold, therefore, that the provisions in question apply only to cases where the petition for adjudication is still pending, and not to cases in which adjudications had passed upon the petition before the approval of the act.

It results that the motion must be denied.

ORDERED ACCORDINGLY.

NOTE.—The retroactive clauses of the late amendment to the bankrupt act have already, in several instances, come before the federal courts for construction and application. Recently we published the decision of Judge BLODGETT (*in re* Scammon, *ante*, p. 328), in which, however, there had been no adjudication.

Judge HOPKINS, of the United States District Court for the Western District of Wisconsin, in the case of Raffaux, bankrupt, decided on the 9th inst. held that the amendment did not disturb adjudications already made. The facts upon which the question arose were these:

The bankrupt has filed affidavit showing that the requisite number of his creditors did not petition for his adjudication according to the 12th section of the recent act amendatory of the bankrupt law, and moves that the proceedings be dismissed unless a sufficient number join in the petition within the time prescribed in said act. The petition was filed against the bankrupt in this case on the 5th day of February, 1874, and an order was made requiring him to show cause, on the 16th day of February, why he should not be adjudged a bankrupt, which was duly served upon him. On the 16th of February he was adjudged bankrupt by default, and a warrant issued to a messenger in due form, upon which his property was served, and his creditors notified of the first meeting before the register to elect an assignee. On the day fixed an assignee was duly chosen by the creditors, who then and there accepted, qualified and proceeded in the execution of his trust, under the assignment. He was pursuing his duties as such assignee when the amendatory act above mentioned was passed. The question raised by this motion is whether the amendatory act applies to cases in the advanced condition this was when the act took effect.

The conclusion of the learned judge was expressed by him in the following language: "My conclusions upon the case here presented are, that it is not necessary to amend the petition, where there had been an adjudication before the amendment took effect; that the provisions of the amendment in regard to the number and amount of the petitioning creditors do not apply to such cases; but on the contrary, hold that the judgment of adjudication based upon a petition conforming to the provision of the law in force when made, is valid, and as binding upon the debtor and his creditors as if the amended act had not been passed; that the adjudication removes the case beyond the domain of legislative control. The motion of the bankrupt is denied."

In The Matter of Rosenthal, bankrupt, before the Judge of the United States District Court for the Western Districts of Missouri, presented the following questions as stated in the opinion of Judge KREKEL: "Can a bankrupt by a mere protest made to the assignee, alleging want of jurisdiction in

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the court, in a case commenced since the 1st of December, 1874, and prior to the late amendments of the bankrupt law, stop the declaring of a dividend which could legally be declared under the law prior to the amendments?" The court very properly held in the negative, and in the course of its opinion remarked:

"All parties, debtor as well as creditors, may be willing that the proceedings pending shall go on to final settlement. It would require a very plain provision of law to show that Congress intended to arrest and oust the court of the jurisdiction of a case which had been commenced and prosecuted under existing laws and progressed to the satisfaction of all parties."

County Bonds—Power to Issue Coupons—Mode of Signing—Sufficiency of Declaration.

NATHANIEL THAYER v. MONTGOMERY COUNTY.

United States Circuit Court, District of Kansas, June Term 1874.

Before Mr. Justice MILLER.

1. If the bonds to which coupons are annexed are properly signed and sealed by the officers of the county, it is no defence to an action on the coupons that they are signed by only one of the county officers.

2. A declaration upon county bonds should shew by averment, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. This principle applied, and the declaration held sufficient.

3. Bridge bonds—construction of local statute respecting; Kansas Municipal Bond Registration Act construed; Kansas Municipal Bond Curative Act construed; election and conditions precedent to issue of bonds—see cases in note.

Action on coupons on county bonds. The bonds in suit are in the usual form, signed by the chairman of the board of county commissioners, attested by the clerk and are under the seal of the county. They are payable to the "Leavenworth, Lawrence and Galveston Railroad Company, or bearer," and contain the following recital: "This bond is executed and issued under the provisions of and in conformity to the laws of the state of Kansas, and in pursuance of the vote of a majority of the electors of Montgomery county, of June 21, 1870."

The petition set out the bond and coupons in suit in full, but did not contain any express averment of the purpose for which the county issued the bonds, and such purpose did not appear otherwise than on the face of the bonds. The coupons were signed only by the county clerk.

Demurer to petition on three grounds:

1. That the county clerk had no authority to sign coupons.

2. That it does not appear that the vote was by the *qualified* electors of the county.

3. That the authority or right of the county to issue the bonds in suit is not averred, and does not appear on the face of the bonds.

N. T. Stevens, for plantiff; *Clark, Gamble & Shannon*, for the county.

Mr. Justice MILLER, orally overruling the demurrer, said in substance:

I. As to the first ground of demurrer: The bond itself being duly signed and sealed by the proper officers of the county, and the coupons being part of the bond, it is no defence to the coupons that they are not signed by the chairman of the board as well as by the clerk.

II. The omission in the recital of the bond of the word "qualified," in describing the electors is immaterial. The electors are the qualified electors.

III. The third ground of demurrer presents to my mind a more serious question. It is that an authorized, lawful purpose for which the bonds were issued should be alleged in the declaration or be recited on the bonds, which are made part thereof. This, I think, is a sound proposition. The power of counties to issue bonds is not inherent or general. They are authorized to issue bonds or negotiable paper, only for limited or specific objects or purposes and hence it should appear by averment in the petition or by recital in the bonds that they were issued for one of these specified purposes.

I should have preferred that the petition here should have alleged that these bonds in suit were issued by the county in payment for stock subscribed by it in the railroad company, but I must pass upon the sufficiency of the petition as it stands. The petition sets out the bond in full, and although my conviction is not strong and clear, yet, taking a somewhat liberal view of the bonds, I think it can be gathered from them that they were issued under the statute of the state, by the county, to aid corporation payee in the construction of its road. In this view, I incline to hold, though with some hesitation, that the petition is good.

ORDERED ACCORDINGLY.

NOTE.—We append in the form of a note other rulings of the Circuit Court for the District of Kansas, at the June term, 1874.

Coler v. Wyandott County.

Bridge Bonds—Local Statute—Election.—Action on bridge bonds issued by the county, reciting that they were issued under the internal improvement act of 1866, as amended in 1871. Special plea that the bridge for which the bonds were issued cost more than $1,000, and that the question of incurring the debt was not submitted to the voters at a *general* election, of which the plaintiff had notice. This plea was based upon section 13 of the act in respect of bridges, of 1867. It was urged in support of this plea that the act last mentioned was an implied repeal of the internal improvement act of 1866, as to bridges. But the court (MILLER and DILLON, JJ.) decided otherwise, holding that the bridge act of 1867 contemplated the case where bridges were to be paid for out of the county treasury, from the ordinary revenue, and that the internal improvement act of 1866, as amended in 1867 and 1871, contemplated the case of bridges to be paid for by the issue and sale of bonds, and that the vote under the last named act need not necessarily be at a *general* election, as the act provides that it may be at such time and place as the county commissioners may order.

Grant & Smith, for the plaintiff; *Wheat & Cook*, for the county.

January v. Johnson County.

Registration Act—Municipal Securities.—Before Mr. Justice MILLER. The act of the State of Kansas of March 2, 1872, providing for the registration of municipal and county bonds, is not a curative act in the sense that it takes away any valid defence which the city or county would otherwise have to bonds theretofore issued.

Grant & Smith, for the plaintiff; *Mr. Cobb*, for the county.

Thayer v. Johnson County.

Election—Condition Precedent—Curative Act.—The bonds in question were issued to the Kansas and Neosho Valley R. R. Co., or bearer, part dated in September, 1867, and the rest in June, 1868. There is no recital in the bond, except that it purports to be a "stock bond," and states that it is issued "by order of the board of commissioners of the county of Johnson." They are signed by the chairman of the board, attested by the clerk, and are under the seal of the county.

The present questions arose on demurrer to several special pleas in the answer. The general nature of these pleas appear in the opinion.

Pratt & Ferry and C. W. Blair, for the plaintiff; *Cobb & Cook*, for the defendant.

DILLON, Circuit Judge:—I am of the opinion that the second count of the answer is insufficient. It does not deny that the plaintiff is a holder of the bonds in suit for value without notice. Part of the bonds were issued after the curative act of February 25, 1868 (Gen. Stats. of Kansas, 1868, p. 892.) This act, it seem to me, validates bonds thereafter issued as against the two objections urged against them, one of which is that the particular railroad company, to which the subscription was to be made was not named in the order of submission, and the other, that the line of the road was not located through the county prior to the election. If the bonds issued in June 1868, under the order and vote of 1865, are valid by reason of the curative act of February 25, 1868, I am inclined to think the bonds issued in 1867, under the same order and vote, are also made valid. But, however this may be, the plaintiff, as a presumed *bona fide* holder, may, under the doctrine of the Supreme Court of the United States, recover, as against the matters pleaded in the second count of the answer, no notice thereof to plaintiff being charged in this count.

The third count is like the second except that it charges notice to the plaintiff of the order of submission, and denies that the plaintiff is a holder for value. Under the statute under which the vote in question was taken the supreme court of the state has decided "that some corporation must be named [in the

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order for the vote] as the recipient of the subscription and bonds, or the proceeding will be without warrant of law and void." Lewis v. Commissioner, of Bourbon County (1 CENT. LAW JOUR. 16.) As the plea in question alleges notice to the plaintiff of this order, it would, if this view be correct, and if the doctrine of the state supreme court were followed by this court, be a good defence. But as to the bonds issued since the curative act, and, as it seems to me as to those issued before the same, they are validated by this act.

As the fourth plea does not charge notice to the plaintiff that the bonds were issued without any subscription having been made or stock received, it sets up no defence available against an innocent holder of the bonds for value.

The 6th and 7th pleas set up, the one the failure of consideration, and the other, the want of consideration, for the bonds in question, with notice to the the plaintiffs. These constitute good defences. Under the statutes of Kansas, bonds can be issued only in payment for stock, and no statute has been cited under which, as I think, the transaction of June 19, 1868, can be upheld. Sound policy requires that local and municipal officers be kept within the limits of their powers.

The result is that the demurrer to the second, third and fourth counts of the answer is sustained—as to sixth and seventh counts, overruled.

Book Notices.

LIVES OF THE LORD CHANCELLORS OF ENGLAND. By Lord CAMPBELL. New edition, edited by John Allan Mallory, of the New York bar. New York: James Cockcroft & Co. 1874. St. Louis: Soule, Thomas & Wentworth.

This beautiful and illustrated edition of this famous work leaves nothing to be desired, and affords almost nothing to be criticised. It is produced with the same taste that marks the publications of the house of Cockcroft & Co., and at a price much less than the English editions can be had for, which are no better.

We forbear any extended notice of a work so well known, both in Great Britain and in this country. It has done more to make Lord Campbell known to the world than all the labors of his long life as an active lawyer, who held, in the course of his career, successively the places of solicitor-general, attorney-general, member of parliament, lord chancellor of Ireland, chief justice of the Queen's bench, from which in 1859 he retired, when he was appointed by Lord Palmerston lord chancellor of England, in the possession of which office he died in London, in 1861, at the advanced age of 80 years. The Lives of the Lord Chancellors was first published in 1846, and such has been its popularity that it has gone through several editions in England, and been several times reprinted in this country. About five years before the death of its illustrious author the whole work was carefully revised by him, and in submitting the new edition to the public in 1856, he declared that it was "in as perfect a state as I can ever hope that it may attain." This edition is reprinted from that, and contains a variety of illustrations, adding to the beauty and value of the work. The work has some well-known faults, but they are of minor consequence, and it will, perhaps, ever remain *the* work on this subject, combining as it does all the charm of biography with the instruction of history, and tracing in connection with the lives of the chancellors the growth and development of English law and English institutions.

THE LAW OF MUNICIPAL CORPORATIONS. By JOHN F. DILLON, LL. D. Second edition, revised and enlarged. 2 vols. New York: James Cockcroft & Co. 1873.

The second edition of this work is thus noticed by the Albany Law Journal, March 14, 1874:

"It is not often that law books are composed in a manner so faithful and satisfactory as the work of Judge DILLON on municipal corporations. For eight years the work grew with the author; it was a part of his legal life; he infused into it loving care and intellectual pride, and thus it became the product of the author's genius, ability and desires. The field in which Judge DILLON labored was essentially a new one in legal literature, although the materials for a work of the kind had been long accumulating, and had become abundant. But no complete treatise on the subject of municipal corporations had appeared in America before the work of Judge DILLON; and the English treatises upon the same subject were substantially inapplicable, in many respects, to our institutions. The American municipal corporation is really a growth of our own institutions, and has little in common with the municipality of Great Britain; consequently, the law of England, upon subjects coming under this genera head, needs considerable modification to render it applicable to our institutions. In fact, the law of municipal corporations in America is a peculiar system—a jurisprudence almost *sui generis;* and we might as well first as last, make up our minds to base that jurisprudence upon the deep foundations of the nature and spirit of our institutions. The functions of American municipal corporations are far more varied and extensive than those of European municipalities. The duties, liabilities and powers of municipalities in this country are not specifically and particularly defined. Much is involved in obscure and general language, which often requires the most subtle reasoning and analysis to limit and define. The American municipality is, in fact, a *quasi* government, possessing nearly all the functions of a general government. These functions being delegated by the state governments, questions are continually arising as to the extent of power delegated, the power reserved, the concurrence of powers, the duty and liability of municipalities under their delegated functions. To construct from the great mass of decisions, upon these and kindred questions, a clear and well-reasoned work, has been the endeavor of Judge DILLON. The task was not without manifest difficulties; but the author, in connection with his judicial duties, so far overcame these difficulties as to bring out, in 1872, a complete work of 800 pages upon Municipal Corporations. The comparative novelty of the work, its great usefulness and wide-spread application, combined with the ability and learning with which it had been prepared, made its advent into the libraries of the profession and into the courts almost a legal ovation. From the very first it received the highest judicial and professional encomiums, and none were found to offer adverse criticism. The favor which the first edition received was such that it was soon exhausted, and the author has prepared a second and revised edition. The first edition was contained in one volume; but the second edition contains 200 pages of additional matter, and the work is, therefore, divided into two volumes of about 500 pages each. The author reiterates the fact that he has done all the work himself, and has not committed the preparation of the text or notes to others. No one who has examined the work would have supposed that any part of it had been entrusted to to any less competent hands than his own. The whole work is singularly uniform in ability and care, and everywhere shows marks of patient and faithful endeavor on the part of the author. In the second edition the general arrangement is not altered, but the recent cases are incorporated. The principal changes are made under the heads of "Municipal Securities," "Taxes," and "Assessments." The large number of recent decisions on negotiable bonds of municipalities are embodied in the revised work. The success which has attended the publication of this work on "The Law of Municipal Corporations," is a striking instance of the appreciation of the profession for law books prepared with zeal, care, research and ability. Judge DILLON has, as yet, furnished no grander monument of his genius than the present treatise. It is, indeed, *monumentum perennius ære.*

Summary of Our Exchanges.

—THE Daily Register for several days past has been publishing the opinion of Surrogate HUTCHINGS in the Rollwagen Will case, which has attracted considerable public attention. It contains little else of general interest.

—THE Southern Law Review for July contains an unusual number of interesting articles. Chancellor Cooper contributes another paper on Modern Theories of Government. E. S. Hammond, Esq., of Memphis, contributes a very interesting and instructive paper, criticising the rule laid down by the Supreme Court of Tennessee in Click v. Burris, Knoxville, Term, 1871, that in chancery sales when it appears that an increase bid of ten per cent. has been offered, the biddings will be re-opened. The rule of the Supreme Court of Tennessee is handled without gloves, and reasons are adduced against reviving a pernicious practice which has been abolished by statute, even in England, which the learned court which has so recently legislated it into existence in Tennessee will hardly be able to refute. The Right to Disinherit without Cause, is discussed in a short paper by Judge Bliss, of Columbia, Mo., formerly one of the judges of the Supreme Court of this State. Edmund S. Mallony, Esq., of Jackson, Tenn., contributes a somewhat exhaustive paper on the Wife's Separate Estate. As the law on this subject has been thrown into confusion by recent decisions in Tennessee, and is in a transition state in most of the states of the Union, discussion of the question is well-timed and appropriate. M. F. Taylor, Esq., of St. Louis, criticises severely the "Slaughter-House Cases," 16 Wallace, 36. Free discussion of judicial decisions of this kind is good. There is no court so exalted but that it may possibly be benefited by it. A second paper on The Privilege Tax is furnished by J. S. Wiltse, Esq., of Chattanooga, Tenn. The next paper is

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entitled The Rule of Private International Law as to Sales made where Lawful, when the Goods sold are to be removed for Re Sale where Unlawful. It is from the pen of Simon Obermeyer, Esq., of the St. Louis bar. Mr. Obermeyer states the question which he discusses as follows: "A. is domiciled in Missouri. B. is domiciled in Massachusetts. In the former state there is no statute prohibiting the sale of intoxicating liquors. Under the statutes of Massachusetts, the sale of such liquors, except for certain specified purposes, is unlawful. A. is a wholesale dealer in liquors, and sells to B. a bill of his goods. B. takes the goods to Massachusetts, and re-sells them in violation of the laws of his state. B. fails to pay A. the price of the liquors, and A. sues him in the courts of Massachusetts. Can the plaintiff recover? What is the remedy of the vendor in the forum of the vendee? Our subject invites us to the discussion of this question." And Mr. Obermeyer discusses it at considerable length, collecting an unusual number of authorities, which his access to the St. Louis bar library enabled him to do. Edward Mc Crady, Jr., Esq., of Charleston, South Carolina, discusses in a brief paper the subject of Private Communications to Judges, in which he denounces in severe terms, the practices of communicating privately with judges, in regard to causes pending in court. "The People" is a paper by William O. Bateman, Esq., of St. Louis, discussing the nature of sovereign power in popular governments, and the relation of the people to their constituted governments. A valuable paper on the Thirteenth and Fourteenth Amendments to the Federal Constitution is contributed by D. D. Shelby, Esq., of Huntsville, Ala. The Philosophy of Punishment is considered by Horace Chilton, Esq., of Tyler, Texas. The Review also contains a digest of the English Law Reports for February, March and April; a digest of the decisions of the Supreme Court of the United States, and a select digest of State Reports. It also publishes an exhaustive opinion of Hon. JOHN R. FLIPPIN, of the Criminal Court of Shelby county, Tennessee, in State v. Miller, on the disqualification of jurors in criminal cases, on account of impressions or opinions formed from reading newspaper accounts of the facts of the case. Also an opinion of Chancellor COOPER, in which he considers the effect of voluntary settlements with reference to the rights of existing creditors, and holds that such settlements are not void *per se*. Also an opinion of the Virginia Court of Appeals, in Rollo v. Andes Insurance Co., holding that bonds deposited with the treasurer of the state by a foreign insurance company, under the laws of the state, cannot be attached by garnishment at the suit of a foreign creditor of the insurance company. The Review also publishes an argument of John Reid, Esq., of counsel for the defendants, and representing the depositors, in the case of The State of Tennessee v. Samuel Watson, trustee of the State Bank of Tennessee, *et al.*, delivered before the Supreme Court of the United States at its last term. The case involves the legality of bank notes issued in aid of the late Confederacy. Mr. Reid being for the depositors, is, of course, against the note-holders, and argues that the notes are tainted with illegality, and hence invalid.

—THE American Law Review for July, contains three valuable papers—one by Mr. Bigelow, of Boston, being an enlargement of a note from his forthcoming work on the Law of Torts, entitled Fraudulent Representations by Agents. Another (anonymous), on The Three Degrees of Negligence; and another on Testamentary Powers of Sale. The rest of this number is taken up with a digest of English and American Reports, Book Notices, Summary of Events, and an Index and Table of Cases, to accompany Volume VIII.

—THE Chicago Legal News for July 18, publishes an opinion of the Supreme Court of the United States, by HUNT, J., in Habich v. Folger, holding that the judgment under consideration by the court was binding upon the corporation and the receivers, and in case of suit brought by either of them against the trustees, would be an indisputable bar to their right of recovery in any State in the Union. This is one of those cases which, to be understood, the opinion must be supplemented with a statement of the facts. As this is not done, it is unintelligible. The News also publishes the opinion of federal district judge HOPKINS, of the Western District of Wisconsin, in the case of Raffaux, a bankrupt, and credits it to judge LONGYEAR, of the Eastern District of Michigan. We notice this opinion elsewhere in this number. The News also publishes judge LONGYEAR'S opinion in *re* Angell, published by us elsewhere in this number. Also the opinion of DILLON, J., in Union Pacific R. R. Co. v. Merrick Co., which we notice editorially in this number. Also the opinion of judge KREKEL, in *re* Lowenthal, which we notice elsewhere in this number. Also an opinion of the Supreme Court of Illinois, by CRAIG, J., in Le Moyne v. Quimby, holding that a creditor who has his claim against a deceased person's estate, allowed in the county court, has no right to file a bill to remove a cloud from the title to the land of the deceased, or to settle conflicting interests of the several owners; that the allowance of a claim of a creditor against the estate of a deceased person, only establishes the debt of the creditor. It differs materially from a judgment. The Legal News says: "If it is intended to announce in this opinion that a creditor who has a claim allowed in the county court, against the estate of an insolvent intestate, cannot file a bill to remove clouds from the real estate of such deceased intestate, and to have the real estate sold for the purpose of paying his own and the other claims against the estate, then we do not think it is in harmony with the former opinions of the court." The Legal News says that the Supreme Court of Illinois, in several cases, have said that, ordinarily, an execution must issue on a judgment, and be returned unsatisfied, before a court of equity will entertain a bill to reach real estate, in which the judgment debtor has not such an interest as can be sold on execution; but in proceedings against intestate estates, which are insolvent, a resort to equity may be had without this preliminary step, since, by our statute, an execution cannot issue upon a judgment against an administrator; that in such a case the administrator must be made a party defendant to the suit. See Mc Dowell v. Cochran, 11 Ill. 33; Street *et al.* v. Hoagland *et al.*, 39 Ill. 265; Bay v. Cook, 21 Ill. 336. The Legal News also publishes an opinion of the Supreme Court of Illinois by SCHOLFIELD, J., in Hallida v. Hunt, holding that the Illinois patent law of 1869 is unconstitutional. Judge DAVIS, in the United States Circuit Court for the district of Indiana, in *ex parte* Robinson, reported in 2 Chicago Legal News, 297, held that the law passed by the egislature of Indiana to regulate the sale of patent rights was void; that property exists in inventions by virtue of the laws of Congress, and no state has the right to interfere with its enjoyment or to annex conditions to the grant. Unless we are mistaken the precise question was before the Supreme Court of Ohio and was decided otherwise some years ago.

The Legal News also publishes an opinion of the United States Circuit Court for the Northern District of Ohio, by WELKER, J., in Commercial Bank of Cleveland v. Simmons, holding that the right of a national bank to sue in the federal courts is not controlled by the judiciary act, and that a national bank has the right to bring suit in the United States circuit court of the district where it is located, upon a note endorsed to it by the payee, who is also a citizen of the state, and a resident of the district.

—The Albany Law Journal for July 18 contains a very intelligent discussion of the question, Can a Judge Direct a Verdict of Guilty?—the occasion of which is the remarkable ruling of Mr. Justice HUNT of the Supreme Court of the United States, sitting at *nisi prius*, in the Northern District of New York, in the case of The United States v. Susan B. Anthony *et al.*, in which the learned justice refused to poll the jury, but directed a verdict of guilty to be entered by the clerk. This ruling, it will be remembered, was strongly censured by the house judiciary committee, and also by Senator Carpenter, of the senate judiciary committee. We select the following sentences as embodying the opinion of the editor of the Albany Law Journal on the ruling in question. "In effect, Miss Anthony had no trial by jury. She had only a trial by Judge HUNT. This is not what the constitution guarantees her. We think this is so, irrespective of the question of intent. She cannot be pronounced guilty until a jury have so found her, *as the result of their opinion*, and not merely as the result of the judge's opinion." The Albany Law Journal also contains a selection from the Solicitor's Journal, on Warranty of Care, and another on Exoneration from Performance of a Contract by Default of the other Contracting Party. It also publishes The Oregon Steam Navigation Company v. Winsor, on Contracts in Restraint of Trade, published in the last number of this journal; and also an opinion by Mr. Justice CLIFFORD in the Supreme Court of the United States, holding that a maratime lien for advances, gives the person making the advances an insurable interes in the vessel.

—The Chicago Railway Review (by the way, an excellent and well-conducted journal in its line) discusses the effect of the recent decision of DAVIS and DRUMMOND, JJ., on the Potter Railroad Law of Wisconsin, and collates a number of articles from other journals on the subject. It also publishes a long decision of the Supreme Court of Indiana on the rights of passengers and railway companies under 1000-mile tickets. We regret that this was printed without a syllabus. We shall, perhaps, find space to reprint or notice it hereafter.

Legal News and Notes.

—HON. GEO. H. BROWN, who was recently elected chief justice of Rhode Island, has declined that position.

—WASHINGTON city is becoming celebrated as a divorce market. Judge WYLIE, of the District Supreme Court, has recently been untying them at the rate of three or four a day.

—AT adjudicature of prizes at University College, London, on Wednesday, June 24th, both the first and second prizes in jurisprudence were awarded to young ladies. The lady who took the first prize achieved a

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like success two years ago in political economy, and the London Athenæum (July 27th) uses these facts as an argument for the proposed admissions of females to all the classes in that university, and to degrees in the arts and in law.

—It is common enough for wives to apply to the courts and get divorces in cases of cruel treatment by their husbands, but rarely is an application made by a husband for divorce on the ground of cruel treatment by a wife. Such a case came up, however, before Judge Westbrook in the supreme court yesterday. Jules D. Meyer, the complainant, charged his wife, Helen D. Meyer, with cruel and inhuman treatment, and so satisfied was the judge with the truth and gravity of the complaint that he granted the divorce, though, as he said, with great hesitation and reluctantly. There is, then, after all, law for the man as well as for the woman when the case is clear. —*New York Herald, July 7.*

—The frequent occurrence of railroad accidents, occasioned by some fault or negligence of the employees of the road, and the failure to fasten the responsibility upon the proper party, has caused coroner's juries to attempt to fix the blame directly upon the company, where it generally belongs. In a late English case of a woman killed by a railroad collision, the jury very sensibly rendered a verdict that the death "was caused by the imperfect and reckless mode of working the line, and the employment of inexperienced men at low wages." There is a wise suggestion contained in this verdict. Skilled men cannot be employed at low wages, and any attempt to manage a road by unskilled employees is risking the lives of the lpassengers to save a few dollars salary, and should meet with prompt public censure. It is not a place for the practice of economy.—*Washington Cronicle.*

—We learn from the Albany Law Journal that at a recent term of the Superior Court of Massachusetts, held at Springfield, the case of George H. Knapp, against whom charges had been preferred by the bar association, was called. Mr. Knapp did not appear in person or by counsel. A. L. Soule, appointed to conduct the hearing, called several witnesses whose testimony showed that Mr. Knapp had collected claims and kept the money, had prosecuted claims previously settled, had often been grossly intoxicated, and in other ways, had conducted himself in an unbecoming manner. Judge Aldrich reviewed the testimony at some length, spoke of his personal relations with Mr. Knapp, and decreed Mr. Knapp's removal from the bar.

—One of the most striking instances of speedy justice, of which there is any example in countries where the rights of accused persons are respected, is thus related in a telegram from Hartford, Conn., July 9. We do not vouch for its truth: "This morning, about half past seven o'clock, James McCabe broke into the jewelry store of W. M. Beaman, in State street, and stole $2,300 worth of watches and chains from the safe. The safe had been unlocked by a clerk who had temporarily closed the store to get breakfast. McCabe was seen by a clerk in a neighboring establishment, who soon reported the facts to the police, and officers were dispatched to various points. At eight o'clock McCabe was secured in East Hartford, and at half past three he was in the Connecticut state prison to serve out a term of seven years. He is a New York burglar and has been in the Albany penitentiary."

—The Chicago Legal News takes to task Messrs. Shearman and Redfield for not incorporating into the last edition of their work on Negligence cases published in the legal journals and not elsewhere reported. It says: "So far as we have been able to examine, the authors appear to have cited the most important recent cases reported in the regular series of reports; but to have ignored entirely the American law periodicals, and, as a consequence, to have deprived their readers of the benefit of the recent leading opinions from one to three years. We will only cite one case of many we have noticed. In Tyler *et al.* v. The W. U. Telegraph Co., Judge Breese, in the supreme court of this state, on the 7th of February, 1873, delivered one of the ablest and most elaborate opinions ever delivered in America, upon the right of telegraph companies to require messages to be repeated, and the right as claimed by such companies to purchase exemption from liability for negligence. Although the questions decided in the opinion are discussed in this work, the opinion is not cited. It was published in the Legal News on the 13th of September, 1873, and afterwards in other legal periodicals."

—We regret exceedingly to have received with the last number of Chaney's Quarterly Michigan Digest, the following announcement: "*Valedictory.*—With this number the Digest suspends publication for want of income enough to pay for its type-setting. In dropping an undertaking which we had hoped would prove more lasting, we have, nevertheless, to return our warm thanks to those lawyers who gave it from the start a welcome as unexpected as it was complimentary, and whose good opinion constituted a "moral support" which, in that direction at least, left nothing to be asked for.

Henry A. Chaney, Editor.
W. S. George & Co., Publishers.

"Lansing, Mich., June, 1874."

This was an exceedingly well-edited publication. Every page bore marks of good judgment and painstaking accuracy. In taking leave of our valued friend, the Quarterly Digest, we may be permitted to express the hope that Mr. Chaney will not lay down his pen for the more profitable contests of the bar, but will advance into the higher walks of legal authorship, and give us a treatise on some of the titles of the law.

—The following specimen of Chinese conveyancing, which has recently come to light in a San Francisco police court, is worth considering. It expresses so clearly and unequivocally the intention of buyer and seller that it would be impossible for legal ingenuity to pick a flaw in it. It will be observed that the *consideration*, the *receipt* of the purchase money, and the *delivery* of the chattel, are all distinctly declared. The only objection to the instrument is that the transaction is "tainted with illegality," according to the vulgar notions of the outside barbarians. The instrument was in Chinese, and was interpreted as follows: "Loi Ho makes this distinct agreement to sell one because of her present distress, having no money to use, but having a girl named Ah Cheung, aged thirteen years, born in the first month of the year, the twentieth day, at two o'clock A. M. Now Loi Ho is willing to sell this girl to another person to get money to use. The middle man, Ah Loke, finds Qui Foh willing to buy her. The three persons (Loi Ho, Qui Foh and Ah Loke), face to face distinctly determined the price of her body to be $200. From the day of this agreement, the money being all paid in presence of all, Loi Ho with her own hands having received the money, the girl and the money both exchange hands. Qui Foh may take the girl, Ah Cheung, for her own until she has grown up to full size. This is true money and a true bargain. No other person has any part in it. That there may be proof of this, Loi Ho makes this bill of sale, one paper, and gives it to Qui Foh to receive and keep for proof.

"Signed by Loi Ho, her finger mark."

Notes of Cases.

Contract to Convey Made by Agent—Statute of Frauds.—Where the name of the agent, with whom a contract for the purchase of real estate was made, appears in the written memorandum of the agreement signed by the purchaser, who is the party to be charged, the statute of frauds is satisfied, although the names of the principals are not disclosed therein. Walsh v. Barton, 24 Ohio State, 28.

Specific Performance—Burden of Proof.—When a vendor of land, having contracted to convey a perfect title, brings his action to compel specific performance against the vendee, who denies the sufficiency of the vendor's title, the burden of showing title in himself rests on the plaintiff, and the introduction of a deed of recent date executed to himself, without further proof of title, is not sufficient. Ibid.

Specific Performance—Lien upon Property, when a Defence by Purchaser.—A purchaser of land, who is entitled under his contract to a perfect title, cannot be compelled to perform his agreement if the property purchased be subject to a judgment lien, unless he can be protected by the decree from loss or inconvenience by reason of the lien, although it be shown that the judgment debtor has other property sufficient to satisfy the judgment. Ibid

Railroad Companies—Power to Purchase Land—Ohio Statute.—The power to purchase land, conferred upon a railroad company by section 14 of the act of February 11, 1848 (S. & C. 273, note), is not limited to the acquisition of such lands as may be necessary for operating or maintaining its road. Ibid.

———. ———. ———. If, in making a purchase of real estate, the company abuse the power conferred upon it by said section, still, after re-sale and conveyance, the title becomes indefeasible in the hands of its vendee Ibid.

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Interpretation—Mortgage of a Railroad, Etc.—A mortgage executed by a railroad company on "the road" of the company, "whether made or to be made, acquired or to be acquired, and all property, real or personal," of the company, "whether now owned or hereafter to be acquired, used or appropriated for the operating or maintaining the said road," is not a lien upon real estate of the company, then owned or afterward acquired, which has not been used or appropriated for operating or maintaining the road. Ibid.

Deed by Corporation—Proof of Execution.—A deed, purporting to have been executed by the president of a railroad corporation, under the seal of the corporation, as authorized by section 15 of the Ohio act of May 1, 1852 (S. & C. 279), if objected to, cannot be given in evidence without proof of its execution. Ibid.

Vendor and Purchaser—Agreement of Vendee to Maintain Fence.—Where it is stipulated in a deed-poll that the grantee, his heirs and assigns, shall build and perpetually maintain a fence on the line between the land granted and other lands owned by the grantor, and the parties to such deed, at the time of its execution, contemplate the subdivision of the granted premises into building or town lots, and their subsequent sale, the burden of maintaining such fence will not attach to, or run with, lots which do not abut on the line of the proposed fence. Ibid.

Auction Sales—By-Bidders.—Where a "sale" at auction is announced to be "positive," it is an act of fraud on the part of the vendor, or his agent to employ by-bidders to keep up the price for his benefit. Ibid.

Railroads—Fencing Track—Killing Cattle—Contributory Negligence of Owner in allowing Cattle to Run at Large.—In Marietta and Cincinnati Railroad Company, as Reorganized, v. Stephenson and Brown, 24 Ohio State, 48, the following points are ruled:

1. Inclosures of railroads, as required by the Ohio act of March 25, 1859 (S & C. 331), must be separate and distinct from the enclosures of adjoining proprietors.

2. The obligation to construct and maintain fences upon both sides of railroads, imposed by that act upon railroad companies, is not limited to owners and occupiers of adjoining lands, but extends to the public generally.

3. The rule of the English common law, which requires the owners of domestic animals to restrain them from running at large, has never been adopted or recognized as the common law of this state.

4. The owner of such animals running at large is not guilty of a breach of any duty imposed upon him by the Ohio act of April 13, 1865 (S. & S. 7), if they be at large without the omission on his part of reasonable care.

5. Where cattle running at large, without the fault of the owner, enter the enclosed field of another person, through which a railroad passes, and thence go upon the track of the road by reason of the want of fences which it was the duty of the railroad company to have constructed so as to separate the railroad from the adjacent lands, such owner is not guilty, under the Ohio act of April 7, 1865 (S. & S. 373), of contributing, by his own wrong, to an injury done by a passing train to his cattle while upon the railroad.

1. **Federal Court Practice—Parties as Witnesses.**—The federal statute of July 2, 1864 (13 Stat. 351), making parties competent to testify, is remedial, and is to be liberally construed. Nash v. Williams, Supreme Court United States, October Term, 1873.

2. ———. ———. Although a party has made one deposition in a cause, he is not precluded from making another, nor is the sanction of the court necessary to validity of the second deposition. Ibid.

Lost Records—Secondary Evidence.—In Nash v. Willi ms, Supreme Court of the United States, October Term, 1873, secondary proof was offered of a judgment, the original record of which was destroyed by fire in the year 1862. The proof in question consisted of a copy of the judgment, the latter duly certified by the clerk of the court by whom the judgment was rendered. It was proved that the certified copy had been destroyed. The judgment in question was recovered upon a prior judgment in favor of the same plaintiff against the same defendant. There was evidence tending to show that a certified copy of the latter existed, but it was not positive. There was no proof of the existance of such a copy of the judgment sought to be proved. There was a discrepancy as to a single word in the copy offered in evidence. It set forth that the clerk had assessed the damages at "forty-three thousand nine hundred and *sixty*-six dollars and thirty-four cents, and that it was, therefore, considered by the court that the plaintiff recover of the defendant the sum of forty three thousand nine hundred and *thirty*-six dollars and thirty-four cents," etc. It was satisfactorily proved, *aliunde*, that *thirty* instead of *sixty* was correct, the latter being a mistake of the copyist. Under these circumstances it was *held* that the secondary evidence offered was properly admitted. Mr. Justice SWAYNE, in delivering the opinion of the court, said: "The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice, and guard against fraud, surprise and imposition. Renner v. The Bank of Columbia, 9 Wheat. 597; 1 Greenl. Ev., sec. 84 and note. The copy here in question was properly admitted. Winn v. Patterson 9 Pet. 676 This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence. Doe v. Gilbert, 7 Mees. & W. 106. The act of Congress of March 3, 1871 (16 Stat. 474. ch. III.), provides for putting in a permanent form proof of the contents of judicial records lost or destroyed, such proof to take the place of the original records for all purposes The statute of Texas upon the subject of proof in cases of lost records (Paschal's Dig., Art 4,969) has also been referred to in this connection. There is nothing in either the act of Congress or the statute in conflict with the action of the court we have been considering."

Administration of Estates—Presentation and Allowance of Claims—Texas Statute.—A statute of Texas requires all claims against the estate of a decedent to be presented to his legal respresentative, and to be *allowed* by such representative, and to be *approved* by the probate judge. Until so *allowed* and *approved* they have no legal validity, and cannot be recognized as debts against the estate. If disallowed, or not approved, they must be sued upon within three months. If sued without a refusal to allow or approve, there can be no recovery. The absence of such fact is fatal to the action. Paschal's Dig., Art. 1,309, 1,311; Danzy v. Swenney, 7 Tex. 625; Marlin v. Harrison, 7 Tex. 456. Construing this statute, it is *held* in Nash v. Williams, Supreme Court of the United States, October Term, 1873, that where the order of sale sets forth that the claims had been *allowed* by the administrator, but is silent as to its *approval* by the probate judge, it is not void so that it can be impeached collectually. Upon this point Mr. Justice SWAYNE expresses the rule of the Supreme Court of the United States, as follows:

"The application of the judgment creditor and the answer of the administrator gave the judge jurisdiction over the parties and the real estate of the deceased. Paschal's Dig. Art. 1,305. Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The question always arises in such proceedings—and must be determined—whether, upon the case as presented, affirmative or negative action is proper. The power to review and reverse the decisions so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is, that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had the power to make it and did make it. It is presumed to have been properly made, and the question of its propriety was not open to examination upon the trial in the circuit court. These propositions are sustained by a long and unbroken line of a judications in this court. The last one was the case of McNitt v. Turner, 16 Wall. 366. They are not in conflict with the adjudications of Texas upon the subject.

"The statute of Texas does not require the evidence upon which the judgment of the court proceeded to be set forth in the record. Such a statement can do no good, and its omission does no harm. As regards public officers, acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.' Bank United States v. Dandridge, 12 Wheat. 70. "Facts presumed are as effectually established as facts proved, where no presumption is allowed." Ward's Lessee v. Barrows, 2 Ohio State, 247. In the case last mentioned a sale for taxes came under examination. It was held that certain acts of the county auditor were presumptive proofs that he had administered to the collector the oath prescribed by law touching the delinquent list. The sale was sustained. Here the judge who made the order of sale was the judge to approve the claim. The order was presumptive proof of the requisite approval. Such approval was necessarily implied, and what is implied in a record, pleading, will, deed, or contract, is as effectual as what is expressed. United States v. Babbit, 1 Black, 61."

Lost Depositions—Secondary Evidence of their Contents when the Witness is Living.—In Burton v. Hard. Supreme Court of the United States, October Term, 1873, it is *held*, that where a deposition has been regularly taken and filed with the papers in the case, and is subsequently lost or destroyed without the fault of the party at whose instance it is taken, such

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party has a right to give in evidence a copy of the same, although the witness be living. The witness in this case resided in another state. Mr. Justice SWAYNE discussed the rule as follows:

"It is an axiom in the law of evidence that the contents of any written instrument lost or destroyed may be proved by competent evidence. Judicial records and all other documents of a kindred character are within the rule. Renner v. The Bank of Columbia, 9 Wheat. 581; Riggs v. Tayloe, Ibid, 483; 1 Greenleaf's Ev. sec 509. But it is said a different rule as to depositions —unless the witness be dead—obtains in Vermont, and the cases of Follet v. Murray, 17 Vermont, 530, and Low v. Peters, 36 Ibid, 177, are referred to as supporting the exception. Those cases are unlike the one before us. In Follet v. Murray the witness resided within the state, and there being no copy of the caption it did not appear that the deposition had been regularly taken. In the other case the witness was dead, and no question was raised as to any defect in the lost original. The copy was, therefore, admitted as of course. If a deposition be not properly taken, it is not made admissible by the death of the witness. Johnson v. Clark, 1 Tyler, 449. In Harper v. Cook, 1 Carr & P. 139, it was held that the contents of a lost affidavit might be shown by secondary evidence. The necessity of retaking it was not suggested. In the present case the witness lived in another state and more than one hundred miles from the place of trial. The process of the court could not reach him; for all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one state be in the possession of a person living in another state, secondary evidence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary. 22 Con 272; 4 Bennet (19 Mo.), 475; 10 Barb. 376; see also 3 Monroe, 532; 7 Pick. 10; 9 Cow. 115; 13 J. R. 58. Here there was nothing to prevent the operation of the general rule as to proof touching writings lost or destroyed. The deposition was one of the files of the case. The plaintiff was entitled to the benefit of the contents of that document. Having been lost without his fault, he was not bound to supply its place by another and different deposition, which might, or might not, be the same in effect with the prior one."

Secondary Evidence of the Contents of Bank Books.—In the same case it is ruled that secondary evidence is admissible to prove the negative fact that the books of a bank located in another state do not contain certain entries, the party offering the evidence having shown that he had attempted to procure the books themselves, but that those having them in custody had refused to permit them to be taken. The court also apply the rule laid down by Greenleaf with regard to voluminous documents, as follows:

"When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. 1 Greenl. Ev. sec. 93. Here the object was to prove, not that the books did, but that they did not show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, *a multo fortiori* must it be so to prove the latter."

Homestead Exemption.—The constitution, and probably Comp. Laws of Michigan, §§ 6137–6145, exempt a homestead only as an entirety—not a part of or an undivided interest in a homestead. Existing laws furnish no practical mode of securing a homestead in an undivided portion of premises, particularly where the claim is set up to the upper story only of a building used in common. Amphlett *et ux.* v. Hibbard, Supreme Court of Michigan, April Term, 1874.

———. **Evidence of Homestead Rights.**—A deed of property claimed as a homestead, executed after the time when it is claimed that the homestead right attached, bears materially on the question of that right, and is admissible in evidence in ejectment brought for the premises.—Ibid.

———. **Purchase Money—Mortgage Unsigned by Wife.**—A mortgage for purchase money upon an undivided half of certain property was held a valid security upon that half, though the mortgagor's wife did not join; also that, it would take precedence of any homestead rights in that half. The conveyance and mortgage back being contemporaneous and to be construed as one, the title vests only subject to the mortgage.—Ibid.

Homestead—Case in Judgment.—Hibbard brought ejectment. The Amphletts claimed a homestead right, but circuit judge decided against it, finding that John W. and Moses H. Amphlett had been tenants-in-common, and that J. W. and wife had deeded their undivided half to M. H. with warranty, the latter returning a mortgage on the whole property, his wife not joining. Neither was she made a party to the subsequent foreclosure, under which the property was bid off to Hibbard. The building on the premises was used partly by Moses' family, and partly by J. W. and M. H. for store purposes. M. H. and wife had also reconveyed to J. W. an undivided half of the whole without specifying which half. The judgment was affimed.—Ibid.

Conveyance—Election as to Undivided Portion.—If, in the absence of proof thereon, there is any right of election as to which portion passes by a conveyance of an undivided portion, the right belongs to the grantee.—Ibid.

———. **Mortgage Void as against Homestead.**—Where one, his wife not joining, mortgaged certain property in half of which he possessed homestead right, and afterward conveyed an undivided half of the property with warranty, it was held fair to presume that if it was intended to convey either half as distinct from the other, it was the half least encumbered. The mortgage would then be void as to the husband as well as to the wife, so far as the homestead half was concerned (Dye v. Mann, 10 Mich. 291; Beecher v. Baldy, 7 Mich. 488), and would not be made valid by the subsequent conveyance, even though the property should cease to be a homestead.—Ibid.

Registration—Subsequent Purchasers—Notice by Record.—In general, he who seeks benefit from the recording laws must incur all risks from the failure duly to record his papers, whether the fault be his own or an officer's. Such laws cannot be equitably construed to embrace cases not within them, or as giving constructive notice of things not shown by the records Where, *e. g.*, a mortgage appears to be for less than the fact, or a deed to cover less than was embraced by it, it has been generally held that a subsequent purchaser may rely on the record as showing the exact facts. Frost v. Beekman, 1 Johns. Chy. 288; Heister's Lessee v. Fortner, 2 Binn. 40; Sawyer v. Adams, 8 Vt. 172; Sanger v. Craigue, 10 Vt. 555; Jenning's Lessee v. Wood, 20 Ohio, 261; Chamberlain v. Bell, 7 Cal. 292; Baldwin v. Marshall, 2 Humph. 216; Shepherd v. Burkhalter, 13 Geo. 444; Miller v. Bradford, 12 Iowa, 14; N. Y. Life Ins. Co. v. White, 17 N. Y. 469; Barrows v. Baughman, 9 Mich. 213; Barnard v. Campau, Supreme Court of Michigan, April Term, 1874.

———. ———. **Quære.**—If a deed that has been incorrectly recorded is shown to a prospective purchaser of the lands conveyed by it, or if in this case the sheriff had shown to Campau his execution and the levy upon the land in question thereon endorsed, whether such positive and unequivocal notice would have any effect as against the record.—Ibid.

Oral Notice.—Mere oral notice simply puts the person notified upon enquiry; he need not assume that it asserts the facts, and if reasonable diligence furnishes no corroboration from sources likely to be informed, the notice loses all force. (Converse v. Blumrich, 14 Mich. 109.) Ibid.

Constructive Notice.—Subsequent purchasers are charged with constructive notice of what appears of record, and their rights are the same whether they have actually seen the record or not.—Ibid.

In Botsford, *et al* v. Kleinhans, *et al*, Supreme Court of Michigan, April term 1874, it appeared that Kleinhans & Draper, produce dealers, sued the plaintiffs in error, commission merchants, for wheat sold against orders and at a loss, and to recover a balance of account. After most of the wheat had been sold, a partner of the Botsfords had retired from business and the Botsfords had continued under agreement and public notice that they were to settle accounts and collect firm debts. Subsequent accounts between Kleinhans & Draper and the new firm were kept separate, but dealings continued as before and accounts of sales were rendered from time to time. The following points are ruled:

Evidence—Clerk's Letter.—In a suit between firms relating to certain sales, a letter, written in the name of one of the firms, by a boy in the office in answer to a dispach referring to the sales, was offered in evidence, but objected to for want of proof of authority to write it A member of the firm testified to the handwriting; also that the letter was written on paper having the printed heading of the firm and such as was used in the office at the time; also that the boy was in the firm's employ and sometimes wrote letters for it; though he said he did not know whether this particular letter was written by the firm's authority, or how or by whom it was sent. It was held that the evidence was sufficient to go to the jury on the question whether written by the firm's authority, and that the letter was properly admitted.

Evidence of Dealings with a Firm and its Successors.—In suing an old firm upon dealings which had been continued with its successors, i would be competent to admit in evidence a note payable to and endorsed by the new firm, if it related to the account with the old one.

Transfer of Accounts from old to new Firm.—Those who continue dealing with a firm after its composition has been changed, the new firm assuming the right and obligations of the old one, have a right to assume that the business will be kept separate, and cannot be bound without their knowledge, consent, or acquiescence, by the transfer of the old account, to the books of the new firm, and by the continuance of the accounts after the dissolution of the old firm.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, JULY 30, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

SUITS BY NATIONAL BANKS IN FEDERAL COURTS.—Mr. District Judge WELKER of the Northern District of Ohio in the case of the Commercial Bank of Cleveland v. Simmons (6 Ch. Legal News, 344), has recently decided that a national bank may sue in the United States Circuit Court of the district where the bank is located upon notes endorsed to it by the payee, though the defendant is a resident of the same district. The United States Circuit Court for the Eastern District of Missouri at the last March term (present DILLON and TREAT, JJ.) decided the same point.

BANKRUPT ACT—RATROACTIVE CLAUSE OF AMENDMENT OF 1874.—In our note to the cases of Obear Thomas and Angell, last week, we omitted to state that Mr. District Judge WITHEY, on July 13, in *re* Pickering, decided that prior adjudications were not affected by the recent amendment to § 39 of the bankrupt act. He is reported as saying that the language of the amendatory act is broad enough to have this effect, but he holds that it is not in the power of the legislative deparment of the government to interfere to this extent with the decrees of judgments of the judicial tribunals.

Mr. District Judge HILL, of the District Courts for Mississippi has, in a recent case, ruled the same question in the same way.

Limits of the Taxing Power—Exemption from Taxation, when Valid.

The Supreme Court of Maine has recently rendered an important decision respecting the limits of the taxing power, and the power to exempt property, unless by general laws of uniform operation, from taxation. The court recognizes the principle decided by it in the case of Allen v. Jay 12 Am. Law Reg. N. S. 481, at the July term 1871, in which the legislature had authorized the town of Jay to lend $10,000 to certain men to enable them to build a saw mill and grist mill and to exempt the mills from taxation for ten years, and where the act was adjudged invalid. It also recognizes the decision of the Supreme Judicial Court of Massachusetts in Lowell v. Boston, holding the "Sumner Street Fire Bonds" invalid, the principle of which was applied in The Commercial Bank v. Iola, 2 Dillon, C. C. R. 353, and which is now on error in the Supreme Court of the United States.

The recent decision by the Supreme Court of Maine was in the case of Brewer Brick Company v. Brewer, which involved the validity of a tax assessed by the defendant upon the plaintiffs' manufacturing establishment. The plaintiffs claimed that their property was exempt from taxation under the provisions of the general law of the state, which exempts manufacturing establishments to a certain extent for a term not exceeding ten years, provided the town shall, in a legal manner, assent to such exemption. The defendants claimed that the statute is unconstitutional, and hence the tax was properly assessed. They further contended that the plaintiffs were not, as brick makers, within the purview of the vote passed by the town. On both grounds the court are with the defendants. Upon the question of constitutionality, the court reiterated the conclusion arrived at in the Jay case, as well as in the subsequent case of the Boston Loan bill in Massachusets (Lowell v. Boston), that incidental benefits to the public derived from the investment of capital in private enterprises afford no justification for partial taxation, and hence towns and cities have no power to raise money by taxation to give away or to patronize or loan to such enterprise—and any efforts made to that end are void and illegal. Exemption from taxation the court regarded as equivalent to a gift of the same amount to the party exempted, and hence equally obnoxious to the principle involved. The court, however, recognizes the doctrine that the legislature has the right to pass general laws of exemption, but those laws must be uniform upon all subjects of the same class over the entire state. But the legislature cannot delegate the power to others, nor exact laws partial in their operation. The statute in question is obnoxious to both these objections, it being left to each municipality to accept or reject the provisions within its own limits. The court, therefore, decided the law in question to be unconstitutional, the tax assessed to be therefore legal, and the plaintiff's action, of course, not sustained.

Judge CUTTING dissented on the main question, but concurred in the result upon the other points in the case.

The Liability of Municipal Corporations for the Torts of Police Officers.

In the Court of Queen's Bench, at Montreal, in 1871, before DUVAL, Ch. J., and CARON, DRUMMOND, BADGLEY and MONK, JJ., in The Corporation of Montreal v. Doolan, it was ruled—DUVAL, Ch. J., and BADGLEY, J. dissenting—that a municipal corporation is liable in damages for an assault committed on a citizen by a policeman in the pretended discharge of his official duty. The case is reported in the Lower Canada Jurist for July. As this decision is directly opposed to the rule as settled in England and the United States, it may be interesting to examine the case and the views of the concurring judges.

The facts, as stated by Justice BADGLEY, in his dissenting opinion, were as follows:

"The plaintiff was a quiet and decent citizen and a respectable cab owner and driver, and on the occasion of the fire at Zion church in Montreal, he was called from his stand at the corner of Victoria Square and McGill street, and went near the church. Whilst there a person who had been severely injured by the fire was put into his carriage by some of the firemen, whose wet and dirty condition soiled and dirtied his carriage, and soiled his clean cushions, which of course did not please him, whereupon he called to them not to dirty his cushions, and was about taking his seat to drive the injured person, when two policemen, James Maubry, and Gideon Marineau, seized him and dragged him away from his horse and carriage, which were driven off at full speed by a stranger. The policemen dragged him off to take him to the station house, treating him very roughly. The same rough treatment was continued by the policemen until his arrival at the police office in Jacques Cartier Square, where the officer on

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duty said the policemen had no charge against the plaintiff, except that he would not drive furiously for them. He was immediately set at liberty, and after about a couple of hours, received his horse and carriage which were brought back to the stand, the horse much over driven and the carriage and cushions soiled and dirtied with burnt dust, ashes and cinders. For his own arrest and for the injury done his carriage he sued the corporation in damages, which, he averred, were caused by the policemen, as the alleged servants and agents of the corporation and acting under the general authority of that body, the policemen being on duty at the time and acting as such. The defendants pleaded, first their non-responsibility or liability for the misconduct of the city policemen or for their unauthorized, unlawful or wrongful acts, and not content with this plea, they further pleaded, that plaintiff used abusive language to the policemen, who were justified at the time in arresting him; and that he suffered no damage, and finally they pleaded *defence au fond en fait.*"

It was also in evidence that he was put to the expense of $35 for getting his carriage repaired and put into clean order as before. In the court of *premiere instance* the action was dismissed upon the ground of the non-responsibility of the corporation for the unauthorized and wrongful acts of the city policemen; but this judgment was reversed by the judges of the Superior Court sitting in review, who awarded to the plaintiff the $35 as proved for the carriage injury, and $65 for his unwarrantable arrest, making his total damage $100, which judgment was entered in his favor against the defendant."

The following are the views of the concurring judges:

"CARON, J., for the majority of the court, was in favor of confirming the judgment. After referring to the pleadings and evidence, his honor stated that the French law must govern the case, and under this law he was clearly of opinion that the plaintiff was entitled to recover against the corporation. Among other reasons, he remarked that it was the corporation that appointed the policemen. Equity also strongly sustained the claim of the plaintiff.

"DRUMMOND, J., concurring, said the judges were all agreed as to the facts, and as to the disgraceful conduct of the policemen. There remained simply the question on whom the responsibility should fall, upon the policemen alone, or upon the persons who employed them. The principle was one of vast importance. If the ruling laid down by the chief justice and Judge BADGLEY were to prevail everywhere, then, even in a case like the Westfield explosion, the directors of the company owning the steamer would have no responsibility whatever, though they employed an engineer who did not know what a vacuum was. For it might be said that they did not employ him for the purpose of blowing people up. But without digressing to that case, he thought even the English authorities are strongly in favor of the pretentions of the plaintiff. After citing several authors, he proceeded to say that the French authorities are still stronger, and most unquestionably fix the responsibility upon the employer in such cases. It was a very important question to what law we should resort in such cases. There was a great deal to be said in favor of the view of the chief justice, but he thought that where the civil rights of individuals were concerned, a government stood in the same position as an individual. He thought the subject had a right to resort to the law of France. This law was strongly in plaintiff's favor. *Some American cases had been referred to, but his honor attached no weight whatever to these decisions; for in the opinion of eminent jurists, as well as in his own there had been more unjust opinions pronounced by judges in the United States in favor of corporations than in any other country. In England there was a gradual advancement towards a more enlightened regard for the rights of the subject, and Americans were a long way behind England in this respect.* He was clearly of opinion that the corporation should be held liable.

"MONK, J., said the question was one of such importance that he would make one or two observations with regard to the technical points on which he concurred in the judgment. The preliminary question, whether this case was to be determined by English or French law, was of great importance. He was not prepared to say that the chief justice was wrong on this point, but he was rather disposed to concur with Justices CARON and DRUMMOND. He thought that the law which determined the rights of the individual against a public body must be the law of the land—the French law. And according to French law, in his opinion, there was no difficulty in holding the corporation liable. There was no difficulty whatever as to the facts. But supposing the case had to be decided according to English law, then there would no doubt be a difficulty, he admitted, in holding the corporation liable. He was not prepared to say that the authorities cited by the chief justice were not perfectly sound, and might be applicable to a case in which the general principle alone was involved. But there was another plea in the record. No doubt, an intimation from the defendants of what they considered their position would relieve the court from immense difficulty. How did the matter stand? The counsel for the corporation, knowing the facts and the law, thought proper not to content himself with a *defence en fait*, but went further and added a plea of justification. He said, admitting all that you say to be true, the policemen were justified in what they did. This plea relieved him, Mr. Justice MONK, from all embarrassment. Upon the plea of justification he certainly thought that the corporation was liable. They had thus taken themselves out of the general rule, and had made their position exceptional. All that remained was to look to the evidence, and upon the evidence they were responsible."

The judgment was confirmed, Chief Justice DUVAL and Judge BADGLEY dissenting.

This opinion, founded, as it confessedly is, upon French law, and supported only by the views of three judges against two, would not, of course, be regarded as authority by any American court. But it is, perhaps, worth considering, at least by our legislatures, whether the English and American rule finds any support in justice or common sense. Our courts, under special statutes to that effect, constantly give damages against municipal corporations for the property destroyed by riots; and, without statute, for damages caused by the negligence of their workmen in leaving excavations in streets unclosed; but refuse damages growing out of the negligence or torts of policemen, on the ground that they are public and not municipal agents. They are public agents in no higher sense than the city engineer, city architect, city street contractor and his force are public agents. The writer believes that it is demanded by justice and public policy that a municipal corporation should be held responsible for the wrongful acts of its public officers, done in the course of their official

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relations and under color of their office. Such a rule would be of vast service in protecting life, liberty and property from the aggressions of irresponsible and brutal persons, who, in many instances, are employed and retained on the police forces of our large cities in defiance of the rights and interests of the public. It would compel the corporation, through its agents, to select for police officers none but sober, prudent and competent men, and then to put a check upon their imprudent or wrongful conduct by compelling them to give a bond to the corporation to indemnify it against any liability it might sustain thereby. We know a case which happened in Saint Louis, where a medical practitioner in good standing was arrested without warrant on a charge of committing a criminal abortion, was publicly upbraided and accused of felony by a chief of police, was marched through a crowded street to a police station and there kept in confinement without bail for two days, when he was discharged, an investigation by a coroner's jury disclosing no evidence against him. This man was thus incalculably outraged in his feelings, and injured in his professional reputation by a police officer who was pecuniarily irresponsible. Is there a man in any community whose sense is not crazed and obscured by legal technicalities, and whose perception of justice is not blunted by legal precedents, that will not say that if, in the opinion of a jury, this arrest was malicious and without probable cause, the city of Saint Louis ought to have responded in damages? And what shall we say of still harder cases, such as one which recently occurred in New York city, where a police officer, in the exercise of his authority, wantonly shot and killed a citizen. His family, deprived of their head and support, were left hopelessly without remedy. Our legislatures ought to look to it, and sweep this rule away, as they have in many other instances been obliged to sweep away rules of law which the courts have established.

The American authorities have fully settled the doctrine that the municipal corporation which appoints a police officer is not responsible for his torts. The cases are collected, and the grounds of the doctrine stated in Dillon Munic. Corp. §§ 33, 34, 149, 773. This doctrine is not peculiar to American jurisprudence, but is borrowed from England; and if the courts are open to the censure pronounced by the Canadian judge as to giving unjust judgments for corporations, it should not have been limited to the "judges of the United States." However it may be with respect to *private* corporations, which we do not stop to discuss, we think it is not true of *public* municipal corporations that our courts have unduly inclined in their favor. And it is a proposition easy of demonstration that the courts of the United States have asserted a much larger measure of liability on the part of municipal corporations than has been asserted by the courts of Great Britain. The rule as to the non-liability of a municipal corporation for the torts of public officers is so strongly established by judicial decisions that it is not, perhaps, competent for the courts to change it, and the change, which on grounds of public policy seems desirable, must come from the legislature.

—T. C. T. BUCKLEY, Esq., a distinguished New York lawyer, died recently.

—THE persons appointed by the secretary of state under the law of Congress to index and annotate the new Revised Statutes of the United States are busily at work. They will not be able to conclude their labor until December 1st.

Negligence—When a Question for Jury.

PHILADELPHIA CITY PASSENGER RAILWAY COMPANY v. HASSARD.

Supreme Court of Pennsylvania, May 11, 1874.

The defendants allowed the front door of their car to be open, the passageway to the rear platform to be obstructed by passengers, and the front platform to be unguarded by a fender. The plaintiff, a boy of ten years, issued by way of the front platform, and jumped off while the car was in motion, being thereby injured. *Held*, that under the facts, the court could not charge, as matter of law, that there was no negligence in the defendants, or that there was no contributory negligence in the plaintiff, having in view his years. Both of these questions were for the jury.

Error to the District Court of Philadelphia.

George W. Thorn, Esq., for plaintiff; *George L. Crawford*, Esq., for defendant.

WILLIAMS, J., delivered the opinion of the court.

This was an action to recover damages for an injury occasioned by negligence. The plaintiff below, a boy ten years of age, was a passenger on the defendant's car, and, in getting off, jumped from the front platform while the car was in motion, and received an injury which resulted in the loss of a leg. At the time of the accident there were more passengers in the car than could be seated. Some were standing on the front and rear platforms, and others inside the car, in the passageway, between the seats. The plaintiff got into the car in company with his younger brother and sister, at or near the intersection of Walnut and Broad streets. The latter, upon entering the car, got seats near the door at the rear platform. The plaintiff, after standing awhile, obtained a seat at the upper end of the car, near the front door, which was open. The car stopped at Twenty-first street, and the younger children, without the knowledge of the plaintiff, got off with other passengers. But, as the car started, he saw them on the sidewalk, and tried to get out to the rear platform, but the passageway was so crowded that he turned and rushed out of the front door, and, as he says, told the driver to stop, who answered "all right," and slackened up with the reins. While the car was in motion the plaintiff jumped off upon a pile of loose bricks, and slipped under the car. The hind wheel passed over his leg, crushing the bone above the ankle, and opening the ankle joint. The driver testified that he slackened up because it was down grade; that he did not hear the boy ask him to stop, and that the first he saw of him he was falling or jumping off the front platform. He could not say whether he jumped off or fell off; that he checked his horses, put his break to the car and did his best to stop it. The conductor was on the rear platform making change for a passenger who was paying his fare, and did not see the plaintiff until he felt the bouncing of the car as it passed over his leg, and then he saw him crawl over to the sidewalk.

The court instructed the jury, in substance, that if the plaintiff's injury was occasioned by the negligence of the defendants, without any fault on his own part, then he was entitled to maintain the action. But if it was not occasioned by the defendants' negligence, or if his own negligence contributed to produce it, he was not entitled to recover. But in determining whether he acted with ordinary care, or was guilty of negligence, the jury must consider his conduct and action in view of his age. All that the law exacted of him was such prudence and discretion as is usually exercised by boys of his own age, and if he acted with as much care and prudence under the circumstances as children of his own age generally exercise, then he was not chargeable with negligence. No complaint is made in regard to these instructions, but it is alleged that there was error in the answers of the court to the plaintiff's fifth and seventh points, and to the defendant's first, second, third, fourth, fifth, sixth and tenth points. All of which, as it seems to us, were answered in substantial conformity with the instructions contained in the general charge. The assignments of error embracing the answers to these points, virtually raise but two questions:

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1st. Whether, under the facts disclosed by the evidence, the court should have charged that no negligence was imputable to the defendants?

2d. Whether the court should have charged that the plaintiff's injury was occasioned by his own negligence or misconduct?

I. It was the duty of the defendants to carry the plaintiff and set him down safely, if they could do it by the exercise of reasonable care and vigilance. If the plaintiff, on account of his age and inexperience, was incapable of taking proper care of himself, then the defendants were bound to exercise the highest care and vigilance necessary and proper to secure his safety. Whether the carrier, in the case of an injury to a passenger, has exercised reasonable and proper care to prevent it, or has been guilty of neligence, it is, as a general rule, a question of fact for the jury. But there may be such an obvious disregard of duty and safety, as to make it incumbent on the court to declare it negligence as matter of law (Pennsyvania Railroad Company v. Ozier, 11 Casey, 60; Pittsburgh and Connell Railroad Company v. McClury, 6 P. E. Smith, 295;) and so the evidence may show such care and vigilance, and such an absence of any fact from which negligence can be inferred, as to make it the duty of the court to declare that no negligence is imputable (Philadelphia and Reading Railroad Company v. Hummell, 8 Wr. 375.) But such cases are exceptions to the general rule, that what is negligence is a question for the jury, when the measure of duty is ordinary and reasonable care (McCully v. Clark & Thaw, 4 Wr. 399; Glassey v. Hestonville, etc., Passenger Railway Company, 7 P. F. Smith, 172; Kay v. Pennsylvania Railroad, 15 ib. 269; Pennsylvania Canal Company v. Bentley, 16 ib. 39; Westchester and Philadelphia Railroad Company v. McElwee, 17 ib. 311.) Is this then the case before us within the exception, or does it clearly come within the general rule?

It was undoubtedly the duty of the defendants to prevent children from getting on or off the front platform, or from riding in a place of so much danger (Pittsburgh, Allegheny and Manchester Railway Company v. Caldwell;) and if negligence is not imputable to them as a matter of law, because they did not enclose the front platform with a screen or fender, the fact that it was not so enclosed is a matter proper to be considered, in connection with the other facts of the case, in determining whether or not the defendants were guilty of negligence in allowing the front door to remain open, when the car was filled with passengers, some of whom were children, unattended by their parents or guardians, and who, from their youth and inexperience, may not have known that there was greater danger in getting off the front, than there was in getting off the rear platform. If the car was filled with passengers—if some were standing on the platforms, and others in the passage-way, blocking it up so as to make it difficult for the plaintiff to get to the rear platform, and impossible for the conductor to see him, how, under these circumstances, could the court say, as a matter of law, that it was not the defendant's duty to keep the front door closed, and that they were guilty of no negligence in allowing it to remain open? If the plaintiff did not know that it was more dangerous to get off the front, than to get off the rear platform, was not the crowded passageway and the open front door an invitation to him to go through it and get off the front platform? If the latter had been enclosed with a screen or fender, the door might have been allowed to remain open with safety. But there was nothing in the construction of the front platform, showing that it was not to be used by passengers in getting on and off the car; and the evidence shows that the plaintiff was not told or informed that he must not get on or off the front platform. It is clear, under all the circumstances, that the court could not have instructed the jury as matter of law, that it was not the duty of defendants to keep the door closed, and if so, the question of negligence was properly submitted to their determination. Where both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved (McCully v. Clark & Thaw, *supra*.) The court below was, therefore, right in refusing to charge that no negligence was imputable to the defendants.

II. Was there error in not charging that the plaintiff's injury was occasioned by his own negligence or misconduct?

It may be conceded that if the plaintiff had been an adult of ordinary discretion and intelligence, he would have been chargeable with negligence in jumping from the front platform, while the car was in motion, and the court might properly have instructed the jury that his injury was occasioned by his own folly and imprudence. But the plaintiff was a mere boy, and the law, because of his tender age and inexperience, does not exact of him the same degree of care and prudence that it does of a person of mature years. A boy's capacity is the measure of his responsibility; and if he has not the ability to foresee and avoid danger to which he may be exposed, negligence will not be imputed to him, if he unwittingly exposes himself to it. Whether, then, the plaintiff had sufficient discretion and intelligence to know that he was exposing himself to great bodily harm in jumping from the platform as he did, was not a matter of law but a question of fact, and was properly submitted to the jury with the instruction that the law exacted of the plaintiff just that degree of care, prudenee and discretion that his years had given him and no more, and if greater prudence and discretion than that exercised by the plaintiff upon this occasion would characterize the conduct of other boys of his age, under similar circumstances, then the company is not to be held responsible because of the rashness and impulsiveness of this boy in springing from his seat, rushing by the driver and jumping from the car whilst it was in motion. The law governing the plaintiff's responsibility for the act which resulted in his injury, is clearly and accurately stated in the defendant's eighth and ninth points, which were affirmed by the court without qualification, and by their affirmance the question of the plaintiff's negligence was submitted to the jury with just such instructions as they asked. If the verdict of the jury was against the weight of the evidence, the defendant's remedy was a motion for a new trial, the granting or refusal of which was a matter within the sound discretion of the court below, and is not reviewable here.

JUDGMENT AFFIRMED.

—*Legal Intelligencer.*

NOTE.—One of the most difficult *practical* questions relating to the law of negligence is, under what circumstances negligence is a question of law for the court, or a question of fact for the jury; in other words, under what circumstances the court may withhold a case from the jury and direct a nonsuit, on the ground that the testimony does not establish negligence; or under what circumstances the court may instruct the jury that the facts proved do not amount to negligence; and under what circumstances the question whether there has been negligence in the particular case is to be left, under general instructions, to be resolved by the jury. Under the practice which obtains in England, Massachusetts, and some other states, the judges are in the habit in many cases of determining this question for the jury, either by withholding it from them or directing them what verdict to render. But in other states, as Tennessee, for instance, where the judge is prohibited from directing an involuntary nonsuit, or from intimating to the jury his opinion on the weight of the evidence, of course the very opposite rule prevails, and negligence or no negligence is, under proper instructions as to the law, a question for the jury in all cases. But in many of the states, under what circumstances negligence is a question for the jury or for the judge, is being constantly mooted, and the evident tendency of opinion is to enlarge the power of juries over it. We recently published (*ante*, p. 202) an instructive opinion of Mr. Justice HUNT, of the Supreme Court of the United States, on this question. In the case of Crissy v. Hestonville, Mantua, and Fairmount Passenger Railway Co., recently decided by the Supreme Court of Pennsylvania, and reported in the American Law Times Reports, N. S., 166, the plaintiff was a child of the age of thirteen years. He and his companion, a boy of the same age, signaled the driver as the defendant's car crossed Thirteenth street. The car was slackened to receive them; they stood there by the side of the driver all the way out to Forty-first street and Lancaster avenue. No objection was made by either the driver or conductor to their riding there; neither of them requested the plaintiff to step inside of the car;

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the conductor came to him and collected his fare; at Forty-first street and Lancaster avenue the plaintiff said to his companion in a voice sufficiently loud for the driver to hear, "I am going to get off here." The speed of the car was thereupon slackened; the plaintiff took hold of the dasher with one hand, and the iron on the car with the other, and stepped off; the car continued in motion; the plaintiff's foot slipped; he retained his hold to save himself; he was dragged two or three yards, and until the front wheel ran over his foot, causing the injury of which he complains. There was a crossing in the street where he desired to get off. The court below directed the jury to find a verdict for the defendant. This the supreme court held to be error. With reference to the general rule on the subject the court (MERCER, J.) says: "As a general rule, a question of negligence must be submitted to the jury. It should be where there is any substantial doubt as to the facts, or to the inferences to be drawn from them. Pennsylvania R. R. Co. v. Barnett, 9 P. F. Smith, 259; Johnson v. Bruner, 11 P. F. Smith, 58. There is no absolute rule as to what constitutes negligence. It is dependent upon the particular circumstances of the case. Where the measure of duty is not unvarying; where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of the performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proven. McCully v. Clarke *et al.*, 4 Wr. 406; Pennsylvania Canal Co. v. Bently, 16 P. F. Smith, 30. Where the measure of duty is ordinary and reasonable care, it is always a question for the jury. Westchester & Philadelphia R. R. Co. v. McElwee, 17 P. F. Smith, 311."

And with reference to the particular facts, they say: "In view of the plaintiff's age, we think this evidence should have been submitted to the jury; the jury should have determined whether plaintiff had been guilty of negligence; he should be held to the exercise of that degree of care and discretion ordinarily to be expected of a child of his age, neither more nor less. Smith v. O'Conner, 12 Wright, 218. So in regard to the defendant's alleged negligence. The fact that the plaintiff was suffered to stand upon and get off from the front platform, and whether the defendant exercised proper care under all the circumstances, in not sooner stopping the car, should have been submitted to the jury. It is the duty of a railway company to cause its cars to come to a full stop, to permit a passenger to get off. Whether the defendant properly discharged his duty with a due regard to the age of the plaintiff, and of notice of plaintiff's desire to leave the car, should have been left to the jury."

Liability of a Railway Company for Injury to a Passenger Travelling on a Free Pass, where there is a Restriction Against Liability.

JACOBUS v. SAINT PAUL & CHICAGO RAILWAY COMPANY.

Supreme Court of Minnesota, April Term, 1874.

Hon. S. J. R. McMILLAN, Chief Justice.
" JOHN M. BERRY, } Associate Justices.
" JOHN B. YOUNG. }

1. **Railway Negligence—Injury to Passengers—Free Pass Stipulating against Liability.**—A railway company is liable for an injury to a passenger, although he was travelling on a free pass, which contained a condition that the company should not be liable "under any circumstances, whether of negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property while using or having the benefit of it."

2. ——. ——. **Negligence and Gross Negligence.**—And held *arguendo* (citing authorities) that the distinction between negligence and gross negligence is not applicable to the case of railway carriers of passengers, because the law exacts of such carriers the greatest care, and makes them liable for the slightest neglect.

3. ——. ——. **Contributory Negligence of Passenger—Remaining in Baggage Car.**—The fact that the passenger at the time of the injury was in the baggage car, contrary to a rule of the company, is not such contributory negligence as will bar his recovery, although he may have been informed of the rule, and may have persisted in remaining there in violation of it.

BERRY, J.—The plaintiff brings this action to recover damages for injury occasioned to his person by the alleged gross negligence of defendant's servants in charge of defendant's railway train, upon which plaintiff was travelling. Plaintiff was riding upon a free pass, which, together with the conditions indorsed, is in these words, viz.:

"St. Paul and Chicago Railway. Pass D. Jacobus upon the conditions indorsed hereon, until December 31st, 1871, unless otherwise ordered. Not transferable.

" D. C. SHEPARD,
" Chf. Eng. and Supt.

" CONDITIONS.

"The person who accepts and uses this free ticket thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for any injury of the person, or for any loss or injury to his property, while using or having the benefit of it."

Upon the pleadings and the charge of the court, the first question arising in this case is, whether the pass, with its conditions, protects defendant from liability for injury received by plaintiff while riding upon such pass, even though the injury was caused by gross negligence upon defendant's part. In our opinion, this question should be answered in the negative, for the reason that the degree of care and diligence exacted of a bailee should be proportioned to the importance of the business and of the interest at stake. Holly v. Boston Gas Light Co., 8 Gray, 131; 57 Me. 202. The law imposes upon the common carrier of passengers the greatest care and foresight for the safety of his passengers, and holds him liable for the slightest neglect. McLean v. Burbank, 11 Minn. 288. And for like reasons the same extreme care is required, though the passenger be carried gratuitously.

Having undertaken to carry, the duty arises to carry safely. Philadelphia and Reading Railroad Company v. Derby, 14 How. (U S.) 486; Nolton v. Western Railroad, 15 N. Y. 444; Steamboat New World v. King, 16 How. (U. S.) 474; 2 Redfield on Railways, 184–5 and notes; Perkins v. N. Y. Central Railroad Company, 24 N. Y. 200; Todd v. Old Col. and F. R. R. Co, 3 Allen, 21.

In the case at bar, however, the plaintiff was not merely a gratuitous passenger, *i. e.*, a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass, expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? Upon the question whether conditions of this kind are valid and effectual to exonerate the carrier of passengers, the adjudications differ.

In New York the conditions appear to be held sufficient to absolve the carrier from liability, even for the gross negligence of his employees. Wells v. New York Central Railroad, 24 N. Y. 181; Perkins v. same, Ib. 196; Bissell v. same, 25 N. Y. 442.

In New Jersey it is held that such conditians are good as against ordinary negligence, with a very decided intimation that the exemption from liability comprehends gross negligence also. Kinney v. Central Railroad Company, 34 N. J. 513.

In Pennsylvania, Illinois, Indiana, and several other states, the courts hold that no such condition will avail to protect the carrier from responsibility for the gross negligence of its employees. Ill. Central R. R. Co. v. Read, 37 Ill. 484; 19 Ib. 136; The Ind. Cen. R. R. Co. v. Mundy, 21 Ind. 48; Penn. R. R. Co. v. McCloskey's Adm'r, 23 Pa. St. 532; Mobile and Ohio Railway v. Hopkins, 41 Ala. 489.

There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patriæ*, has in protecting the lives and limbs of its subjects. Shearman & Redfield on Negligence, §24; C. P. & A. R. R. Co. v. Curran, 19 Ohio State, 12; Phil. & Reading R. R. Co. v. Derby, *supra*; Steamboat New World v. King, *supra*; Smith v. N. Y. Central R.

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R. Co., 24 N. Y. 222; Ill. C. R. R. Co. v. Read, *supra*; Penn. R. R. Co. v. Henderson, 51 Penn. State, 315; Bissell v. N. Y. C. R. R. Co., 25 N. Y. 455, per DENIO, J.; N. Y. Central R. R. Co. v. Lockwood (U. S. Cupreme Court), not yet reported [17 Wall, 357].

So far as as the consideration of public policy is concerned, it cannot be over-ridden by any stipulation of the parties to the contract of passenger carriage, since it is *paramount* from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can then be permitted to stand.

Whether the case be one of a passenger for hire—a merely gratuitous passenger—or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned.

It is said, however, that is unreasonable "to suppose that the managers of a railroad train will lessen their vigilance and care for the safety of the train and its passengers, because there may be a few on board for whom they are not responsible." In the first place, if this consideration were allowed to prevail, it would prove too much; for it could be urged with equal force and propriety in the case of a merely gratuitous passenger as in a case like this at bar. Yet, as we have seen, no such consideration is permitted to relieve the carrier from the same degree of liability for a gratuitous passenger as for a passenger for hire.

Again, suppose (what is not at all impossible or improbable, as, for instance, in case of a free excursion,) that most or all of the passengers upon a train were gratuitous, or riding upon conditioned free passes, the consideration urged would be no answer to a claim that the carrier should be responsible. A general rule can hardly be based upon such calculations of chances. Moreover, while it might not ordinarily occur that the presence of a free passenger upon a train, for injury to whom the carrier would not be liable, would tend to lessen the carrier's sense of responsibility and his vigilance, it still remains true that the greater the sense of responsibility, the greater the care; and that *any* relaxation of responsibility is dangerous. Besides these considerations, it is to be remembered that the care and vigilance which a carrier exercises do not depend alone upon a mere sense of responsibility, or upon the existence of an abstract rule imposing stringent obligations upon him. It is the enforcement of the rule and of the liability imposed thereby—the mulcting of the carrier for his negligence—which brings home to him in the most practical, forcible, and effectual way, the necessity for strictly fulfilling his obligations.

It may be that on a given occasion the gratuitous passenger, or the passenger upon a free pass, is the only person injured (as, for aught that appears, was the fact in this instance), or the only party who will proceed against the carrier — the only person who will practically enforce upon the carrier the importance of a faithful discharge of his duty. These considerations, as it seems to us, ought to be decisive upon the point that sound public policy requires that the rule as to the liability of the carrier for the safety of the passenger should not be relaxed though the passenger be gratuitous, or, as in this case, riding upon a conditioned free pass.

It is contended that there was no proof of gross negligence on defendant's part, and that therefore the verdict was not justified. There was evidence that the train was a mixed train; that it was running from 40 to 45 miles an hour, according to the plaintiff, and according to the other witnesses from 15 to 22 miles an hour; that the lumber was upon a platform car, and that the stake of the lumber car, in consequence of the breaking of which the injury occurred, was a stick of butternut cord wood, and was cross-grained. There was also the testimony of J. T. Maxfield, of St. Paul, a passenger, who appears to be an intelligent and entirely disinterested witness, and who says: "I felt anxious about the lumber car. I was afraid of the speed. * * * I was apprehensive of danger from the character of our train. I spoke to the brakesman about it. * * Have traveled on trains a good deal." And taking all these facts together (to say nothing about others appearing in the case), it cannot be said that there was not evidence in the case proper to be considered by the jury, and having some reasonable tendency to establish negligence, which has been well described as being a negative word signifying the absence of such care as it is the duty of the negligent party to exercise in the particular case. Grill v. Iron Screw Collier Co., Law Rep. 1 C. P. 612; Steamboat New World v. King, *supra*. We will go further even, and say that the evidence, in our opinion, had a reasonable tendency to establish *gross* negligence in the sense of a great degree of negligence. Angell on Carriers, §22.

As to the point of the degree of negligence necessary to sustain this action, it is, however, to be remarked, in view of the stringent rule as to liability, that where the question is between a railway carrier of passengers and a passenger, there would seem to be no occasion for the ordinary distinction of different degrees of negligence, as slight ordinary and gross. As is well and forcibly said by Mr. Justice GRIER, in Phil. & Read. R. R. Co. v. Derby, *supra*: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" So, in Steamboat New World v. King, Mr. Justice CURTIS, referring to the doctrine thus announced, says: "We desire to be understood to reaffirm that doctrine as resting not only on public policy, but on sound principles of law." A similar view of the impracticability of a distinction between different kinds of negligence, as applicable to cases of this kind, is taken in Perkins v. N. Y. Central R. R. Co., *supra*. The carrier being bound to exercise the greatest care, and being liable for the slightest neglect, what is said by Rolfe, B., in Wilson v. Brett, 11 Mees. & Welsby, 113, and endorsed by WILLIS, J., in Grill v. Iron Screw Collier Co., Law Rep., 1 C. P. 612, is in point in a caes of this kind, viz., that he "could see no difference between *negligence* and *gross* negligence; that it was the same thing, with the addition of a vituperative epithet." See also Angell on Carriers, §22, and Briggs v. Taylor, 28 Vt. 180.

It is further argued on behalf of the defendant, that the plaintiff, by his own negligence, contributed to the injury sustained, and for that reason he cannot recover. This argument is founded upon the fact that plaintiff was in the baggage car at the time of the accident, and, as defendant contends, wrongfully there. But, in the first place, the evidence is conflicting as to whether or not the plaintiff was informed of the rule of the company excluding passengers from the baggage car. If he was not so informed, and was suffered to remain there without objection, it could hardly be said that his presence there was negligence. Dunn v. Grand Trunk Railway, 58 Maine, 187. Again, if it be admitted that the plaintiff was duly informed of the regulation of the company excluding passengers from the baggage car, the evidence shows that he was at least *permitted* to remain there by the conductor. If he was thus permitted to remain, so that he was there with the knowlege of the conductor, and without any attempt on the part of the conductor to enforce the company's rule by removing him, his presence there would not be such negligence as would exonerate the defendant from the consequences of its negligence or want of care. On the contrary, his presence there under such circumstances would render it the duty of the company, in view of the

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fact that he was there, to exercise the highest care required for his safety, and to refrain from the slightest neglect tending to his injury. Dunn v. Grand Trunk Railway, *supra;* Isbel v. N. Y. & New Haven Railway Co., 27 Conn. 303; 2 Redfield Railway Cases, 474–502. Still again, admitting that the plaintiff was cognizant of the rule of the company excluding passengers from the baggage car, and that he persisted in remaining there without the permission or consent, yet with the knowledge of, the conductor. and was guilty of negligence in so doing, this negligence would not prevent his recovering unless it was contributory to the injury received. To be thus contributory in a legal sense, it must be a proximate cause of the injury—that is, it must have been near in the order of causation (Shearman & Redfield on Negligence, 37–38), and it must have contributed to some extent directly to the injury, and must have been not a mere technical or formal wrong, contributing either incidentally or remotely, or not at all, to the injury. Isbel v. N. Y. & N. H. R. R. Co., *supra;* 2 Redfield R. cases, 485–490. Now, notwithstanding the fault or negligence of the plaintiff in remaining in the baggage car, and admitting that the baggage car was a place of greater danger than the passenger car, and that the plaintiff would not have been injured if he had not been there, his presence there, with the knowledge of the conductor, made it defendant's duty to exercise care to avoid injuring him while there; and if injury resulted from want of such care, the defendant is liable. Isbel v. N. Y. & N. H. R. R. Co., *supra.*

If the iniury resulted from want of such care, *i. e.*, negligence on defendant's part, such negligence, and not plaintiff's fault in being in the baggage car, would be the immediate and direct — *the more* proximate — cause of the injury, and defendant would be responsible for the same. Isbel v. N. Y. & N. H. R. R Co., *supra;* C. C. & C. R. R. Co. v. Elliot, 4 Ohio State, 476; Shearman & Redfield on Negligence, §25; Keith v. Pinkham, 43 Maine, 503; Huelsenkamp v. Citizens' Railway Co., 37 Mo. 537; Richmond v. Sac. V. R. R. Co., 18 Cal. 351; Lackawanna & Bloomsburgh R. R. Co. v. Chenewith, 52 Penn. State, 386.

In our opinion there was evidence in the case for the consideration of the jury in reference to these views of the law, and from which they might reasonably find that plaintiff's negligence in this case was not contributory to the injury received by him.

These considerations dispose of the case, the result being that the order denying a new trial is

AFFIRMED.

[Communicated.]

A Great Trial.

I had the good fortune to be present at the trial of General Geo. W. Cole (brother of Senator Cornelius Cole of California), at Albany, New York, in the forepart of December, 1868, for the murder of Hon. L. Harris Hiscock, a member of the New York State Constitutional Convention. The trial was one of the greatest, if not *the greatest*, of the kind that ever took place in this country, and, I think, presented the ablest array of lawyers ever grouped together in a capital case in America. No man was ever more ably defended than Gen. Cole. Nothing was wanting in the defence that ability could devise or money procure. The facts were plain and undisputed. Gen. Cole, believing that his wife had been seduced by Hiscock, was seized by a fit of madness at Syracuse, and rushed off to Albany, a distance of 150 or 200 miles, searched out Hiscock, found him at Stanwix Hall, a hotel, and shot him down in his tracks without warning. Hiscock probably never knew who or what hurt him, as Cole approached him from behind, was unseen by him, and he died almost instantly. The following lawyers were engaged in the case: For the prosecution, Hon. Henry Smith, district attorney, an able lawyer; and Hon. Lyman Tremaine (successful defender of Stokes and prosecutor of Tweed, and now member of Congress at Large) of Albany; Hon. Charles B. Sedgwick, among the ablest; and Frank Hiscock (brother of the killed man), also distinguished at the bar, from Syracuse. For the defence, the attorney of record, Wm. J. Hadley, Esq., distinguished for his energy, method and correctness of procedure, and legal acumen in criminal matters; and Hon. Amasa J. Parker, a walking encyclopedia of law, and withal an able advocate, both of Albany; O. M. Mitchell, Esq., of Syracuse, an inimitable examiner of witnesses, and erudite in the law of criminal evidence; Hon. William A. Beach, then of Troy, New York, but now of New York city, second to no man in the United States in all that goes to make up a great advocate; and lastly, the brilliant and invincible James T. Brady, also of New York city. The trial was presided over by Hon. HENRY HOGEBOOM, of Hudson, then about seventy years of age, one of the most profound jurists and able judges in the state, who held the scales of justice so evenly and impartially that it was impossible to tell what his opinions were as to the guilt or innocence of the accused. The trial was protracted, lasting eight or ten days, during which every principle or theory of law applicable to the case, was most learnedly and elaborately discussed and sifted to the bottom by the counsel, and decided by the court with great deliberation. Mr. Hadley opened the case to the jury on the part of the defence, and took the bold and imminent stand of justification by the seduction of Mrs. Cole by Hiscock, and in a two-hours' address sought to prove by reason and citations of law and cases in point (among which was the case of General Sickles), that the avenger ought to go free. Mr. Smith and Mr. Tremain summed up the case for the people, and Messrs. Mitchell, Beach and Brady for the prisoner. Mr. Beach's address was a masterpiece of ability, truly great, eloquent and ennobling, but not as well calculated to pursuade the jury as that of Mr. Brady. I had never before seen Mr. Brady to recognize him, consequently, when he arose to conclude the argument for the defence, I was disappointed at his appearance. He was the most ill-favored of all the lawyers in the case; somewhere about the medium height, his corpulence gave him the appearance of being extremely short, which, with a large head set down closely upon broad shoulders, completed the exact ideal of an over-fed, lazy, obtuse, loggerheaded New York alderman. He began by felicitating himself and the court upon past associations and experiences; paid the judge a deserved tribute of commendation and praise for the impartiality and ability with which he had presided at the trial; asked the indulgence of the court while he discharged the awful duty of making the final plea for his client's life, and supplicated forbearance from counsel, court and jury for anything he might say, in the ardor and excitement of the occasion, which transcended the limits of the case or the proprieties of the event, should he be so unfortunate. This part of his address consumed at least half an hour, and seemed to be entirely superfluous, but the result proved it to be otherwise. I well recollect how the members of the bar looked into each other's faces eagerly and blankly, and enquired what on earth Mr. Brady was "*driving at*," and why he was so prodigal of time as to squander it in that way? for he was limited to two hours. The length of this article and a defective memory will not allow me to give a full report, or even a synopsis, of this remarkable effort of one who was reputed to be among America's greatest advocates; and I shall therefore be excused from doing more than giving a brief outline and such extracts as my memory has retained. The defence was: First, justifiable homicide, as stated by Mr. Hadley in his opening; and, second, insanity, *melancholia*, or an uncontrollable frenzy, induced by by the acts of the adulterer, which possessed the prisoner at the time of the killing, and made him irresponsible. Mr. Brady is credited with originating the "*melancholia*" and "*uncontrollable frenzy*" of the latter defence. Unlike that of Mr. Beach, his speech was made up entirely of "small talk," and his illustrations were all common-place, and of the simplest character. He talked of "whittling spiggots for cider barrels," and accompanied his conversation—for that was all it was—with the motions of the act of whittling. He spoke of horses, dogs, cats and canary birds, and used numerous other common objects to demonstrate his theory of the defendant's irresponsibility. Beginning at the act of killing, he entered the dominion of the philosophy of human action, and carried the minds of the jurors from the *effect* of the defendant's act of killing to the *cause* of that effect; enlarged upon the theory of "uncontrollable" frenzy and "melancholia," and showed the almost uncontrollable impulse with which one is possessed when a pet cat or dog is, without cause, ruthlessly murdered by a cruel ruffian, to avenge the wrong. "Suppose," said he, "you had a beautiful canary bird, which through a series of years, had become endeared to you by its blithesome song and loving antics, as it fluttered about your apartments, thus relieving care and making life happier; at an unexpected moment, and in your very presence, some inhuman wretch strikes it down, crushing and mutilating its beautiful form, and extinguishing forever the warbled harmony with which you

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have been beguiled from care and fascinated to an extraordinary degree of delight. Would you not be seized by an impulse well-nigh amounting to uncontrollable frenzy, which would inevitably impel you to strike down the atrocious miscreant, and ought you to be held accountable for the act? If such impulses govern you at such a time, what bounds could be set to the fury and distraction that would surely attend the robbery of the virtue of the darling wife of your bosom, and the murder of your domestic peace and happiness?" He then dwelt upon Gen. Cole's military history; took him from home to do battle for his country, representing him as going from home with a light heart to the tune of "The girl I left behind me," to join the Union army; he eulogised the chivalry and heroism by which he was advanced to be a brigadier general; decorated him with the laurels of victory, and pictured him as returning home again to deck his hearthstone with his laurels, and share his well-earned glory with the adored being of his heart. "But," said he, "what did he find there? Alas! that hearthstone was desecrated; the spoiler had been there. Where joy and brightness had reigned luxuriantly, sorrow and gloom were. That beautiful fabric of domestic love and tranquility was overwhelmed in ruin, and the ravens of despair were croaking and gloating over the dark desolation. Gentlemen, what is home without its jewels; what is earth without its flowers; what is heaven without its stars? What would you have done under the weight of such an appalling calamity—what wouldn't you have done? I will tell you what *I* would have done." Then extending his hands upward, and looking heavenward, throwing his head back and his chest out, with slow utterance and impressive solemnity, he exclaimed, "S-o h-e-l-p m-e G-o-d A-l-m-i-g-h t-y! I would have immolated him on the spot!" He concluded his argument with a reference to the history of Julius Cæsar. "He was one of the greatest men that ever lived in his sphere of activity and life. He was assaulted in the senate chamber and killed. He was struck down by daggers as he stood erect in his toga, and never bowed his head. His best friend—the Hiscock of that day—struck the last blow at his heart. He exclaimed as that friend struck him, '*Et tu Brute!*' and fell at the foot of Pompey's Pillar. *He*, also, experienced the pangs of knowing that it was his most trusted friend that struck him to the heart—

'For when the noble Cæsar saw *him* stab,
Ingratitude, *more strong* than traitor's arms,
Quite vanquished him.'

"Men may think that they are wise, and can stand any shock that may be given to them, but it remains to be known what *may happen* when a calamity such as was visited upon the prisoner shall befall them. When you, gentlemen, shall sit down to your Christmas dinners, your families may enquire what has become of the prisoner. I believe that you will be able to say that the prioner is free, and as ready to receive the congratulations of his friends as you will be."

As I have previously remarked, Mr. Brady's suavity to the court was, in fact, well timed, for it procured him an extension of time of half an hour, so that he consumed full two and a half hours with his argument. This was the last trial of note in which he was engaged, and his last great effort, as he died the following spring or summer. I am told he received $10,000 his services in this case. He was under his physician's care at this trial, and barely able to discharge the duty assigned him—that of speaking finally for the defence. Sometime after Mr. Brady's death I met Mr. Beach, and in a conversation with him, the conversation turning upon the Cole trial, asked him what he thought of Mr. Brady's speech, and whether or not it met his expectations.

"Ah! poor Brady, he was on his last legs," said he in reply. "I own *I* was greatly disappointed at the time, and entertained the opinion that the speech would have damned a tyro at the bar. But since then, after analyzing it in my own mind, I have come to consider it a remarkable effort. True, it was not great in the ordinary acceptation of the word, yet it was indeed wise and sagacious to the end in view—the convincement of the jury; by it he made himself thoroughly understood; and when he sat down, the case was virtually disposed of. Judging of Mr. Brady's ability by this address, I would not call him great, as he was generally reputed to be. He had a national reputation, but I judge it was attributable chiefly to the wonderful success before juries, and the secret of that success was his marvelous faculty of convincing. As he stood before you, his solemn earnestness, his humble manner, his plain action, his homely language, his simplicity of thought, expression and illustration, all told you that he was there to achieve success solely, and not to make a display of his own ability, if he had any. That to accomplish his purpose he desired, at the point of reason, to persuade and convince, not dazzle, fascinate and enthrall; and that impassioned eloquence, great thoughts, elegant diction, graceful gesticulation, and splendid flights of imagination, were not legitimate and sure means to that end, neither appropriate to the solemn occasion."

Mr. Brady found in Mr. Tremain a "foeman worthy of his steel." He closed the argument for the prosecution, and acquitted himself admirably. I can only recall one of the fine retorts which he made. The defence, among the arguments put forth in justification of the killing, referred to the fact that there was no statute law in New York making adultery a crime and punishing it as such, *although there ought to be*, and that, therefore, the defendant had no other redress than to avenge the wrong as he had done, the law affording him no remedy. Mr. Tremain called the attention of the jury to this reasoning and said: "It is recorded in Irish history that under the benign and auspicious reign of King Brian, the people were inspired by such a lofty sentiment and spirit of honor, virtue and religion, that a young and beautiful woman, adorned with jewels and costly dress, made a journey alone from one end of the kingdom to the other, with a wand only in her hand, at the top of which was a ring of great value. Yet no attempt was made upon her honor, nor was she robbed of her costly apparel or precious jewels. Ireland's great poet, Thomas Moore, has celebrated the event in these noble lines:

Rich and rare were the gems she wore
And a bright gold ring on her wand she bore;
But, oh! her beauty was far beyond
Her sparkling gems, or snow-white wand.

'Lady, dost thou not fear to stray
So lone and lovely through this bleak way?
Are Erin's sons so good or so cold,
As not to be tempted by woman or gold?'

'Sir Knight! I feel not the least alarm,
No son of Erin will offer me harm;
For though they love woman and golden store,
Sir Knight! they love honor and virtue more!'

On she went, and her maiden smile
In safety lighted her round the green isle;
And blest forever is she who relied
Upon Erin's honor and Erin's pride.

"Such is the proud character of our free and happy country. Here woman is exalted to a station of nobility; her virtue venerated, and her honor protected and vindicated with a spirit of devotion and chivalry surpassed by no other nation on the globe. Here she may, as did the Irish maiden of old, go throughout the whole length and breadth of this fair land, however beautiful and attractive she may be, and still, if *she will*, retain her virtue untarnished and honor unsullied, and I hurl back the assertion that a statute is necessary to protect the chastity of American women, to the source from which it came as an atrocious calumny upon their character, fair fame and honor."

Mr. Tremain should be heard to be fully appreciated. His address, a masterpiece of ability and eloquence, was frequently interrupted by the applause of the audience.

Judge HOGEBOOM'S charge was a rare specimen of judicial excellence. The law enunciated was substantially as held in these cases: People v. Freeman, 4 Denio, Reports; People v. Willis, 32 N. Y.; People v. Obrien, 36 N. Y. "We are not here," said he, "to administer sympathy, but to execute justice; to carry into effect the laws of the land; to enforce their solemn mandates, and not to nullify or relax their positive commands by misplaced sympathy or morbid clemency. If our duty is clear, we foreswear ourselves if we do not perform it. I have taken a general oath faithfully to perform the duties of my office; you have taken a special oath well and truly to try, and true deliverance make between the people of the state of New York and George W. Cole, and a true verdict render according to the evidence, so help you God. This duty we must discharge at whatever hazard, whether painful or agreeable; neither manhood nor honor, the restraints of conscience, nor the the solemn mandates of the law, allow us to decline its performance, or hesitate at its execution. Many laws may not be in precise accordance with our views of policy, or even of

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strict justice, yet it would lead to the utmost confusion and injustice should we refuse to execute them. If we are dissatisfied, we should apply at the proper time to the proper form for their amendment, or seek to avert their excessive rigor by an appeal to executive clemency. Certainly it is to be regretted, if further legal enactments could be of any avail to restrain the unholy passions and devilish acts of the seducer and adulterer, that they have not heretofore been made. But the wisdom and efficiency of such enactments have been questioned. It is enough for us to know that we must administer the law as it is, and have no right to usurp legislative power, and apply to a past transaction laws of our own creation. Let us content ourselves with administering the law as we find it in our own appointed sphere of duty. Then shall we have a conscience void of offence toward all men, and the happy consciousness that in the spirit of our oaths, and in conformity with the obligations which rest upon us, we have, as faithful and law-abiding citizens, executed the laws of the land. You have a higher duty to discharge than either to please or to offend the prisoner or the people. You are to find a true verdict according to the facts established before you. You are to declare it without fear or favor, and without reference to the wishes of either side. True indeed, if under the influence of the evidence you conclude the prisoner's reason to have been dethroned, and he was not, at the time of this transaction, an intelligent agent, having not the power of mental discrimination between right and wrong in regard to the particular transaction which you are undertaking to investigate, he must stand acquitted before you upon the ground of criminal irresponsibility. But if he had this power of mental discrimination and could distinguish in regard to the moral qualities of his conduct, then, notwithstanding your pity for the man, and your sympathy for the sufferer, you *must* condemn the criminal, and especially you must not be led aside from the path of duty by a recollection of the severe rupture which has taken place in his domestic relations, unless the deceased is proven to have been connected therewith, and, in some sense, the author thereof, so as justly to call down upon himself, within the limits of the law, the just vengeance of an injured husband. These injuries, at least the intelligence of them, which was communicated to him, were of the most heartrending character, and must, of necessity, excite the ardent sympathy of every feeling heart. It may be difficult, perhaps impossible, wholly to divest ourselves of these feelings, but we shall fail to meet the stern and inexorable necessities of this hour, if we allow them to turn us aside from the path which the law has appointed for us to tread. That path is the path of duty; that duty is to find a verdict according to law and evidence; and whether it enjoins upon you the agreeable task of pronouncing a verdict of acquittal, because the evidence fails to satisfy you beyond a reasonable doubt of the guilt of the prisoner, or of his responsibility for crime; or the painful one of pronouncing a verdict of conviction, because the evidence satisfies you, beyond a reasonable doubt, of the prisoner's guilt and responsibility for crime, you will, I doubt not, acquit yourselves like men; and without fear or favor, without partiality or prejudice, discharge the solemn and responsible trust which the law has imposed upon you on this occasion. In this confidence I commit this case into your hands for your final deliberation and verdict."

The jury retired, and after an absence of several hours returned into court and rendered a verdict of "*Not guilty*," which was received with immense applause by the large audience present. And thus ended this great trial.

JOHN D. PARKS.

[Correspondence.]

Word Shrubbery.

BOSTON, July 1874.

EDITORS CENTRAL LAW JOURNAL:—Jean Paul Richter, in his third preface to Hesperus, written at Baireuth in the fourth lustre of the present century, in contrasting the English language with the German, in which he wrote, said: "How entangled, and wild with foreign growth, after some centuries, will the English language, with its native but powerless stem, full of engrafted word shrubbery, capable only of inoculation, and fetching back from its duplicate, America, more new words than wares, be." At the expiration of half a century since Jean Paul so wrote, it is certain that "word shrubbery" is not on the increase, but rather on the decline both in England and in America; and especially is this true of law books and the written opinions of courts. A quarter of a century ago Judge FLETCHER wrote an opinion in Gregg v. Wyman. He was an able judge, and withal a good lawyer, yet, in that opinion he says: "It is a sound and wholesome principle that he who comes to ask the aid of a court of justice should come with clean hands." Of course the judge meant something else than what he said—as when the unlettered man of to-day says: "I don't take much stock in your remarks" means he don't believe what you say. Judge Fletcher had borrowed this "principle," as he calls it, from the English judges; and so significant did he deem it, that he states it a second time in the same opinion. It is no doubt true that it is "wholesome"—that is it conduces to health and happiness, and thereby, I suppose, to virtue also, that not only parties, but witnesses and counsel, not now to speak of judges, should come to the performance of their several duties in court with clean hands, which, alas! I am witness they do not always do. But this was not what Judge FLETCHER meant. I do not dispute the significance of the maxim, because, I suppose, everybody understands what is meant by it, and what is meant is true and important; but what is meant is not what is said, and, therefore, what is said is "word shrubbery" or gibberish. My point is, there is less such now, especially in law opinions, than when Jean Paul wrote.

Since Dr. Franklin there has been another "maxim" supposed to be worthy of his wisdom, that—"Every tub should stand on its own bottom." This, too, needs explanation. To say that it is safer and therefore better, that a tub should stand on its bottom rather than on the bottom of another tub, is, perhaps, open to no more serious animadversion than that of Lord Ellenborough, when Mr. Preston, a once famous English conveyancer, began an erudite harangue by saying: "An estate in *fee simple*, my lords, is the highest estate known to the law of England," whereupon Lord Ellenborough said: "Stay there; let me take that down," which having done, and read it over very deliberately, he added: "The court is much indebted to you for the information, sir."

Outside the profession, but in what I suppose was claimed as politer society, a quarter of a century or more ago, there was, I believe, a "maxim" that—"Every man must skin his own skunks." Now, to all except perhaps the exceptionably learned, this certainly needs explanation. If one really owned a skunk, and insisted upon his being skinned, since it is not known that skunk skinning has come to be a profession or established calling, there is no apparent injustice, except to the skunk, in one skinning his own. Indeed it might be better that one should do so rather than require his table-servant to do it for him. But the truth which this maxim illustrates, if any, is beyond my learning. The vice in writings in which these "maxims" are employed, is, that each such sentence must have its fellow—its expositive—as Mr. Choate remarked of a second presidential message, of his time, following soon after the first, and relating to the same matter. The second message was needful to tell us what the first one meant. I still insist the style in writing is simpler and clearer than formerly. But England is not indebted to Mr. Carlyle nor America Mr. to Emerson for this simpler style. Something is due to Mr. Macauley, and to the new readings of Plato and Spinoza—the best writer "top of the earth" when he lived in Amsterdam.

PELHAM.

Notes and Queries.

We thank "Milwaukee Subcriber" for the following. We hope other subscribers will take sufficient interest in each other's perplexities to follow his example, and help us make our department of Notes and Queries useful and interesting.

MILWAUKEE, July 20th, 1874.

EDITORS CENTRAL LAW JOURNAL:—I notice among the Notes and Queries in your issue of July 16 an enquiry from "Carthage Subscriber," as to the construction of the Missouri statute for a change of venue where there are several defendants and the application is made by one only. If I am not mistaken, the Missouri statute resembles the one we have in Wisconsin, and your correspondent will find that question discussed in the case of Wolcott v. Wolcott, *et al.* 32 Wis. 63. In the case cited there were four defendants, one of whom had made no appearance. The other three joined in one answer, charging among other things, that the fourth defendant was really interested with the plaintiff. An application for change of venue was made by the three defendants, based on the affidavit of one only of their number, that he believed the judge was prejudiced against him and his co-defendants, naming the other two. This application was granted and the plaintiff appealed from the order granting the change of venue on the ground that the words "any party" in the statute meant all the parties on one side, and that the fourth defendant should have joined in the applica-

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tion. The supreme court sustained the order changing the venue, but Judge LYON, in his opinion takes occasion to say:

"Suppose one of two plaintiffs makes the required affidavit of the prejudice of the judge and applies for a change of the place of trial, and the other plaintiff does not join in the application, but prefers that the case be tried in the court in which it was commenced. In such case the rights of the plaintiff who does not join in the application are certainly equal to those of his co-plaintiff, and it seems very clear that the statute ought not to be so construed as to give the latter control of the action in this particular to the exclusion of the former." MILWAUKEE SUBSCRIBER.

Book Notice.

AMERICAN RAILWAY REPORTS: A collection of all reported decisions relating to Railways, Vols. 1, 2. New York. James Cockcroft & Co. 1873, 1874.

The purpose of this series of Reports, the first volume being edited by J. H. Truman, Esq., of Chicago, and the second volume by John A. Mallory, Esq., of New York, is to give in full all of the cases decided by the American courts, state and federal, relating to railways, since 1872. The selection of cases here reprinted is good, and the editorial work has been well done, and the volumes will be found useful to the profession.

In view of the fact, however, that we have some sixty or seventy volumes of reports published annually, which it is safe to say, will average three or four cases each relating to railways; and in view of the fact that these volumes will not average over about seventy-five cases each, we think the plan of publishing *all* railway cases *in full* not so desirable as to publish the leading and important cases in full, and to give the rest of the cases in the notes by way of abstract and reference. For example: If a decision turns on a local statute, let the editor give the statute in full, state accurately the point decided under it, and in few lines indicate the reasoning of the court. In this way the series can be kept down to one volume a year; will be more popular, and will contain all that is of general value to the profession. Under competent editorial management we feel certain that the plan we suggest is the true one, and we suggest it to the favorable consideration of the enterprising publishers.

Summary of Our Exchanges.

THE Chicago Legal News for July 25, publishes the case of the Union Pacific Railroad Company, in the United States District Court for the District of Massachusetts, in which Mr. District Judge LOWELL holds that it is not an act of bankruptcy for a railroad corporation to convey its property in trust to secure bonds to be issued and sold, and the proceeds to be applied to pay all its unsecured debts; the same being done *bona fide* with a view to enable the company to continue its legitimate business, though it may be technically insolvent, or likely soon to be so; and that such a mortgage is not made invalid by the circumstance that the unsecured creditors are offered the right to take the new bonds, or the proceeds of sale thereof, at their election. We do not know how this case got into court, unless the act of 1873, ch. 226, 17 Stat. p. 509, which provides that the bankrupt act shall not apply to the Union Pacific Railroad Company has been repealed.

The Legal News also publishes McQuiddy v. Ware, Supreme Court of the United States, October Term, 1873, holding that the foreclosure of a mortgage by constructive notice, while the defendant was absent in the Confederate service, was valid. (See *ante* pp. 66, 226.) Also, Amory v. Amory, United States Circuit Court, Eastern District of Wisconsin, (DAVIS and DRUMMOND, JJ), which was a bill of Angelina Amory, claiming as widow and heir-at-law of James Amory, deceased, praying that the defendants, Samuel B. Amory and John Amory, executors, might be enjoined from pleading a decree of divorce by the Superior Court of New York city in bar of proceedings by the complainant to recover the estate of the said James Amory, and praying that the complainant might be adjudged the lawful widow and heir of said James Amory. The bill alleged fraud by the complainant's counsel in the divorce proceedings in the New York court. The court rule the following points:

1. Fraud upon a party by her counsel in a state court will not invalidate a decree where it does not satisfactorily appear that it altered the result.

2. A woman claiming an estate from a man as his widow and heir-at-law, required in this case to give satisfactory proof, independent of her own statement, that she was actually the wife of the deceased.

3. If, soon after decree, the party has knowledge of facts calculated to throw suspicion upon the conduct of her counsel, she is bound to use due diligence in enquiring and in seeking relief, and a delay of eleven years bars any relief against the decree and the consequences of the fraud alleged.

The Legal News also publishes Burr v. The City of Carbondale, in which the Supreme Court of Illinois hold (WALKER, MCALLISTER and CRAIG, JJ., dissenting) that the bonds were issued to secure the location of the university, which was a corporate purpose, under a vote of the people, are in the hands of innocent holders, and must be held valid.

The Legal News, referring to a mistake it made in crediting the opinion in the case of Raffaux to Judge LONGYEAR instead of to Judge HOPKINS—an error which we pointed out in our last issue (*ante*, p. 367)—adds: "We hope some of our exchanges that are in the habit of reprinting opinions from our columns without credit, will not follow this error. We shall see." We diligently read our legal exchanges, and do not think that any of them is in the habit of copying opinions from the Legal News without crediting them to that journal. Who is it?

The Irish Law Times for July 4 contains a valuable article on the Effect of the Statute of Frauds upon sales at Auction, and another, The Rights in Bankruptcy of Execution Creditor holding a Guarnishee Order. It also contains a number of valuable selections from other journals. Among its reported cases we notice nothing this week of interest to our readers, though we should judge them of much value to practitioners in Ireland.

The Albany Law Journal for July 25 contains an article on Contracts of Married Women, reviewing a number of New York decisions on the subject. It also publishes Judge LONGYEAR's opinion in *re* Angell, published in our last issue. It also reports Town of Danville v. Pace, Court of Appeals of Virginia, reciting the following point: "After a town had issued its bonds, an act was passed providing that no corporation should interpose the defense of usury. *Held*, in an action against the town on the bonds, that the act applied to contracts made before its passage, and that defendant could not allege usury." This, the Albany Law Journal thinks is destined to become a leading case on the question involved. The Albany Law Journal also publishes several notes of interesting cases; also its usual abstract of the decisions of the New York Court of Appeals, and brings down the publication of the general statutes of New York as far as the acts past by the last assembly have been signed by the governor.

The Pacific Law Reporter for July 7 publishes the opinions of Justices BRADLEY, HUNT and CLIFFORD in The Mayor, etc., of Nashville v. Ray, on the power of municipal corporations to borrow money and levy taxes. This is a very important case, and we hope to find space to publish it hereafter. It also publishes San Francisco v. Spring Valley Water Company, Supreme Court of California, April Term, 1874, holding that corporate rights or powers cannot be conferred by special grant of the legislature, but can only be derived under general laws; and that a special act of the legislature attempting to grant such powers to a private corporation is void, because in conflict with the constitution of California, section thirty-one of article four. It also reprints from the Legal Intelligencer, an opinion of Mr. Circuit Judge MCKENNAN in Baker v. The ship "Tros," holding that where salvage services are performed merely by the permission of another wrecking company, which has possession of the vessel, and which services are rendered with the understanding that the wrecking company, and not the vessel is to be responsible, the vessel is not liable for such salvage services.

The same journal for July 14 publishes Oregon Steam Navigation Company v. Winsor, which has already appeared in this journal (*ante* p. 350). Also Howard v. Continental Life Ins. Co., Supreme Court of California, April Term, 1874, which relates to the constructi n of a life insurance endowment policy. Also Langenberger v. Kroeger, Supreme Court of California, April Term, 1874, which relates to an authorized endorsement on a check of the words "payable in gold coin." Also Dailey v. Cox, same term of same court, which construes the California act of February 18, 1864, creating a board of water commissioners for San Bernardino county, with reference to the apportionment of water in an irrigating canal. Also Pennybecker v. McDougal, same court and term, which rules that a house set upon blocks, resting upon the surface of the ground, not attached to the soil, and removable without disturbing the land in any way, is not a part of the realty. So, also, a portable fence is not a part of the realty. And that in replevin for materials out of which improvements on realty have been constructed, only the materials or their value can be recov-

ered and not damages to the freehold. The Law Reporter also publishes People v. Brown, same court and term, relating to challenge to panel of jurors, instructions, and possession of stolen property as evidence of guilt. Also Silvey v. Hodgden, relating to the attack of the credibility of an adverse witness by proof of hostile feeling towards the party against whom the witness is called.

The Legal Gazette (Philadelphia, King & Baird) for July 24, publishes Trask v. Maguire, Supreme Court of the United States, which appeared in this journal for April 9 (*ante* p. 175.) Also The Great Western Insurance Company v. Fogarty, decided at the last term of the same court. In this case insurance was effected upon machinery, consisting of the parts of a sugar packing machine, on board of the bark Ella Adele, at and from New York to Havana, free from particular average. During the voyage the vessel was driven upon rocks during a violent gale, and abandoned to the underwriters. Parts of the machinery was recovered and tendered to the owner, but refused by him on the ground that the insurance company was liable to him as for a total loss: *Held*, that the parts tendered not being *machinery* but merely pieces of iron, worthless as part of the sugar packing machine, the company was liable.

The Legal Gazette also publishes the opinion of Mr. District Judge CADWALLADER in Brady v. The American Steamship Company. This is an exceedingly interesting case, illustrating the law of salvage applied to a case where a vessel in distress is saved by one of the passengers, being himself a seaman. The circumstances were that the steamship Pennsylvania, being in great distress at sea, her captain and first and second officers having been washed overboard and lost, and her third officer failing to exercise the command which thus devolved upon him, Captain Brady, a passenger on board, who was a master navigator, assumed command of the ship and brought it safely through the storm. This was held to be a meritorious salvage service. But the next day, the storm having abated, Captain Brady improperly continued to exercise command, instead of yielding the vessel to the third officer. Because of this illegitimate exercise of authority, the learned judge holds that there must be a reduction of the salvage to which he would otherwise be entitled, and awards him $4,000, with $200 costs.

In Brown v. Commonwealth, published in the same paper, the Supreme Court of Pennsylvania rule the interesting point that where two persons are murdered at the same time and place, and apparently by the same person and from the same motive, evidence of commission of the one murder may be given upon the trial of the prisoner for the other.

Legal News and Notes.

—MR. Justice MILLER has gone to Cape May.

—WILLIAM L. DENNIS, a prominent member of the Philadelphia bar, died recently in that city.

—GENERAL A. C. HARDING, a distinguished lawyer, soldier and politician, died recently at his residence at Monmouth, Illinois.

—THE federal attorney-general has decided that auditors and others who are empowered to settle accounts, have the power to administer oaths.

—THE man who attempted to bribe Chief Justice RYAN of Wisconsin, and who "vot for Mr. Taylor," has been fined $100.

—CHIEF JUSTICE GRAY of Massachusetts, having recovered from a recent injury received from the fall of his horse, has gone a fishing with the chief justice of New Brunswick.

—THE Court of Commissioners of Alabama Claims met at the state department in Washington on the 24th inst., and promulgated a series of rules of procedure to be observed before them.

—MR. DISTRICT JUDGE CADWALLADER of the federal court at Philadelphia recently awarded $4,000 to Captain Brady for bringing into port the steamship Pennsylvania, after her captain and chief officers had been washed overboard.

—A new law periodical is announced in Paris. It is called the "Journal du Droit International Prive," and will be devoted to the publication of papers in different languages upon the various subjects embraced under the head of Private International Law.

—THE attorney-general of the United States has decided that under section 19 of the new bankrupt law, registers in bankruptcy and United States marshals are not required to make the returns provided for in that section until they are furnished with tabulated forms and directions from the judges of the United States Supreme Court. As the justices can scarcely leave their circuit duty until October, it seems probable that this decision will have the effect to delay proceedings under this section for some months.—*Albany Law Journal.*

—THE Luzerne Legal Register, in reviewing a western law periodical, says: "It is quite a mistake to suppose that we must always look to the old states for 'the gladsome lights of jurisprudence.' The diversified interests of western life give rise to a great variety of new and important questions, and the ability with which they are discussed and disposed of by the fresh and giant intellects of the West commands our highest admiration." That will do.

—NOTWITHSTANDING her repulse from the Court of Claims, Mrs. Lockwood seems to be driving a lucrative practice. The other day she entered a replevin suit for George F. Rider against the commissioners of the District of Columbia, for unjustly detaining the iron bridges built by him across the Washington canal, which have been taken down, part of them lying in the property yard, useless, being destroyed and stolen. These bridges were at Maryland avenue, Seventh, Tenth, Twelfth, and Fourteenth streets, and the plaintiff represents that having furnished the materials and erected them, and having received but one payment on the same, he has property in them, and prays that they be taken from the defendants and delivered to him. Unless we are very unsound on the law of replevin, Mrs. Lockwood has mistaken her client's remedy.

—A correspondent, writing to the Albany Law Journal, says: "In your Journal of July 4, you discuss the case of State v. Linkhorn, in the trial of which, a witness 'sang a verse,' and you say, 'we are puzzled by the admission in evidence of the imitation of the defendant's style of singing.' There is high authority for it—no less than that of Chief Justice TANEY, who, in the case of Reed v. Carusi, which involved the copyright to the song of the 'Old Arm Chair' allowed, under strenuous objection, the singing by a professional singer of the original song, and the alleged piracy, in the presence of the jury, saying that he 'would make a rule for the case, which he considered a reasonable one, however novel and peculiar it might be.' See the Life of Chief Justice TANEY, p. 312."

—THE Cour de Cassation of Paris has just given judgment in a somewhat curious case. It is customary in many Oriental courts of justice for the advocates as well as the public to take off their shoes on entering, as a sign of respect to the bench. M. Pannoutombi, a native advocate of Pondicherry, some time ago took upon himself to transgress this custom, and to keep his shoes on in the presence of the judges. For this he was suitably admonished; but M. Pannoutombi rebelled, and maintained that he had a right to appear in court with or without his shoes, according to his convenience or fancy. He was in consequence forbidden to practice. M. Pannoutombi appealed to the French minister of justice, who quashed the decision of the court of Pondicherry. The affair was carried before the Cour de Cassation, whose solemn sanction henceforth authorizes M. Pannoutombi to keep his shoes on in the discharge of his professional duties.—*Irish Law Times.*

—A "DISTINGUISHED practitioner at the Supreme Court bar," has discovered a mare's nest in the bankruptcy amendment. It seems that the revision of the United States Statutes and the amendments to the bankruptcy law were passed on the same day. The act adopting the Revised Statutes provides that the revision shall take effect from December 1, 1873, and repeals all prior acts any portion of which is contained in the revision. In the revision, the bankruptcy act of 1867 is considerably transposed. The amended bankruptcy act, however, amends the sections of the act of 1867—which act was repealed by the revision. It is therefore claimed that the bankruptcy amendment act amended a statute already repealed. A semi-official telegram from Washington announces that "it is all right," inasmuch "as the bill for revision contains a clause providing that it shall be considered as the first bill passed after the meeting in December last, and all other laws passed at the session to be regarded as amendments to the the revision." But we are not quite sure that this obviates the difficulty.—*Albany Law Journal.*

Notes of Cases.

Our notes of English cases are from the Law Times. Our notes of cases decided in the New York Court of Appeals and in the New York Commission of Appeals are from the Albany Law Journal. Those decided in the Supreme Court of Ohio are from advance sheets of the 24 Ohio State Reports, furnished by Messrs. Robert Clarke & Co., of Cincinnati, or from the American Law Record (Cincinnati). Those decided in the Kentucky Court of Appeals are from the American Law Record. Those decided in the Supreme Court of the United States are from printed opinions in our possession. Those decided by the Supreme Court of Michigan are from Chaney's Quarterly Digest. Others are from cases reported in our exchanges, unless otherwise stated.

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Will—Specific and Residuary Devises and Bequests—Personalty Insufficient for Payment of Debts—Administration—Claim disallowed—Costs.—Where the personal estate is insufficient for the payment of debts, real estates comprised in a residuary devise are chargeable with the payment of debts in priority to real estates specifically devised. Hensman v. Fryer, 17 L. T. Rep. N. S. 394; L. Rep. 3 Ch. 420, not followed. The court refused to make any order as to the costs of an unsuccessful claim made by the plaintiff against the testator's estate. Lancefield v. Iggulden, 30 L. T. Rep. N. S. 156. V. C B.

———. **Gift over on Bankruptcy—Personal Enjoyment—Forfeiture of Life Estate.**—Testator gave specific legacies, and gave all his residuary real and personal estate to S. and C. upon trust for conversion and investment, and to pay thereout an annuity of £250 to S. and also an annuity to E., and subject thereto and to his debts, the remainder of his real and personal estate to be held in trust for C. for life, or until he should become bankrupt or insolvent, or do or suffer anything which but for that provision would deprive him of the personal enjoyment, in which case there was a gift over. S. and C. were appointed executors. Testator died in June, 1870, considerably indebted. His personal estate not specifically bequeathed was under £20. C. was adjudicated bankrupt in July, 1871. In January, 1872, a scheme for arrangement of the bankrupt's affairs, by paying 20s. in the pound was made, and the bankruptcy was annulled, and an order was made vesting his property in S. In January, 1873, the order vesting the bankrupt's property in S. was rescinded. Prior to his bankruptcy C. had received the rents of the testator's real estate, but since then S. had received them. The rents had been applied towards paying the testator's debts, and the annuities so far as they would extend, but S.'s own annuity was in arrear, as the rents were not sufficient to pay it in full. C. had received nothing for his own use. Held, that as C. had not been deprived of the personal enjoyment of the residuary estate, there had been no forfeiture of his life interest. Robins v. Rose, 30 L. T. Rep. N. S. 152. V. C. B.

———. **Devise of all Lands and Hereditaments—Strict Settlement—Leaseholds—Contrary Intention.**—The 26th section of the Wills Act throws the *onus probandi* upon those who assert that a devise of "lands" does not include leasehold estates in land, but that onus is satisfied by showing from the whole will sufficient grounds to satisfy a reasonable man that the testator did not intend by the word "lands" to pass leasehold estates. A testator, by his will made in 1861, devised all his messuages, lands and hereditaments in the county of Middlesex, and all other lands and hereditaments in England belonging to him, to the use of his eldest son for life, with remainder to his eldest son's issue in tail male, with an ultimate remainder to his own right heirs. He also bequeathed all his money, securities for money, goods, chattels and personal estate to trustees upon trusts corresponding with the trusts of the hereditaments thereinbefore devised in strict settlement, but so that the same should not vest absolutely in any person thereby made tenant in tail by purchase unless such person should attain twenty-one. As to the devised realty, the will contained a power of sale, empowering the trustees to invest the proceeds of any sale in the purchase of freeholds or leaseholds convenient to be held therewith. The will also contained a bequest of certain chattels and heirlooms in strict settlement, so far as the rules of law and equity would permit. The testator, both as to any leaseholds to be purchased under the power, and as to the chattels, repeated the proviso that the same should not vest absolutely in any person thereby made tenant in tail by purchase, unless such person should attain twenty-one. At the time of his death, the testator was possessed of both freehold and leasehold estates in the county of Middlesex. Held (affirming the decision of Malins, V. C.), that the leaseholds did not pass under the devise of lands and hereditaments by virtue of the 26th section of the Wills Act, inasmuch as there was sufficient indication of a contrary intention appearing on the face of the will, but that they passed under the ultimate bequest of personal estate. Prescott v. Barker, 30 L. T. Rep. N. S. 149. Chan.

———. **Construction—Bequest of Residue to Charities—Pure and Impure Personalty—Marshalling—Mortmain Act.**—J. M., who died in March, 1866, by will in July, 1855, after appointing executors and trustees, and bequeathing legacies specific and pecuniary, and giving certain annuities, said, "as to all the residue and remainder of my personal estate and effects whatsoever and wheresoever, which I may be possessed of or entitled to at the time of my decease, I give and bequeath the same as follows, namely: one equal third part or share thereof to St. Mary's Hospital, Paddington, aforesaid, one other equal third part or share thereof to the Society for the Propagation of the Gospel in Foreign Parts, and the remaining one equal third part or share thereof to the Society for Promoting Christian Knowledge, and my will is, and I expressly direct, that the three last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees, or trustee, for the time being for that purpose, and that such legacies and shares of residue shall respectively be applied to the purposes of the said hospital and societies respectively, and the receipts of the respective treasurers of said hospital and societies repectively, shall be sufficient discharges for the same respectively." The suit was one for administration, and the question raised was as to the marshalling of debts, legacies, and annuities. Held, that the direction that the charitable bequests were to be satisfied out of such part of the testator's personal estate as could lawfully be applied to the payment thereof, and which should be reserved for that purpose, was a plain direction to marshal the assests, so as to give the charities the fullest benefit they were capable of taking. Miles v. Harrison, 30 L. T. Rep. N. S. 152. Chan.

Practice—Money advanced by Trustee—Interest.—A trustee will be allowed interest upon money advanced by him, and applied in payment of his testator's debts, or otherwise on account of his personal estate. Finch v. Prescott, 30 L. T. Rep. N. S. 156. V. C. B.

Injunction—Trespass—Waste.—The defendant, to an action of ejectment to recover a piece of woodland, adduced evidence of adverse possession for more than twenty years, and the action was discontinued. Subsequently the plaintiff in the action from time to time walked in the wood, and turned his cattle into it, in order to assert his alleged right, and to bar the Statute of Limitations. At length he cut down a tree in the wood, whereupon the defendant to the action filed his bill for an injunction. Held (affirming the decision of the Master of the Rolls), that as the result of the action of ejectment showed the defendant to that action to be in possession of the wood, he was entitled to the injunction. Lowndes v. Bettle, 10 L. T. Rep., N. S. 55; 33 L. J. 431 Ch.; approved and followed. Stanford v. Hurlstone, 30 L. T. Rep. N. S. 140. Chan.

Action against a Carrier for a Homicide Committed by a Passenger—Negligence.—This is an action to recover damages for the death of A. D. Putnam, plaintiff's intestate, who was killed by William Foster. It appeared upon the trial that plaintiff's intestate, in company with two females, took passage upon defendant's car. Foster, who was intoxicated, subsequently got on the front platform of the car, and after riding there a short distance opened the door of the car and insulted and annoyed the ladies. Putnam requested the conductor to make Foster keep quiet; the conductor directed him to sit down and be quiet; he sat down near Putnam, and after the conductor returned to the rear platform, addressed to Putnam abusive and threatening language in a low tone not audible to the conductor. After remaining a short time he returned to the front platform, where he remained quietly until Putnam left the car, when he jumped therefrom with the car hook, and as Putnam was assisting his companions to alight, Foster struck him with the car hook, causing his death. Held, that the evidence did not show a neglect of duty on the part of the conductor, or want of proper care and vigilance on the part of any of defendant's servants, certainly none connected with the attack upon Putnam, or to which it could be legally or logically traced, and that defendant was not liable. Putnam, Admr'x, &c., v. Broadway & 7th Ave. R. R. Co., N. Y. Court of Appeals. Opinion by ALLEN, J.

Conveyance—Practice.—R. owned certain premises upon which was a saw-mill; he conveyed by metes and bounds that portion thereof upon which the mill was located, with appurtenances, describing it as his mill property. There was a piece of land between the premises conveyed and the highway which had been used for many years as a way to the mill, and as a mill-yard for storing logs. There was no other access to the mill from the highway, and the use of this piece of land was necessary to the mill as a mill-yard. Held, that the principal thing conveyed carried with it an easement in said land for a way and for a mill-yard.

Also held, that in determining how much passed as an incident appurtenant to the premises conveyed, the necessity of the mill for its full and free enjoyment controls.

Also held, that the fact that the owners of the land subject to such easement had exacted toll for its use as a mill-yard of the occupants of the mill, did not, as against one not showing himself prejudiced thereby, vary the rights of the parties or estop the owner of the mill property and his licensees from insisting upon his actual rights.

The opinion of the grantee in such a deed of the effect thereof, or as to what the effect should be, cannot affect the rights of a subsequent grantee who has bought with a right to rely and relying upon his grantor's title.

A party seeking to enforce the rule that facts, though proven, are not available unless pleaded, must take his ground at the trial, otherwise he cannot avail himself thereof on review. Voorhees v. Burchard, same court. Opinion by FOLGER, J.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. }
S. D. THOMPSON, Ass't Editor. }

ST. LOUIS, THURSDAY, AUGUST 6, 1874.

{SUBSCRIPTION: $8 PER ANNUM, in Advance

FRAUD AS A GROUND OF ANNULLING MARRIAGE.—We learn from an exchange that a decision has just been made by one of the judges of the Supreme Court of New York, nullifying a marriage on the ground that the woman had been unchaste before wedlock, the fruits of guilt appearing shortly after. It appears that the husband had been deceived. He had heard reports affecting her character, but she had succeeded in convincing him that they were false. The order of the judge was to the effect that the marriage between the parties was obtained by fraud of the defendant, making the same utterly null and void, dissolving it, giving both freedom from the obligation of marriage with each other. The judge ordered the infant child of the parties to be committed to the defendant, and that the defendant pay the plaintiff $50 as the costs of the action. This decision is similar to Carris v. Carris, decided by the Court of Appeals of New Jersey (*ante*, pp. 235–6), and other cases therein cited.

PRIVILEGED COMMUNICATIONS.—The Washington Chronicle undertakes in its editorial columns to enlighten the public on "Why Moulton hesitates to speak," by showing that Moulton acted in the character of an attorney between Beecher and Tilton, and hence is prohibited from telling what he thus learned, his knowledge having been acquired from them under the seal of professional confidence. In support of this view the writer in the Chronicle learnedly quotes several legal authorities. The nonsense of it, however, consists in two facts: 1. That Mr. Moulton is a merchant, and not an attorney. 2. That if he had been an attorney, he was not acting as the *legal adviser* of either of the parties, but simply as a common friend. In order to be privileged, the communication must have been made to the *counsel*, *attorney*, or *solicitor*, acting, for the time being, in the character of *legal adviser*. 1 Greenl. Ev., §§ 239–241.

If our American dailies would follow the example of their English contemporaries and maintain a good lawyer upon their editorial staff, they would not drift into such egregious blunders when they undertake to discuss legal subjects. If the law editor of the London Times, or Pall Mall Gazette, had sent such an article to the printer, the next "privileged communication" would have come from his chief editor to him—"never more to be officer of mine."

The Salaries of Judges.

By the new constitution of Ohio the salaries of the supreme court judges are fixed at five thousand dollars per annum. In defending the action of the convention in this respect the committee appointed to prepare an address to the people say: "In learning and general ability these judges ought to occupy the first rank. It can hardly be expected, however, that men of this character will sacrifice the remunerative practice of their profession for a position on the supreme bench at a salary which scarcely pays their expenses. They must remain at the capital for nearly the entire year, where the cost of living has largely advanced. Their families must be supported and educated. When they shall have ceased to serve the state they ought not to be thrown penniless upon the world to begin professional life anew, and depend upon regaining the business they sacrificed to serve it. While in office they are forbidden to engage in any other employment; they ought, therefore to be reasonably rewarded, so that something shall remain to them when age and infirmity shall come upon them. But the whole matter is within the power of the general assembly, which may at its first session, reduce the salary if it see proper." While we are not an advocate of large salaries in a republic, we cannot forbear to express the conviction that the salary thus fixed by the convention is still much too low. To expect that men advanced in years, who have families to educate, shall be able to support the dignity and discharge the duties of that high office at a salary of five thousand dollars a year, and besides lay up something for their old age, is almost comical. For a new state like Kansas or Nebraska, such a salary would be sufficient. But for an old and wealthy state like Ohio, it is, large as it may seem to some, quite inadequate. It is about one thousand dollars less than the salary of a London police magistrate. We have heretofore expressed the opinion that the miserable salaries which most of the American states pay their judges, afford a striking illustration of the ingratitude of republics. There are at the bar of every large city, retired judges—old men who having given their best years and strength to the honorable labors of the judicial office, who are literally turned out to starve by the ingratitude of their countrymen. There are some who are literally objects of charity—who live by the contributions of their brethren of the bar, and whose presence among us is a walking monument of the meanness and parsimony of their fellow citizens. Judges ought to hold office during good behavior, or, at least, until they have attained a certain age. They ought to receive a salary adequate to support them in comfort, considering the high character of their office on the one hand, and the simplicity which becomes republican institutions on the other. And when they are retired from the bench, they ought to be retired on a pension sufficient to keep their declining years from want.

Reorganization of the Judiciary of Ohio.

The new constitution of Ohio, will, if ratified, introduce a number of important changes into the judicial system of that state. The necessity for relief of some kind is apparent, when we are told, as we are by the committee of the convention appointed to draft an address to the people of Ohio, that the accumulation of judicial business had so blockaded the courts that from one to two years was required to reach the hearing of a cause in the common pleas, and from five to seven years in the supreme ocurt. The committee say that the causes of this delay were obvious. The practice of second trials duplicated the labors of the common pleas judges. The time which ought to have been devoted to that court was diminished from one to three months in each year to review their own decisions in the district court, while the few hours allotted to this court in each county rendered its decisions a judicial farce, and caused it to fall into popular contempt. The committee

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also say that from a general want of confidence in this court, a large proportion of the causes have found their way to the supreme court, and thus have overwhelmed it also.

To remedy these evils a tribunal, called the circuit court, has been created intermediate between the common pleas and the supreme court. The official term of the circuit judges is eight years. This, it is thought, will give the circuit court stability, and be an inducement to legal learning to accept the office. The court sits twice in each county each year. The circuit courts have jurisdiction over the common pleas and other inferior courts.

The supreme court remains unchanged, except that the official term of the judges is extended to ten years. In electing the judges of this and the circuit court, the "minority representation" system of voting is adopted. That is to say, no elector can vote for more than three of the five judges of the supreme court, nor more than two of the three judges of the circuit court. This system is in vogue in New York, and is said to have worked well there.

"Each of the great political parties," say the committee, "is certain to elect a portion of the judges, and will therefore be responsible for their character, integrity and ability. It is supposed that a better class of nominations will thus be secured, the court divested of any appearance of political bias, and its decisions command a more general and hearty confidence."

Provision is also made for the establishment of a temporary commission to assist the supreme court in clearing its docket.

The New Constitution of Ohio.

We have received through the courtesy of Messrs. R. Clarke & Co. of Cincinnati, a copy of the new constitution of Ohio, agreed upon in convention, May 14, 1874, and which is to be submitted to the people for ratification. Among its provisions we note the following: In suits for less than one hundred dollars the jury need not consist of more than six persons. The writ of *habeas corpus* can be suspended only in such manner as shall be prescribed by law. Suits cannot be brought by publication, unless the court shall be satisfied that the residence and post-office address of the defendant cannot be found, so that he cannot have actual notice. This is a wise and excellent provision. The *per diem* of members of the legislature is abolished, and they are to be compensated by a fixed annual salary. The legislature is to sit annually, instead of biennially, as heretofore. The governor is clothed with a limited veto power.

An exceedingly wise and important provision in introduced as to the manner of voting upon appropriation bills, which we state in the language of an address to the people prepared by a committee of the convention: "Under the existing constitution, the general appropriation bill, like the general appropriation bill in Congress, has been made the vehicle for the grossest peculations in the public funds. Absenteeism often reduces the attendance to a mere quorum. A bare majority of this quorum can incorporate into the general appropriation bill, by amendment or rider, any scheme for depleting the treasury. On the final passage of the bill it must be voted on as an entirety, and unless it receive the vote of a majority of all the members elected to each house, it is lost. Appropriations necessary to carry on the government are thus coupled with, and made to abide the fate of, schemes of mere peculation and plunder. Members are compelled, against their convictions, to vote for the bill including these obnoxious items, or suffer a stoppage of the wheels of government. To prevent this is the purpose of the new provisions in sections twenty-three and twenty-five. Each item of appropriation must stand on its own merits and be voted on separately, by yeas and nays, on the demand of any member. If it fail to receive the constitutional majority it is to be stricken out. Thus each member is made personally responsible to his constituents for the vote he may cast. He can no longer have the pretence that, unless he vote for the bill, including the obnoxious item, it must fail, and the government suspend for want of funds." The governor also has a limited veto as to any separate item in an appropriation bill.

To prevent official extortion it is provided that the probate judges and common pleas clerks shall hereafter be salaried officers, and that all their fees shall be paid into the county treasury. In electing judges the principle of minority representation is adopted, so that both the great political parties shall be represented on the bench. Sweeping changes are made in the judicial system, but as these require to be noticed more in detail, we shall speak of them elsewhere. On the whole, the changes introduced by this instrument are so obviously wise and needful that there can scarcely be a doubt of its ratification by a decisive majority.

TAXATION OF PROPERTY OF RAILWAYS—POWER OF THE LEGISLATURE TO RELEASE MUNICIPAL TAXES ALREADY LEVIED AND DUE.—We publish in this number an important case on the subjects above indicated, very recently decided by the Supreme Court of Iowa. Subjects of this character have undergone frequent examination by this tribunal, and its judgments thereon are entitled to great respect and consideration. It will be observed that the court held, under the special constitutional provisions referred to (art. 8 § 2), that the legislature had no power to release railway companies from the papment of taxes fully due to a municipality at the time the releasing act was passed.

The valuable note to this case was prepared at our instance by Mr. Rodgers, one of the counsel, and in it he discusses the still open question as to the extent of legislative power over the *property rights* of municipal corperations. We consider the case one of unusual interest and value.

RETROACTIVE SCOPE OF NEW BANKRUPT ACT.—The extent of the retroactive effect of the late amendment to the bankrupt act, recently came before Mr. District Judge HILL of the United States District Court for the Northern District of Mississippi, in the case of Hightowner & Butler, and was argued by some of the ablest lawyers in the state (R. S. Smith, H. W. Walters and L. P. Cooper, for the creditors, and H. A. Barr and Robert Taylor, for the debtors); and on the next day the district judge, in a well-reasoned opinion, reached the following general conclusions, which seem to be correct:

1st. Amendments, to the bankrupt law, approved June 22, 1874, do not apply to involuntary proceedings in which the adjudication had passed prior thereto.

2d. These amendments do apply to all involuntary proceedings commenced after the 1st December, 1873, and in which the question of bankruptcy was pending on the 22d June, 1874.

3d. The remedial provisions of these amendments apply to

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all pending, or future proceedings in causes commenced since the 1st December, 1873.

See other cases to same effect, *ante* p. 362.

The learned Judge adopted, at the same time, the following RULES OF PRACTICE in involuntary bankrupt cases commenced since December 1st, 1873, and not adjudicated June 22, 1874.

1st. It is ordered that in all such cases the cause proceed as though the petition was amended to conform to the provisions of the amendment made to the bankrupt law, approved June 22, 1874, unless objection is made by the defendant or defendants.

2d. The objection made by such defendant or defendants, will be by affidavit *filed* in court, stating that the petitioning creditor or creditors do not embrace the one-fourth in number and represent the one-third in amount of the defendant's debts, provable under the bankrupt law and will be accompanied by a schedule of the creditors, their residence, and amount of their debts owing by the defendant or defendants, verified by affidavit.

3d. When such affidavit and schedules are filed, the petitioning creditors will be allowed twenty days in which to procure a sufficient number representing a sufficient amount to unite with them, so as to comply with the law as amended, which will be done by amended petition with preliminary proof of debt.

4th. In all involuntary cases commenced since the 22d of June, 1874, the petitioner must allege the requisite number of creditors and amount as required by the amendments. Ordered to apply to the Northern and Southern District, of Mississippi.

July 22, 1874. R. A. HILL, Judge.

Constitutional Law—Railway Taxation.

THE CITY OF DAVENPORT V. THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

Supreme Court of Iowa, June Term, 1874.

1. **Practice—Judgment at Once for Part of Admitted Claim.**—I. When the answer admits a certain part of the amount claimed in the petition to be due, judgment, under the Iowa code, may be rendered at once for the amount admitted, on motion, leaving the action to proceed for the residue of the claim. This is warranted by section 3135 of the revision of 1860, providing that "if only part of the claim is controverted by the pleading, judgment may at any time be rendered for the part not controverted."

2. **Taxation of Railway Property within City Limits.**—An act requiring railroad companies to pay annually to the state treasurer a tax of one per cent. on their gross earnings "in lieu of all taxes for any and all purposes on the road-bed, right of way, track, rolling-stock and necessary buildings for operating their road," did not exempt a railroad company having such property situated within an incorporated city, authorized by its charter to levy taxes for city purposes on "all taxable property" situated within its limits, from taxation by such city on said property. Following Dunlieth & Dubuque Bridge Co. v. City of Dubuque, 32 Io. 427.

3. **Adjudication in respect to other Taxes no Estoppel.**—In an action by a city against a railroad corporation to recover city taxes levied on defendant's property for certain years, a decree in a former suit, between the same parties, enjoining the city from collecting taxes levied on the same property for other and previous years, on the ground that said property was not taxable, cannot be pleaded as an estoppel in bar of the action. COLE, J., dissenting.

4. **Same.**—In such action a decree in a former suit brought by a stockholder in the railroad company against the city, without making the railroad company a party, enjoining the collection of the tax for one of the years sued for, on the ground that the property was not taxable, cannot be pleaded as an estoppel in favor of the railroad company against the city.

5. **Constitution of Iowa—Exemption of Railroad Property from Taxation Forbidden.**—Art. 8, sec. 2, of the constitution of Iowa, which recites that "The property of all corporations, for pecuniary profit, shall be subject to taxation the same as that of individuals;" *requires* the legislature to provide for the taxation of the property of such corporations tot he same extent and for the same purpose as the property of individuals; and forbids the exemption of such corporate property from any kind of taxation imposed on the property of individuals. COLE, J., dissenting.

6. **Power of Legislature to Release Taxes Levied by Municipal Corporations.**—Sec. 9 of chap. 26 of the laws of 1872, providing that "every railroad company which shall have paid all taxes on gross earnings provided for by chapter 106 of the acts of the 13th general assembly, shall be released from the payment of all other taxes which may have been levied upon the road-bed, right of way, track, rolling-stock and necessary buildings for operating their road, and no taxes for prior years for state, county, municipal or any purpose for which any other tax can be levied under the laws of the state, up to the first day of January last, shall be collected from any such railroad company on such property," is in conflict with art. 8, sec. 2, of the constitution, and, so far as it purports to release city taxes lawfully levied on the property of a railroad corporation, is inoperative and void. COLE, J., dissenting.

7. **Repealing Provision Construed.**—The 13th section of said act, providing that "all laws and parts of laws inconsistent with the provisions of this act are hereby repealed," does not take away the power to collect taxes lawfully levied on railroad property before the passage of the act. COLE, J., dissenting.

8. **Recovery of Taxes by Suit—Practice.**—In an action by a city to recover taxes due to it, the objection that such taxes are not recoverable by action, does not go to the jurisdiction of the court, but to the sufficiency of the cause of action, and, unless such objection was taken in the court below, it cannot be raised on appeal to the supreme court.

Cross appeals from Scott District Court. Action by the city to recover amount of city taxes for the years 1867, 1871; levied on the depot grounds, track and buildings of the railroad company, and on the north half of the bridge across the Mississippi river, within the city limits. The tax on the bridge for 1870 being admitted by the answer to be due, on motion of plaintiff, judgment was rendered against defendant for the amount thereof, with leave to prosecute the suit for the residue of the claim. From said judgment defendant appealed. Plaintiff demurred to the 1st, 2d, 3d, and 4th pleas in defendant's answer. The demurrers to the 1st, 2d and 3d pleas were sustained; from which order defendant appealed. The demurrer to the 4th plea was overruled, from which plaintiff appealed. The character of the pleas sufficiently appears in the opinion.

John N. Rodgers, for plaintiff; *Cook, Richmond & Bruning, Thomas E. Withrow* and *Edmonds & Ransom*, for defendant.

MILLER, Ch. J.—This case is one of paramount importance, both in the amount of money involved and the quantity of the legal questions presented. It has been argued by learned counsel, with great and unusual ability, and we have endeavored to give the case that careful and deliberate consideration which, its magnitude demands.

I. The district court did not err in rendering judgment on plaintiff's motion for the sum confessed by the answer to be due and unpaid as taxes upon the north half of its bridge. The answer in plain and unqualified language says that the "plaintiff is entitled to the sum of $3,500;" for taxes on the north half of its railroad bridge, for the year 1870, "for which amount and costs to the date of filing this answer, defendant tenders judgment."

The statute (Rev. § 3135), provides that "if only part of the claim is controverted by the pleading, judgment may any time be rendered for the part not controverted." The petition claims to recover city taxes levied upon the depot grounds and buildings thereon upon its railway track, switches and road-bed within the city limits, and also upon the north half of its railroad bridge across the Mississippi river, also within the city limits, for the years 1867, 1868, 1869, 1870 and 1871. Now the claim for taxes on the north half of the bridge for the years 1870, the defendant does not controvert, but confesses that they are due and payable and offers judgment therefor. The case comes clearly within the section of the statute above quoted. The plaintiff claims taxes on different properties for different years. The defendant does not controvert the claim on one of the pieces of property named for one of the years. This being so, the court did not err in rendering judgment for the sum admitted. The confession in the answer is not to be governed by section 3404 of the revision. The offer to confess judgment there provided for does not contemplate admissions or confessions contained in the pleadings. Under that section the offer must be made in court in presence of the plaintiff, or after notice to him that the offer will be made.

It is collateral to the pleading, for if not accepted it "shall not be deemed an admission of the cause of action in amount to which

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the plaintiff is entitled, nor be given in evidence at the trial." The offer likewise must be as broad as the acceptance is required to be, and since the acceptance must be in full of all demands, it follows that the offer must be equally broad. It is quite clear that the answer in this case does not come within the provisions of this section.

II. Did the court err in sustaining the demurrer to the first division of the answer? The substance of this count in the answer is, that having, for each and every year for which plaintiff claims, fully paid to the state of Iowa, the taxes on its gross receipts according to the requirements of the statute, the defendant was not liable to pay the taxes claimed, except those on the north half of the bridge for 1870 and 1871; that the payment of taxes by the defendant on its gross receipts was in lieu of all other taxes, including taxes which might have been levied by the city.

In Dunleith & Dubuque Bridge Company v. The city of Dubuque, 32 Iowa, 427, this court held that payment by a railroad company of a tax of one per centum on the gross earnings of the road, under chapter 69 of the act of the 12th general assembly, did not relieve the railroad company from the payment of city taxes levied upon its property within the limits of the city. The act was held to be confined in its operation to state and county taxes. Under the doctrine of that case the first count of the answer presented no defense, and the demurrer thereto was properly sustained.

III. In the second count of the answer, the defendant pleads as an estoppel a judgment rendered February, 1867, in the District Court of Scott County, enjoining the city of Davenport from collecting city taxes levied by it upon the same property on which taxes are claimed in this case for the years 1863, 1864 and 1865, in a suit brought by the Mississippi and Missouri Railroad Company against the plaintiff herein, and alleging that the defendant in this snit is now the owner of the said property on which taxes were levied, having purchased the same in 1866, at sheriff's sale, on special execution, issued on a judgment of foreclosure of a mortgage on said property. The demurrer raises the question whether that judgment works an estoppel of the plaintiff to collect the taxes sued for in this action. We are of opinion that it does not. While this actiou may be conceded to be between parties and privies to the former decree, yet we think it is clear that the subject-matter of the two actions are not the same. The taxes enjoined in the former suit were those for 1863, 1864 and 1865. This action is to recover for subsequent taxes. Each year's taxes constitute a distinct and separate cause of action, and the determination of the matters involved in the injunction suit reached no farther than the taxes of the years then in question. The cases are unlike those where two causes of action (as two promissory notes), forming the subject-matter of successive actions between the same parties, *both growing out of the same transaction*, in which a defence set up in the first suit and held good will conclude the parties in the second. So, a judgment of a competent court upon the validity of coupons attached to a bond is conclusive in another action between the same parties upon other coupons attached to the same bond. Bouchaud v. Dias, 3 Denio, 238; Whitaker v. Johnson Co., 12 Iowa, 595. But the taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two different promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.

In support of these views see the following cases: Arnold v. Arnold, 17 Pick. 4; Ferrers' Case, 6 Coke, 7; Cleaton v. Chambliss, 6 Rand. (Va.) 86; Clark v. Young, 1 Cranch, 181; Beere v. Fleming,* 13 Irish Ch. 506; Norton v. Huxley, 13 Gray, 285; Riker v. Hooper, 35 Vt. 457; Harding v. Hale, 2 Gray, 399; Marsh v. Pier, 4 Rawle, 273; Packet Co. v. Sickels, 5 Wall. 580, and cases cited; Myers v. Johnson Co., 14 Iowa, 47; Simmons v. Van Pelt, 12 id. 368, and cases cited.

[*I can find no such case. S. D. T.]

Again, this case does not fall within the principle involved where a particular issue of *fact* is tried and determined and judgment rendered upon such determination, which judgment estops both parties from afterwards denying the fact thus found and determined. See Bigelow on Estoppel, page 35.

In addition to what has been above said on this point it may be further remarked that the statute under which the former judgment was rendered was repealed by chapter 196 of the laws of 1868, which took effect April 29th, 1868, and this act was superseded by chapter 106 of the laws of 1870. Thus the taxes of 1868 and subsequent years were levied under statutes passed after the adjudication pleaded as an estoppel, and while the act of 1868 is similar in its main features to the act of 1862, which was in force when the injunction decree was rendered, yet a judgment involving the construction of a statute, and turning upon such construction, cannot be invoked after its repeal, as estoppel as to the law under a subsequent statute, though similar in its provisions, for this would deny to the court the power to determine whether the subsequent statute should receive the same in a different interpretation from that placed upon the repealed statute. It would tie the hands of the court, and prevent a construction of the subsequent statute. This cannot be allowed. The former decision may be an *authority* in a case arising under the subsequent statute, but it cannot be admitted as an estoppel upon the law-questions involved in the subsequent action.

Mr. Justice COLE does not concur in the holding on this point, but *holds* that since the prior adjudication was based upon the ground that under the state, as it then stood, the city had no power to levy any tax upon the same property, this want of power was therefore as effectually disposed of as it could be by litigating the taxes of each subsequent year. The tax for 1867 was levied under the same law as those embraced in the prior adjudication; other taxes for 1868 and 1869, under laws identical, in these respects, with it, and as to the latter he holds the adjudication conclusive.

IV. The third division of the answer sets up, by way of estoppel, a decree rendered in the Circuit Court of the United States for Iowa, November 2d, 1869, enjoining the city and its marshal from collecting the city taxes levied on the defendant's same property for the year 1868, in a suit by David Dows, of the state of New York, in which case it is alleged that he was then "a stockholder in the defendant's railroad." The tax involved in that case is one of those sued for in this case, but the parties are not the same in that case as in this. The plaintiff in the former case described himself as a stockholder in the defendant's railroad, it is true. This was necessary for the purpose of showing that he had an interest in the relief prayed, and this was the object of the averment. It does not appear to have been made with a view of prosecuting the suit for the benefit, or on behalf of the defendant, nor is it made to appear in any manner, that the railroad company claimed the benefit of the proceedings or even knew of their pendency. It is clear, therefore, that the defendant was neither party nor privy to that action. Nor would the decree in that case have bound the defendant if it had been adverse to the plaintiff therein. For this reason, also, the decree cannot be made a bar to this action. In order to constitute a bar, the former adjudication should have the effect to equally estop both parties. Myers v. Johnson Co., *supra*.

V. In the fourth count of the answer, the defendant claims to have been released from the payment of the taxes sued for, under and by virtue of chapter 26 of the laws of the 14th general assembly, approved April 6th, 1872.

The ninth section of this act reads as follows: "Every railroad company, which shall have paid all taxes on gross earnings provided for by chapter 106 of the acts of the 13th general assembly, shall be released from the payment of all the taxes which may have been levied upon the road-bed, right of way, track, rolling stock and necessary buildings for operating their road, and no taxes for prior years for state, county, municipal or any other purpose for which any tax can be levied under the laws of the State, up to the

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first day of January last, shall be collected from any such railroad company on such property."

The act embracing the above provision was passed after the taxes sued for in this action were levied, and after this action had been commenced.

It is insisted by plaintiff's counsel that this section of the act is unconstitutional, and therefore invalid.

The second section of article 8 of the state constitution is in these words: "*The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals.*"

The first enquiry which presents itself in reference to this clause of the constitution is whether the language used is to be understood as merely conferring upon the general assembly the power to tax this class of property; or whether it is in the nature of a mandate, requiring that such property shall be taxed the same as the property of individuals. Taxation is an attribute of sovereignty. It is one of the powers necessary to the life and existence of the state, and unless restricted in the fundamental law the power of the state is full and ample to subject all species of property within the limits to taxation for all lawful purposes. This power is vested in the general assembly by the people, who are the source of political power, in the following broad and comprehensive language: "The legislative authority of the state shall be vested in a general assembly which shall consist of a senate and house of representatives." See state constitution, section 1 of article 3.

Taxes can be levied only in pursuance of law. The law-making authority of the state is the general assembly. This power is given in general terms and confers the authority upon that body to legislate upon all rightful subjects of legislation, unless prohibited from so doing, expressly or by clear implication. Morrison v. Springer, 15 Iowa, 342-3; Stewart v. Supervisors of Polk Co., 30 Iowa 13. The taxing power being one of the sovereign powers of the state, vested in the general assembly, and not being limited in the constitution as to kinds or classes of property subject to taxation, it follows that the general assembly possesses the power, derived from its general legislative authority, to subject all kinds and classes of property to taxation for all proper purposes, and that the clause first above quoted was not necessary to enable it to pass laws for the taxation of the property of corporations.

The power of taxation reaches all classes of property alike, independently of this provision of the constitution. We therefore conclude that since it must have been intended to give some force and effect to this section as a part of the fundamental law, it must be understood as a command to, and as enjoining it as a duty upon, the general assembly to provide by law for the taxation of the property of corporations for precuniary profit, the same as that of individuals. In other words, this clause *requires* the legislature to provide for the taxation of this class of property, the same as that of individuals.

In the next place, what are we to understand to be intended by the language "the same as that of individuals?"

We need not determine whether this language requires that corporate property shall be taxed *in the same manner* as that of natural persons.

It seems, however, quite clear that it was intended by this language to require the legislature to impose the burdens of taxation upon the property of corporations for pecuniary profit the same as, or equally with, that of individuals. That the property of this class of corporations shall bear the same burdens of taxation as are placed upon that of individuals; that each shall be taxed for the same objects and in the same degree, so that individuals shall not be required to pay any taxes *on their property* which are not assessed and laid upon the *property of corporations* of the class named, nor in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. If the property of individuals be taxed for the state, county, school and municipal purposes, the property of this class of corporations must be subjected to the same taxes and at the same rates. The one cannot be exempt and the other liable.

This state of things existed under the law at the time of the passage of the act of the general assembly under consideration. The property of railroad corporations (which are conceded to be corporations for pecuniary profit), was, like that of individuals, subject to taxation for city purposes. See Dunleith and Dubuque Bridge Co. v. City of Dubuque, 32 Iowa, 427. The laws then in force subjected the property of railroad corporations to taxation for municipal purposes, the same as that of individuals. The act of the general assembly under consideration interposes and declares that those railroad companies which shall have paid all taxes assessed against them for *other* purposes, shall be *released* from these *city taxes*, which have been levied upon their road-bed, right of way, track, rolling-stock, and necessary buildings for operating their road, which would be otherwise subject to such taxation under the law. It seems very clear that here is a direct and palpable conflict between this act of the legislation and the constitutional provisions requiring the property of these corporations to be taxed for the same purposes and the same extent as that of individuals. The effect of the act if held valid would be to *exempt* the property of railroad corporations, situated in cities and incorporated towns, from municipal taxes, while the property of individuals, similarly situated, would be subject thereto; which is the very result that was intended to be prevented by the framers of the constitution.

It is insisted by the counsel for defendant that the act operates as a release of taxes on railroad *property*, and not on railroad *corporations*, and that it makes no distinction in respect to such property between corporations and individuals. In this we cannot concur with the learned counsel. The act under consideration deals *in terms*, with railroad corporations only. The language is, "every *railroad company* which shall have paid all taxes on gross earnings, etc., shall be released from the payment of all other taxes which may have been levied on the road-bed, right of way, track, rolling-stock and necessary buildings for operating their road, and no taxes for prior years for State, county, municipal or any other purposes for which any tax can be levied under the laws of the state, etc., shall be collected *from any such railroad company* on such property." The act releases the *railroad companies* who have paid, etc., from all taxes levied for any purpose on the property named. It is not an exemption or release from taxation of a class of property, irrespective of the ownership, but a release of these corporations from taxes which had been levied alike on their property and that of individuals. The act attempts to remove the burden from the corporations and leave it remaining upon individuals having property within the incorporated cities and towns of the state. The terms, "railroad companies," are used in the act as synonymous with "railroad corporations." These terms are used indiscriminately throughout the legislation of the state, and are so used as meaning the same thing. The terms "*railroad companies*," are more frequently used in the legislative acts than the terms "*railroad coporations*." In the use of the former terms in the act under consideration, it is beyond doubt they were used as synonymous with "railroad corporations." Indeed this seems to be conceded by counsel for defendant, but they claim that this objection of class legislation applies to all the legislation of the state in reference to railroads. We are not now considering how far the general assembly may go in making laws on other subjects than taxation which apply specially and peculiarly to railroad corporations, or to what extent "class legislation," as it is called, in respect to these corporations, may be carried. On this subject of taxation the constitution has forbidden any discrimination in favor of the property of this class of corporations.

But if the kind of property mentioned in the act under examination, viz: railroad property, be of a character that it may be owned and controlled by a natural person, still it would, under the laws of

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the state, be subject to be taxed for municipal purposes when situated within the limits of an incorporated city or town; for the act purporting to release *railroad companies* from the payment of such taxes cannot be construed to release a private individual from the payment of such taxes on the same kind of property when owned by him. This results in discriminating in favor of corporations and against individuals, and is plainly violative of the constitution. Again, if railroad property be of such nature as that it may not be owned or held by an individual, but can only be owned and held by railroad corporations, the act is equally vulnerable to the constitutional objection, for it affects the property only when held by corporations. It exempts the property of railroad corporations from taxation, while that of individuals remains, under the laws of the state, subject thereto. To prevent this state of things was the purpose of the constitutional provision herein set out.

Finding, therefore, that there is this direct and palpable conflict between the enactment under consideration and the constitution, it becomes our plain duty to declare the former invalid and of no effect. Stewart v. Board of Supervisors, etc., *supra*.

It is urged that the 13th section of the act of 1872, which provides that "all laws and parts of laws, inconsistent with the provisions of this act, are hereby repealed," takes away the power and right to collect the city taxes due and unpaid prior to the taking effect of that act. We think there are two satisfactory answers to this claim. *First*, the only laws declared repealed are those inconsistent with the provisions of that act. The only provision in that act, conflicting with the prior statutes upon this question, is the 9th section, which we have just seen is in conflict with the constitution and void. Being void, it is to be treated as if stricken out of the act, which leaves nothing therein inconsistent with the former statutes upon this subject, and hence they are not repealed.

Second, if the effect of the repealing section would be to release the railroad company from taxation upon their property for city purposes, while that of natural persons similarly situated is subjected thereto, then such repeal is in violation of the constitution, for the reason that it creates this inequality, and is invalid and inoperative.

Mr. Justice COLE dissents from the holding in the foregoing division of this opinion, on the grounds and for the reasons stated by him in his dissenting opinion in the case of the City of Dubuque v. the Ill. Cent. Railroad Co. (decided concurrently with this case).

VI. In the view we have taken of this constitutional question, it becomes unnecessary for us to examine and determine the question (very ably argued) whether the plaintiff, a municipal corporation, had such a vested right in the taxes due and delinquent upon the property of the defendant, situated within the city limits, at the time of the passage of the act releasing the same, as that the legislature could not constitutionally interpose and release them.

VII. Counsel on both sides have also very exhaustively argued the question of the right of the plaintiff to sue and maintain an ordinary action at law for taxes due and unpaid. This question is not raised in any manner by the demurrer, and is argued for the first time in this court. It is not a jurisdictional question that may be taken advantage of at any time. If there is anything in the objection, it is that delinquent taxes are not the subject of a civil action, or in other words, that the facts that taxes have been regularly levied on the defendant's property, which remain due and delinquent, do not constitute a cause of action. This objection must be raised by demurrer or otherwise in the court below, and cannot be presented for the first time in this court. We therefore refrain from intimating any opinion on this question.

On the defendant's appeal the judgment of the district court will be affirmed. But as the court erred in overruling the demurrer to the fourth count of defendant's answer, the judgment will, on plaintiff's appeal be REVERSED.

NOTE.—In the city of Dubuque v. Ill. Cent. R. R. Co., decided in the same court and at the same time with the foregoing case, BECK, J.. delivered an elaborate opinion, holding the releasing act of 1872 (in question in the foregoing case), to be unconstitutional, not only because it conflicted with art. 8 sec. 2, of the state constitution, in respect to taxation of the property of corporations for pecuniary profit, but also as being an invasion of the vested rights of property of the cities in the delinquent taxes sought to be released. The opinion maintains that, although the *powers* of a municipal corporation are subjects, as to their future exercise to be modified or taken away by the legislature, its *property* rights, acquired by the actual exercise of these powers, (including that of taxation), are as fully protected from legislative deprivation as the property rights of individuals; that the levy of a tax, under authority of law, creates a legal obligation upon the tax payer to pay, which is in the nature of a debt, and which the law implies a promise on his part to discharge. That the rights of the municipality to the taxes thus levied and due are protected against legislative deprivation by the constitutional prohibitions of laws impairing the obligation of contracts, and of the deprivation of property without due process of law. In support of these views the learned judge cites Milwaukee v. Milwaukee, 12 Wis. 93; State v. Haben, 22 Wis. 660; Trustees v. Mayor of Aberdeen, 13 Sm. & Mar. 645; Bowdoinham v. Richmond, 6 Greenl. 112; Benson v. The Mayor, 10 Barb. 223; Dillon Munic. Corp. § 39, and authorities cited. The cases mentioned in the note to the Dollar Savings Bk. v. U. S. (*ante*, p. 263) maintaining the right to sue for a tax, are also cited in support of the position that there is an implied contract to pay the tax.

MILLER, C. J., and DAY, J., concurred in holding the act of 1872, to be in conflict with Sec. 2 of Art. 8 of the Iowa constitution, but declined to give any opinion on the question whether it interferred with vested rights.

COLE, J., dissented, holding that a municipal coporation can have no vested right as against the state in uncollected taxes, and that Art. 8, Sec. 2, of the constitution, providing that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," is not *mandatory*, but simply *authorises* the legislature to provide for such taxation. The learned judge says on this point, "the manifest purpose and intent of the section is, to place the property of corporations, just like the property of individuals, completely within the legislative power for the purpose of taxation; so that the legislature could use the same authority and discretion in the enactment of laws for the taxation of the property of corporations as it could use in the enactment of laws for the taxation of the property of individuals. And the history of this section in the constitutional convention shows that the object of it was to place the property of corporations, then *existing* within the power of the legislature to tax, although in the flood of special legislation which had preceded the convention, and the peculiar incorporation privileges thereby conferred, many corporations had been granted exemption from taxation. The words "now existing or hereafter created," which were at one time incorporated in the section, were afterwards fully and sufficiently embraced in the phrase "all corporations" used in the section as adopted. *The sole practical effect of the section is to clothe the legislature with the authority to subject to taxation the property of corporations, although by the terms of their charters previously granted they were exempted from taxation.*"

It may be doubted, however, whether the effect here attributed to the constitutional provision is a very "practical" one, for the following reasons:

1st. The chartering of private corporations by special act either with or without exemption from taxation, has never been possible in the state of Iowa; being expressly forbidden by Art. 8, Sec. 2, of the original constitution, as it is by Art. 8, Sec. 1, of the present constitution. All such corporations in the state had been organized under general laws, and were as fully under legislative control as to taxation, as natural persons. The supposed evil, therefore, which the learned judge regards it as the office of Art. 8, Sec. 2, of the present constitution to remedy, did not and could not exist.

2d. If it had existed, the supposed remedy would have been ineffectual, for any corporation enjoying a chartered exemption from taxation, free from legislative interference under the old constitution, would have continued to possess the same immunity under the new one, notwithstanding the section now in question. An exemption from taxation is irrepealable only when it constitutes a *contract* between the state and the tax-payer; and in that case the state cannot become entitled to violate the contract by a change in its constitution. This is the settled doctrine of the United States Supreme Court. Dodge v. Wolsey, 18 How. 331 (360); Mechs. and Trader's Bank v. Thomas, id. 384; see Jefferson Branch Bk. v. Skelly, 1 Black, 436; see also matter of Lee & Co.'s Bank, 19N. Y. 9 (15).

Hence the construction placed upon the constitutional provision in the dissenting opinion appears to render it nugatory, whether such special exemption of corporations from taxation did or did not exist at the time of its adoption.

In U. S. Express Co. v. Ellyson, 28 Iowa, 370, involving the validity of a statute for taxing express and telegraph companies, the same view appears to have been taken of this section of the constitution as is adopted by the court in the principal case, *supra*; although the point was not then expressly determined. COLE, J., delivering the opinion of the court, says (p. 374): "But if

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the act did prescribe a rule for the taxation of the property of corporations different from that prescribed for the taxation for the same class of property when owned by individuals, we see no escape from the conclusion that it would be in conflict with the clause of the constitution relied upon and quoted above" (viz., Art. 8, Sec. 2), "and hence inoperative and void."

It may be added that the debates of the constitutional convention throw no light whatever upon the actual intent of the framers of this section, it having passed through all the various stages of consideration and action down to final adoption, *sub silentio*.

On the general qeustion of the extent of the legislative power over the *property* rights of the municipal corporations, (which is one of no little doubt and difficulty), in addition to the authorities cited by Mr. Justice BECK, *supra*, the following cases may be consulted with advantage: State v. St. Louis Co. Court, 34 Mo., 570; People v. Powers, 25 Ill, 190; Richland Co. v. Lawrence Co., 12 Ill. 7; Guilford v. Board of Supervisors, 13 N. Y., 143; Darlington v. Mayor, etc., 31 N. Y., 165; Layton v. New Orleans, 12 La. Ann. 515; Hampshire Co. v. Franklin Co., 16 Mass., 76; East Hartford v. Bridge Co., 10 How, 511; Trustees v. Tatman, 13 Ill. 29; Coles v. Madison Co., 1 Ill., (Breese) 120; and the very late case of Spaulding v. Town of Andover, N. H. Supr. Ct., unreported, but stated, *ante*. p. 198. Most of these cases relate to such questions as the power of the legislature to control the funds or property of the municipality, so far as to change their use or application from one municipal purpose to another; to apportion such property on the division of the municipality; to subject the corporation to legal liability for claims founded in justice, which liability might be enforced against the corporate property; to take away a franchise (as of a pubilc ferry) previously granted by the state to the municipality; to release a penalty given to the municipality after judgment in its favor therefor, and the like. These powers have generally been sustained by the decisions, though the power of apportionment on division of the municipality has in some cases been denied to exist unless exercised at the *time* of the division, or unless made with the consent of that part of the original municipality to be prejudiced thereby. Bowdoinham v. Richmond; Hampshire Co. v. Franklin Co., *supra*. In the few cases that have arisen where the legislature has attempted to directly *deprive* a municipal corporation of specfic funds or property in its actual possession (either by appropriating it to purposes not municipal or otherwise) the power appears to have been denied. State v. Haven, 22 Wis. 660; Milwaukee v. Milwaukee, 12 id. 93; Spaulding v. Town of Andover, *supra*. The People v. Kerr, 27 N. Y. 188, maintaining the legislative power to authorize the construction of a railway along a city street, without the consent of, or compensation to, the city, probably does not conflict with the above cases, the city's title to the soil of the street being held in trust for the *general* public.

The power of the legislature to *deprive* the citizens of a municipality of their corporate property, acquired and held for corporate purposes, cannot, it would seem, be maintained (as is some times supposed) by a simple reference to the undoubted power to which the corporation is to take away or modify any of the corporate powers. The legislature often possesses the same power over private corporations, by virtue either of express reservations in their charter, or of a constitutional provision or general law to which the charter is subject. But no one would now contend that this would subject the property of such corporations to legislative confiscation, even in case of the absolute repeal of their charter. The corporate body may be regarded as a trustee holding the legal title in trust for the corporators. And it would seem to make no difference that the corporation is a *public* one, and its property *public* property. It is not "public in the sense of belonging to the *general* public, *i. e.*, the state at large. It belongs, beneficially, to the citizens of the particular municipality, for their own particular and local "public" (in distinction from *private individual*) uses, and they would seem to be as much entitled to protection against deprivation at the mere pleasure of the legislature of their corporate as of their individual property.

It is suggested, with diffidence, that the true test to determine whether property-rights of a municipality are, in a given case, subject to be taken away or defeated by legislative enactment, is to ascertain whether such rights are complete and perfect, needing no further corporate action to protect them; or whether they are as yet *inchoate*, requiring the further exercise of the chartered powers of the municipality in order to bring them to perfection. In the former case, it is submitted, such rights, though acquired by the past exercise of powers conferred by the legislature, and liable to be taken away by it (the taxing power or any other), are to be regarded as *vested* rights, and covered by the shield of the constitution. In the latter case, the right must be regarded as imperfect and not vested, and liable to be defeated by the repeal of the power on the exercise of which it depends.

The result of the application of this test to the particular state of facts presented by the principal case, *supra*, viz: a legislative release of uncollected taxes lawfully levied by and due to a municipality, would depend on the question whether the levy of a tax creates the same relation of debtor and creditor between the tax-payer and the municipality as a contract between private parties; establishing a complete obligation on the one part to pay, and a title on the other to receive, which demand no *further* exercise of the taxing power to perfect them. If this be so, then the right is "vested," and the legislature cannot destroy it. If the contrary be the case, then the right of the taxes is *inchoate*, and must fall with the withdrawal of the power on which it depends.

J. N. R.

Davenport, Iowa.

[From our own correspondent.]

Recollections of Mr. Choate.

BOSTON, July, 1874.

EDITORS CENTRAL LAW JOURNAL:—No other man, who has been dead fifteen years, is so well known in Boston as Mr. Choate. Probably no man ever more earnestly desired to be remembered—as nothing so much pleases a good mother, who, at the same time is good-looking, as to see her *fac simile* in the face of her daughter. No doubt what Mr. Curtis justly called the sweetness of Mr. Choate's temper and the courtesy of his manner, have contributed much to keep his memory alive, for these were indeed sweet and most courteous, and altogether worthy to be remembered. He never offended anybody—never made anybody sad; nobody ever went from his presence but to tell the next friend he met he had just seen Mr. Choate and what Mr. Choate said. But, after all, it is not his manners alone, nor chiefly, charming as they really were, nor yet the sweetness of his temper, that keeps his memory alive, but exactly this: We saw in him a supreme genius, such an one as we had not until then seen, nor have since, nor expect to see again, and as such he is remembered. Mr. Dana said he was a "unique creation;" which would be quite true and apt if men were created, which they are not, but only generated. Mr. Choate was unique; that is, he existed, so far as I know, without an equal—without another like him that I know of. We sometimes have quite pretty plants in the public garden at Boston. Mr. Everett's statue overlooks some such now; but they all need the care of the gardener with his water-pot morning and evening, else they droop and die. But the plants that grow wild in luxurious entanglement in the gorges of the Savoy Alps, where warmth and moisture are perpetual and harvest home and vintage never fail—they are seldom or never seen in New England.

When a case was presented to Mr. Choate, he saw more of it than had been seen by others. He often saw it in some new relation; just as in a case which was pending in Maine, some years ago, in which eminent counsel had been engaged, and which had been through all the courts, and up to Washington and back, with an opinion of the supreme court against the defendant, when, for the first time, the papers, with the opinion, were put into the hands of Mr. Paine, and he saw there was a defence which had not been made, but which was perfect. He tried for a week or so to make his junior, who was his senior in years, understand it; but vainly, until, when on their way to the court house, on the morning when the case was to be re-tried, and when Mr. Paine had gone slowly over the case with him, the old man, all of a sudden, saw the point, as "in a vision," and fell to beating the wind and his person and exclaiming—We've got 'em! we've got 'em! Then suddenly stopping in the road, he added, in a lower tone, and with evident sadness, to Mr. Paine: "Between you and me, in the determination of this cause I shall lose a source of income which I had hoped would last while I lived."

One of Mr. Choate's first questions on consulting him, was—Is there any infirmity in our case? Another was—What are the the salient points? He would have you go all over the case with him; then he would take the papers home; and quite likely when you saw him the next morning, you would learn he had marked out a new course. When the bar meeting was held, soon after his death, and some others who had not been too friendly in his lifetime seemed anxious to connect themselves with his fame, some said he excelled most in the argument of questions of law; others said, it was in the trial and argument of causes before a jury; one said he shone most when addressing legislative committees. The truth is, he shone everywhere, and almost with equal brilliancy wherever he was engaged. For my part, I was associated with him at the argument of the case of Cunningham against the city of Boston, before the fall court, which was one of the last cases he ever argued, in the spring of 1859; and I then thought I never heard him argue so beautifully and well.

His taste for the beautiful was exquisite, and he did not need to be told what beauty was. He knew it by sight. If Socrates had seen and heard Mr. Choate, instead of a long and vain attempt to show in what the essential quality called beauty consisted, he would, I think, have contented himself with pointing to Mr. Choate as an example. Mr. Choate thought faster than he could write, which caused him, even with his rapid manner of writing, to make some mistakes—as a swift-running horse finds difficulty when running in keeping his fore legs out of the way of the hind ones, by which he is propelled.

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But his lines are straight across the paper, and his letters are all beautifully cut and turned. If wealth consists in beautiful thoughts, Mr. Choate was the richest man I ever knew. PELHAM.

[Communicated.]

Law Schools—Admissions to the Bar.

EDITORS CENTRAL LAW JOURNAL—GENTLEMEN:—Permit me to offer a few words in reply to the severe and indiscriminate attack on law schools, contained in your articles of July 2d, on "Admissions to the Bar," and of July 9th, "Law Schools—Reform Needed." I call the attack indiscriminate, because all law schools alike are embraced in it, without reference to the great difference existing among them in the very points upon which the attack is based. It is "the beneficial effect of law schools," as a class, "upon the profession or the public," that you call in question. Had your remarks been based, as those you quote from the Albany Law Journal were, upon the circumstances of a single state, the judgment implied would not be so severe. In New York, the legislature have passed a stringent law requiring a long term of study and careful examinations, before a student's admission to the bar; and the profession there seem to be making laudable efforts to carry out these regulations in their true spirit. This being the case, the exemption of the graduates of two or three schools from these rules, is undoubtedly a mistake. It can only be defended as a temporary measure, intended to protect the schools from the injustice that would otherwise have been done them before they could adapt their own course of study to the new system. And if I remember aright, the exemption *is* a temporary one, which will expire in a year or two—at least, as soon as any valuable fruit can be expected from the new rule of admission. In most of the states, no such legislation has even been proposed; it is doubtful whether popular sentiment would admit of a rule requiring two or three years' study in all cases before admission. To insist under such circumstances that the law schools alone should be required to adopt a course of that length, would be simply to abolish them—a course for which I think even their severest critics are hardly prepared.

Again, it seems to be assumed in the articles referred to, that the diplomas of all law schools are awarded at the mere will of the faculty, and that the professors have no control over the accessions thus made to their number. Whether this is the case in New York, I cannot say; but as all the schools there are private foundations, which originally had no power to admit any one to the bar, it may very probably be so. But it certainly is not the case generally. I doubt if there is a single law school in the West, whose diploma is of itself an admission, that does not give the courts or the bar an opportunity to test in every possible manner the fitness of its graduates for practice, and to exercise their influence on the whole course and manner of instruction. If this opportunity is not used, the blame does not lie with the schools; and if the profession will not take the pains to maintain an easy supervision over admissions from a few schools, how can it be expected that they will, as a body, watch and guard the innumerable courts and committees of examination through which, as through so many open doors, students are constantly pouring into the bar from the offices?

I do not wish to make any invidious comparisons or praise any particular school; but as this question is simply one of fact, you will permit me to use as an illustration the school with which I am most familiar. The graduates of the law department of Iowa State University, are, by law, admitted to practice on the presentation of their diplomas after a course of a single year, and, therefore, come directly within the terms of your criticisms. But who is it that determines who shall receive the diplomas? Every year since the foundation of the school, the Supreme Court of Iowa have appointed a committee of examination from among the best members of its bar, whose decision on the subject is absolute and final. They take the candidates for graduation into their own hands—the faculty, as a rule, not even being present—and examine them in their own method until they are fully convinced of their competency or failure, as the case may be. I have heard many examinations, both in the East and West, and I can truly say that no others, in my experience, have even approached the thoroughness and severity of those usually given by these committees. But that, after all, is not the point; be the examination severe or lenient, it is the Supreme Court of the State, and a picked number of members of the bar that decide finally who shall have the diplomas. If the law schools were all out of the way, how would you guard admission to the bar if not by this very method?

I mention this, not as a credit to the particular school, but for the very reason that I do not believe it to be a singular instance; on the contrary, I think a careful enquiry would show it to be only the type of the whole class, and would prove that no class of candidates for the bar are so carefully tested in all respects, or have their entire competency, intellectual and moral, guaranteed so conclusively by the bar and bench itself, as these decried graduates of law schools "turned out as with machinery."

Let me add one more significant fact—I state it of my own knowledge, but I have no doubt it can be verified from the experience of every law school in the country. Not only do the rejected candidates, who have gone through the whole course, but failed to get a diploma, find easy admission to the bar by the ordinary method as if they had come from an office; but one of the chief difficulties that law school teachers find in maintaining a high standard in their classes, arises from the fatal facility with which any student who has been a term or two in the school, can secure admission to the bar of the district or circuit court without the labor and expense of finishing a *whole* year's course! Every year a considerable number of students leave the school at intervals during the course, going home to get admitted by the old-fashioned process as so much easier than that of the school. Surely this does not look as if the profession needed protection against the law schools.

But I have already claimed too much of your valuable space, which can be used to much better purpose than in discussing an issue that the sound sense of the profession is rapidly settling for itself, as the constant growth of law schools testifies. For the recent outcry against them there may be, as I have already acknowledged, local and temporary grounds. But most of it sounds to me very much like what I used to hear when a student, about the disuse of special pleading. *Then*, it was the code system that was ruining the character of the profession, and filling it "with mere theorists and speculators, whose blunders and mispleadings will cause great confusion and serious losses." The generation, of whose future such dark prophecies were then uttered, has now grown into the seniors of the bar, and is expressing in its own way its profound and sincere conviction that all good law will be buried in its coffin.

Do not understand me, however, as maintaining that our present law schools do not need improvement. No one can appreciate their imperfection more than I do. They are, as yet, but mere experiments, by means of which we are generally learning the true methods and processes of legal education and legal thought generally. I only deprecate attacks which seem likely to check their growth and development, and restore the wretched empiricism from which they are gradually elevating us. In another letter, if I have not already exhausted your patience, I will venture to say something upon this side of the topic. Yours respectfully, &c., &c.,

IOWA CITY, July 16th, 1874. W. G. H.

COMMENTS.—The foregoing communication is from the learned and accomplished Dr. Hammond, one of the professors in the law department of the University of Iowa. Speaking for the profession, as well as for ourselves, we shall be glad to have the writer's views concerning what law schools should be. We may then have some further remarks to make on the important subject thus brought into notice. Meantime we enter a disclaimer of any hostility to law schools, and beg to say that we are in favor of their maintenance, and when reformed so as to prevent too rapid graduation we wish them success. In our opinion, the best way to learn law is to spend a portion of the student-period in the office of an active practitioner and the rest in a school having such a corps of competent instructors as we know the gentlemen to be who fill the chairs of the law department of the Iowa University. We do know, that it is utterly impossible, under any instruction, however thorough may be the course or able the professors, for a young man without any office experience to become fitted to practice law in a single course of lectures, and we shall keep up this agitation until the law schools of the country shall adopt a two years' course or its equivalent, or until graduation under the one year system of instruction shall cease to be an equivalent to admission to the bar. We can indorse Dr. Hammond's statement of facts as to the thoroughness of the examinations at the Iowa University, but the burden of our criticism is upon the one year system and not upon the mode of instruction or its extent except in the too limited period required for graduation.

Book Notice.

THE LAW OF NEGLIGENCE. By THOMAS G. SHEARMAN and AMASA A. REDFIELD. Third Edition. New York: Baker, Voorhis & Co. 1874 Sold by Soule, Thomas & Wentworth. St. Louis.

The favorable reception of this work verifies a remark we before made—that the profession are not slow to discover the merits of a good treatise, and this is particularly true where, as in the present instance, it treats of a subject with which the practising lawyer has daily to deal. Steam is the great motive agency of modern transportation, whether on land or water, and it supplies the power by which nearly all manufactories are operated. To successfully carry on the commerce, navigation, and manufactories of the present day, corporations which can collect and combine the vast capital required have been created and multiplied to an extent absolutely surprising, employing a vast army of servants of all grades, from the board of directory or president to the laborer in the most subordinate position. Steam, while it is a necessary, is at the same time a dangerous agency. The life and limb of the employee, and the safety of the public must be duly regarded. Out of these elements,

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in connexion with legislation touching them, as for example "Lord Campbell's Act" (9 & 10 Vict., chap. 93. 1846), and the statutes in the states of this country modeled upon it, has grown much of the litigation with which the courts have been occupied for the last twenty years. And out of these circumstances has also arisen the necessity for a specific work on Negligence. In executing it, however, the authors, for the convenience of the profession, have not confined it to negligence as a tort, but have also included a vein of the law relating to the negligent performance of contracts.

The first part of the work treats of Negligence—its degrees, and of Contributory Negligence. Then follow separate chapters on the Liabilities of Masters for Servants; of Masters to Servants; and of Servants to Third persons; Landlords and Tenants; Municipal Corporations; and Public Officers; The authors then proceed to treat of the obligations of persons in respect to particular things or kinds of employment—as in the Chapters on Animals, Attorneys, Bankers, Bridges, Canals, Carriers, Highways, Municipal Corporations, Railroads, Real Property, Physicians and Surgeons, Sheriffs, Telegraphs, Water Courses, and many other subjects collected in the chapter on Miscellaneous Cases of Negligence. The work concludes with a chapter on the Measure of Damages in Actions for Negligence.

We can speak from a practical acquaintance with the work of its construction and merits. Scarcely a term of court occurs that it is not referred to by counsel or used by the judges. It is framed upon what we consider in this day, and in the present state of the reports, the true plan: that is, the text is appropriated to the statement of general principles and general results, and the notes to such a minute view of the cases as will illustrate the subject by exhibiting the actual condition of the adjudications. The authors have done their work well, and when we find a meritorious production like the present it gives us sincere pleasure to commend it.

A leading feature of the treatise is its practical character, which is evident on an inspection of the notes and from the fact that though the work contains only about 700 pages, nearly 5,000 cases are cited.

Upon examination we find that, in general, the late important cases have been referred to in their appropriate connections, yet we also discover some omissions, as for example on the important question as to the *extent* of the burden of proof upon the plaintiff to entitle him to a recovery. It is well known that the decisions are conflicting upon the point whether to recover the plaintiff must not only show that the defendant was negligent, but also that he himself was free from contributory negligence. In sections 43, 44 and 412, the authors give a very full view of the state of the decisions, and in section 44 state their own opinion, which we regard as the sound one, yet they omit to cite the recent decision of the Supreme Court of the United States in the case of the [Washington &c.] Railroad Co. v. Gladmon, 15 Wall. 401. This case holds that the burden of establishing such contributory negligence as will defeat a recovery is upon the defendant, unless, indeed, such negligence appears on the plaintiff's own proofs. In view of the rapid increase of the reports, text writers as well as courts will soon be compelled to discriminate more than at present between courts and cases and this will increase the relative weight and importance of the decisions of the Supreme Court of the United States.

We unreservedly commend this work to the profession, who will find tha the present edition is revised and much improved.

THE AMERICAN MEDICAL WEEKLY. E. S. GAILLARD, M. D., editor and proprietor, Louisville, Kentucky. Vol. 1. Terms $2.00 per year in advance.

Law and Medicine have, to some extent, a common domain with which medical jurisprudence has to deal. Dr. Gaillard is well known to his profession as an instructor in the Louisville Medical College, and as an experienced editor. He fully appreciates the advantages of a *weekly* publication, and has therefore established the journal whose name appears above and which we welcome to our table.

STORY ON AGENCY. Eighth edition, revised with additions. By N. ST. JOHN GREEN. Boston: Little, Brown & Co. 1874.

We consider it unnecessary to refer at length to the merits or character of the orignal work. The judgment of the profession is seen in the fact that since 1839 it has passed through seven editions. This is the eighth, but the additions of Judge Redfield and Mr. Hernck, the former editors, are retained and distinguished. The last edition was published in 1869, and the present editor informs the reader that the present edition contains more than 400 additional cases, most of which have been reported since the publication of the last edition.

LAW OF MECHANIC'S LIENS ON REAL AND PERSONAL PROPERTY. By SAMUEL L. PHILLIPS, Washington, D. C. Boston: Little, Brown & Co.; 1874. pp. 728. St. Louis: Sold by Soule, Thomas & Wentworth.

The common law gives to mechanics and material-men no lien upon the buildings into which the labor of the one and the materials of the other have gone, or upon the land on which the buildings are erected. The equity of these persons to such a lien is so persuasive, and the necessity and expediency of making provision for their better security have been so generally and so strongly felt, that in every American state there are enactments giving and regulating the lien of mechanics and material-men. This branch of the law is, therefore, purely statutory; but it is, nevertheless, one of no inconsiderable practical importance.

The present work, while limited in its subject to one topic, is framed, as the author states in his preface, upon the plan of incorporating into it *all* that can be found in the reports concerning it. We believe he has done so. The exact force and meaning of a decision arising under a special statute can only be known when the language of the statute is given, and the general scope of the enactment understood. The author often quotes briefly the text of the statute in stating the construction it has received, but whether he has done so sufficiently to prevent error in elsewhere applying his brief statement of local decisions, may admit of some question. We have no doubt of the general usefulness of this work, and it certainly has been prepared with much labor and it seems to us, also with much care. We have had no opportunity of verifying the author's citations and statements, but we have examined his book sufficiently to have formed the most favorable opinions concerning it, and we do not hesitate to recommend it to our readers.

OLIVER'S PRECEDENTS IN PERSONAL AND REAL ACTIONS, WITH ANNOTATIONS. Revised and enlarged by a member of the Cumberland bar; with references to the later statutes and decisions, and a large number of new precedents, framed by eminent pleaders; embracing also rules, forms and precedents, according to the practice acts of Massachusetts, supervised by a member of the Suffolk bar. Draper, McLellan & Co., Portland, Me. 1874. St. Louis: Soule, Thomas & Wentworth.

This work so well known in New England and by New England lawyers, has an interesting history. It had its origin many years ago in the "American Precedents of Declarations" compiled by B. Perham, Esq., assisted by Joseph Story, then a young man just commencing his professional life. These Precedents received the approval of the profession for years, and were finally added to, and newly arranged by, Benjamin L. Oliver, by whose name the work is now known. This is the fourth edition modernized. It omits nothing of the original work (and in that the present editor has done wisely), and has added 200 pages of new matter, with notes and citations of cases.

The additions record the changes in the state of society, and consequently, of the law which regulates and governs society. In former editions there was no form for actions against towns for defective ways, against railroads and telegraph companies for neglect in collisions and other things; against parties fraudulently concealing from creditors the property of their debtors; against stockholders or corporations for corporate debts; against conductors of railroads; against physicians for mal-practice; any variety of forms in actions against insurance companies; to recover subscription to railroads; to enforce mechanics' liens, etc., etc.

This has been supplied in this edition, and appropriate forms have been given, often with the names of well known lawyers affixed to them. Whoever is in want of a convenient and reliable manual in one volume of Forms of Declarations, or Petitions, or Complaints at Law, will find this to be a useful work. It does not contain forms of pleas or answers. We are tempted to add that the loose and unskillful manner of pleading which has accompanied, if not caused the code era, makes a recurrence to these forms by the younger lawyers desirable. To frame a good declaration or a good special plea, good in substance and good in form, requires a philosophic knowledge of the case or defence, and argues a good lawyer, and our experience under the code is that approved precedents are too much overlooked.

Summary of our Exchanges.

The Legal Gazette, for July 31. publishes The Pacific R. R. Co. v. Maguire, published in this journal for April 30. Also Hicks v. Kelsey, Supreme Court of the United States, October Term, 1873, holding that the mere change in an instrument or machine of one material into another, as of wood, or of wood strengthened with iron, into iron alone, is not "invention" in the sense of the patent acts, and therefore is not the subject of a patent; the purpose and means of accomplishment, and form and mode of operation of each instrument, the new as of the old, being each and all the same; and that the mere fact that the new instrument is a better one than the old one, requiring less repair and having greater solidity than the old one, does not alter the case. It does not bring the case out of the category of more or less excellence of construction.

It also publishes Schooner Mary H. Banks v. Steamer Falcon, same court, same term, in which case a steamer collided with a schooner in Chesapeake

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bay, causing the sinking of the schooner. It appearing from the facts of the case that the steamer was in fault, the court held the steamer to be liable for the full value of the schooner at the time of her loss. And this notwithstanding the fact that the schooner was afterwards raised and repaired.

It also publishes Ahl's Appeal and Rice's Appeal, Supreme Court of Pennsylvania, July 2, where the court hold that jurisdiction of the court over a fund arising from the sale of the property and franchises of a corporation having attached, equity comprehends within its grasp all incidental matters necessary to enable it to make a full and final distribution, and therefore to terminate litigation, while it affords a perfect remedy; and that in this particular case the master appointed by the court below should have distributed the fund among the several claimants and not only to the parties holding the second mortgage bonds of the company.

The Chicago Legal News, for August 1, publishes Oregon Steam Nav. Co. v. Winsor, published in this journal for July 16. Also Knowles v. Logansport Gaslight Co., Supreme Court of the United States, October Term, 1873, on the conclusiveness of judgments of sister states. This case was noticed in our issue for March 19 (*ante*, p. 135), and was also published in full by us in our number for June 25, in a note to the more important case of Thompson v. Whitman, which it follows and applies (see *ante*, pp. 211, 312.)

The Legal News also publishes a highly interesting and important decision by Mr. Circuit Judge Drummond, United States Circuit Court, Northern District of Illinois, in The Atlantic & Pacific Telegraph Co. v. The Chicago, Rock Island & Pacific R. R. Co., of which the following is the syllabus: "An act of Congress of July 24, 1866, provides that any telegraph company then organized, or which might thereafter be organized, etc., should have the right to construct lines of telegraph through and over any portion of the public domain of the United States, and over and along any of the military or post roads of the United States, which had been or might thereafter be declared such by acts of Congress. Other acts declare all railroads in the United States to be post roads: *Held*, that it was not intended by these statutes to authorize any telegraph company to work on the road way of a railroad, or upon a post road of a railroad belonging to it, and not to the public, and that the plaintiff has no right to establish a telegraph line upon defendant's right of way without making compensation therefor in accordance with law."

The Legal News also publishes a very interesting bankruptcy decision of Mr. District Judge Blodgett, of the United States District Court at Chicago, holding that creditors who, since the amendment of June 22, 1874, have joined in the petition, cannot afterwards be allowed to withdraw from the proceedings; that such a practice would lead to underhanded agreements between the debtor and a part of his creditors at the expense of the others, and cannot be allowed. But the learned judge intimates that if all desire to dismiss the proceedings it could be done.

The Legal News also publishes Main v. Second National Bank of Chicago, decided by Mr. District Judge Hopkins, and published in this journal for April 30 (*ante*, p. 232.) Also Vallette v. Bennett, Supreme Court of Illinois, construction of the deed of an assignee in bankruptcy. Also Freese v. Tripp, Supreme Court of Illinois, expounding the Illinois temperance law of 1872, with reference to the measure of damages which a wife is entitled to recover against a saloon keeper who sells liquor to the husband, whereby she suffers injury in consequence of his becoming intoxicated. Also Carpenter v. Sherfy, same court, sheriff's sale under a void judgment.

The Albany Law Journal, for August 1, contains an article by "D.," combatting the views contained in a previous article by J. Alexander Fulton, Esq., of Dover, Delaware, on the doctrine of ancient lights. Under the head of "Some Recent Decisions" we are made acquainted with the points ruled in a number of interesting cases in 11 American Reports. John F. Barker, Esq., of New York, discusses the interesting question, Who is the Legal Custodian of Dead Bodies? This number of the Albany Law Journal contains (as usual) much other interesting and instructive matter.

The Chicago Railway Review, for August 1, publishes Osborne v. Hartford & New Haven Railroad Co., Supreme Court of Connecticut, on railway taxation. Also a synopsis of Chief Justice Waite's opinion in Swasey v. The North Carolina Railway Co., *et al.*, which was a suit on railway-aid bonds guaranteed by the state of North Carolina.

We do not find in our other exchanges, received this week, anything of general interest.

Notes and Queries.

ST. LOUIS, July 27, 1874.

EDITORS CENTRAL LAW JOURNAL:—Do you know anything of the work just published by Dunlap & Blickensderfer of Erie, Penn., entitled "Law Student's Review book?" Is it a reliable work, or is it any account at all? Answer through columns of CENTRAL LAW JOURNAL, and oblige

STUDENT.

ANSWER.—We have not seen the book referred to, but will give "Student" the benefit of the opinion of two of our exchanges. The Legal Intelligencer says of it: "When a student at law has read the course usually assigned him by his preceptor, the latter calmly directs him, as examination approaches, to "review" what he has read. This practically means a re-reading of the whole, which the time will not allow. At this juncture the student will find the above work of very great value. It is a pocket edition of common and mercantile law, by which he can more readily familiarize himself with their ever-recurring principles, than by the tedious perusal of volumnious text-books. Within its 300 hundred duodecimo pages are embraced abridgments of Blackstone, Evidence, Pleading, including Parties to and Forms of Action, the Law of Contracts, and a Glossary of law terms and phrases. We are surprised and gratified to find so small a book contain so much useful matter, well digested and arranged."

The more critical editor of the Albany Law Journal notices it as follows:

"This litle book is designed, as we gather from the preface, to aid the student in a review of some of the principal topics of the law. So far it will be found convenient and useful, but we should not recommend any one to undertake to get from it a knowledge of the law, *de novo*. It contains a synopsis of Blackstone's Commentaries, and of the rules of evidence, pleading and contracts, and concludes with a brief tribute to Blackstone, written, we are informed, by Mr. Dunlap, while engaged in the study of Blackstone's Commentaries. Mr. Dunlap would better have stuck to the Comentaries and let verse-making alone. We quote the concluding lines of this wonderful effusion:

'Where shall we look but to the great Creator,
For one superior to our commentator?'"

Legal News and Notes.

—MAJOR ASA BIRD GARDINER, judge advocate, has been assigned to duty as professor of law at the West Point Military Academy.

—COL. THOMAS C. NESBITT, of Georgia, is dead. He was a prominent man of that state, and an able lawyer.

—JAMES M. SHERMAN, Esq., an eminent member of the New York bar, and a widely known and much esteemed citizen, died suddenly at his residence in New York city, on the 27th instant.

—EDWARD LANGE, convicted last October of stealing United States mail bags, and sentenced by Judge BENEDICT of the United States District Court at Brooklyn, to pay a fine of $200 and be imprisoned one year, was subsequently resentenced to imprisonment alone, the first sentence being contrary to the statute. The second sentence was declared invalid by the supreme court, and Lange was discharged. He now has begun suit against Judge BENNEDICT, for false imprisonment, claiming $50,000 damages and his costs.

—A JUDGE of one of the courts of Kentucky, the other day, so far forgot what was due to his high office as to challenge the editor of the Cincinnati Enquirer to mortal combat. The challenge elicited a card from the editor in which he uses the following language:

"If I acknowledged the right of ever ypublic wrong-doer, whose actsare discussed in the Enquirer, to challenge me to mortal combat, I would find my time so thoroughly taken up with affairs of honor that I would neither be able to earn a livelihood nor serve the public. I have already expressed the opinion the code is the refuge of swashbucklers."

—THE trustees of the Louisville Medical College (Louisville, Ky.), appreciating the impoverished condition of the whole country, have determined to grant a benificiary scholarship to any young man who, sufficiently educated to study medicine and of good character, is unable to pay for his education. To secure this valuable aid, application, with a full statement of the facts, should be made without delay to Dr. E. S. Gaillard, dean, Louisville, Ky. The Louisville medical college is one of the best in the country. Dr. Gillard, one of the principal instructors, is the editor of two widely circulated medical journals, and has a reputation coextensive vith the Union.

—THE business of defrauding life insurance companies is getting to be an important branch of the blackleg profession. We have recently seen Udderzook and Goss burn up a resurrected corpse in a tenement in Baltimore, for this purpose; and then we have seen Udderzook kill Goss in order to cover up of the crime. Still later, a doctor somebody is sent to the penitentiary for two years by a court in New York city for burying a coffin full of bricks, with a like thrifty end in view. And now comes a report from Ireland to the effect that some smart fellows have been detected in a conspiracy to cheat the New York Insurance Company, but unfortunately for themselves they were found out. Among the accused were two doctors, who certified as

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to the health of their neighbors from general knowledge, without taking the trouble of asking the interested persons whether they wanted their lives insured or not. The jury considered that this was criminal neglect, and found them guilty, as well as the agent, who seems to have been the organizer of the conspiracy to defraud. All three were sent to prison, with hard labor, the doctors for twelve months and the agent for eighteen. In the opinion of the Irish press the punishment is too light.

—HON. JAMES B. BOWLIN, formerly judge of the Criminal Court of Saint Louis, and who since filled many important public stations, died recently in Saint Louis. Hon. Lewis V. Bogy, speaking in eulogy of Judge Bowlin at the bar meeting called on the occasion of his death, used the following language expressive of the great changes which time has wrought in the ranks of the St. Louis bar: "Among the members of the bar of that day who are still living, I now at this moment remember but John F. Darby, Judge Hamilton Judge Primm, Gov. Polk, and Judge Drake, now a resident of Washington city. All the other lawyers who were here in 1835 are now dead Some of them were truly distinguished men, yet, it is painful to say, are now in a manner forgotten, even by th ir successors at the same bar, where at one time they were such leading and shining characters. Yet several of them filled the highest offices in the land—United States senator, judge of the supreme court, governor of the state, member of the lower house of Congress, and cabinet minister of the United States—Geyer, Bates, Spaulding, Gamble, Allen and Lawless were men of decided ability and learning in their profession."

—THE fable of the dog who, while crossing a brook with a piece of meat in his mouth, saw his reflection in the water beneath the narrow foot-bridge, and who dropped the substance in order to snatch at the shadow, has been recently illustrated before our courts. Mr. Blank some years ago married a lady much older than himself, who possessed a snug little property which included real estate in Kansas valued at fifty thousand dollars. Mr. Blank's wife died recently, bequeathing to her husband a life interest in the Kansas property, but her relatives contested the will on the ground that the testator had been subjected to undue influence, and they succeeded in getting the will set aside. Exceptions to this decision were promptly filed, but while Mr. Blank's counsel were waiting to argue them, one of the lawyers thought it would be well to ascertain the nature of the laws of Kansas in relation to the reversion of property by married women dying childless and intestate. He found the Kansas laws differing greatly from our own in this respect, for in that state the property of wives without issue who leave no wills, goes to their husbands. The real estate owned by the deceased wife of Mr. Blank being situated in Kansas, the laws of that state would govern its disposition; therefore the decree of the court, in setting aside Mr. Blank's will, gave her property absolutely to her consort. It is needless to add that the counsel for Mr. Blank dropped their exceptions, and that the joy of their client and the chagrin of his late wife's relatives are about equa, in degree.—*Boston Daily Advertiser.*

Notes of Cases.

Our notes of English cases are from the Law Times. Our notes of cases decided in the New York Court of Appeals and in the New York Commission of Appeals are from the Albany Law Journal. Those decided in the Supreme Court of Ohio are from advance sheets of the 24 Ohio State Reports, furnished by Messrs. Rorer Clarke & Co , of Cincinnati, or from the American Law Record (Cincinnati). Those decided in the Kentucky Court of Appeals are from the American Law Record. Those decided in the Supreme Court of the United States are from printed opinions in our possession Those decided by the Supreme Court of Michigan are from Chaney's Quarterly Digest Others are from cases reported in our exchanges, unless otherwise stated.

Bankruptcy—Composition with Creditors.—It is well known that the feature introduced into our bankrupt law by the recent amendment which relates to compositions with creditors, is similar to the English and also to the Irish bankrupt acts. It will, therefore, be interesting to note, from time to time, the decisions of the courts of those countries with reference to this subject. In the case of J. L., an arranging debtor, determined in the Irish Court of Bankruptcy, before MILLER, J., and reported in 8 Irish Law Times Reports, 106, it was ruled that if a debtor who has carried an arrangement under the arrangement clauses of the Irish bankruptcy and insolvency act, 1857, fail to pay the instalments of the composition which his creditors have agreed to accept, the creditors are remitted to their original rights. The court of bankruptcy will not restrain such a creditor from proceeding in a court of common law to recover the entire amount of the debt for which he had agreed to take a composition in the arrangement matter. The learned judge said that "payment of the several instalments of composition in the manner as thus provided is the condition precedent upon which the entire composition hinges, and the debtor was not to be discharged from his original liability to pay the full amount of his debt, unless he paid the composition according to the manner provided in that composition arrangement; or, in other words, from the moment at which the debtor failed to pay the composition according to his arrangement, any creditor who had not compromised himself by his personal conduct, is necessarily, at his own desire, remitted, according to every principle of equity and law, to his original rights and remedies; and under any such agreement, in the terms as stated, no court of equity would interfere unless the default occurred through some accidental circumstances over which the debtor himself had not, perhaps, any control. In a case like the present, where the arrangement for composition admits of so simple a construction, there is no necessity for reviewing the authorities, which are both clear and cumulative."

Married Women — Partnership.— In Swasey v. Antram, Supreme Court of Ohio, December Term, 1873 (Am. Law Record, June, 1874), the following points are ruled:

A married woman has not the capacity to enter into a general mercantile partnership not connected with or relating to her separate property; and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner.

A *feme covert*, having obtained a "permit" to trade within the lines of the army, with the knowledge and consent of her husband, entered into a partnership with other persons for the purpose of buying and selling goods and merchandise under "permit," and she, with the assistance of her husband, managed and conducted the business. The firm was subsequently dissolved, and its property transferred by the other partners to her, she agreeing to pay all the partnership debts. She then sold the property to S., who had notice of all the facts, and who in like manner agreed to pay the partnership debts. This was all done with the knowledge and concurrence of the husband, who joined her in executing the bill of sale to S. In an action by a creditor of the firm against the husband and the other members of the firm, not including the wife—

Held, that the goods in the hands of S., or the price agreed by him to be paid therefor, and not yet paid, are liable to attachment in the action.

Mexican Grant—Statute of Limitations.—In LeRoy v. Carroll, 7 Pacific Law Reporter, 201, Mr. Circuit Judge SAWYER, of the United States Circuit Court for the Ninth Federal Circuit, District of California, decided that the statute of limitations of California does not begin to run against a confirmed Mexican grant, formerly located under the act of Congress of 1860 (12 Stat. 34), until the patent issues. This ruling is based on Henshaw v. Bissell, Supreme Court of the United States, October Term, 1873, in which Mr. Justice FIELD, in delivering the opinion of the court, said that "the statute can only begin to run against the title perfected under legislation of Congress, *from the date of its consummation.*"

Municipal Bonds—Enforcement of Payment after Judgment—Aldermen Resigning—Costs.—In United States *ex rel.* I. W. Pollard v. The City Council of The City of Pleasant Hill, United States Circuit Court, Western District of Missouri, April Term, July 6, 1874, an alternative writ of mandamus was, on the 19th day of May, 1874, granted upon an information showing that the relator had previously obtained a judgment against the city, upon which execution has been issued, and returned in part unsatisfied for want of property whereon to levy. The writ commanded the city council to levy a special tax to pay the balance due on the execution. Returns were made by the mayor and councilmen, who together constitute the city council, setting forth that, since the writ was served upon them, all the councilmen had resigned, leaving their offices vacant, and the mayor alone was left to administer the city government; and that the charter of the city conferred no power on him to levy the tax. There was a prayer that the writ abate as to the councilmen, and that they recover costs.

J. W. Rigdon, for respondents. *T. K. Skinker*, for relator, insisted that the costs should be adjudged against the councilmen.

KREKEL, J.—I have no hesitation in adjudging the costs against the councilmen, who have resigned since the writ was served on them, more especially as they make no attempt to purge themselves of their neglect to obey the writ. Having assumed the duties of public offices, they cannot be permitted thus to thwart the process of this court, deprive the relator of his remedy, and at the same time throw the costs upon him.

Marine Insurance—Stamp Act—"Slip"—"An Enormous Subtlety."—An interesting case, though perhaps of no practical importance in this country, was recently determined in the Court of Exchequer Chamber, Westminster, before Lord COLERIDGE, Baron BRAMWELL, Mr. Justice BRETT, Baron CLEASBY, Mr. Justice DENHAM, Baron POLLACK, and Baron AMPHLETT. The point was, whether the usual "slip" given by underwriters preliminary to a policy, and which had always been considered binding in honor, was in any way

binding in law. The company's agent initialed, according to the usual practice, a "slip" for a policy of insurance on goods about to be shipped, and, according to the course of business observed by the company, their agent had a copy of the "slip" from the plaintiff, and sent it to the company, but the goods were lost before the policy was executed, and the company then declined to execute it. The "slip" was dated, March 16, 1871. On the 29th of Jaunary, 1872, the company being under liquidation, the liquidators wrote to enquire about the "slip" and had no answer from the agent, though the plaintiff told him to carry it out. On the 3d of February the plaintiff was debited by the broker with the premium and stamp duty, and on the 13th of March the amount was received by the company, and the plaintiff asked for the policy but the defendant declined to execute it, and the "slip" was then lost. The stamp act of 1867 declares that no contract for sea insurance shall be valid, unless it shall be expressed in a policy, and no policy shall be admitted in any court, or be good or available in law or in equity unless stamped. It was impossible, then, to sue the company on any contract of insurance as none was executed but the plaintiff brought suit on the supposed undertaking or representation that their agent was authorized to accept risks in their behalf.

The judges were agreed that the only contract which could be shown was contained in the "slip," and as that was void under the stamp act, the plaintiff could not recover. The company was censured in severe terms for attempting to evade a contract binding in honor, but the judges could see no grounds on which to sustain it; and Baron BRAMWELL said that the reasoning of the dissenting justice of the Queen's Bench, Mr. Justice BLACKBURN. who held that the plaintiff entitled to recover, involved "an enormous subtlety."

Criminal Law—Receiving Stolen Goods—Evidence—Practice.—Plaintiff in error was indicted for receiving stolen goods. Upon the trial the prosecution, for the purpose of proving the *scienter*, showed that the accused had received property from other persons, knowing the same to have been stolen. Held, error.

If a prisoner upon trial for one offence calls out upon cross-examination without objection, facts tending to show that he is not guilty of another offence, this does not justify evidence on the part of the prosecution to prove that he is guilty of such other offence.

Calling out evidence for one purpose apparently innocent, and using it for another purpose which is illegal and improper, if it is manifest that the avowed object is colorable merely, is error. Coleman v. The People, N. Y. Court of Appeals. Opinion by ALLEN, J.

Gift.—This was an action brought to recover the balance of a book account alleged to be due from defendant. Plaintiff, with an intent to give the account to defendant, received a dollar from him which was credited, and then the account balanced by this entry: "Gift to balance account." Plaintiff also gave to defendant a receipt, stating in substance that he had received one dollar in full to balance all accounts. Held, that this constituted a valid gift, and plaintiff could not recover. Ryan v. Wood, 48 N. Y. 204, and Bunge v. Koop, Ib. 225, distinguished. Gray v. Barton, same court. Opinion by GROVER, J.

Partnership—Action against Estate of Deceased Partner—Pleading.—Action against defendant as executrix, etc., of C. to recover an indebtedness of the firm of D & C., of which firm defendant's testator was at the time of his death a partner. Plaintiff had recovered a judgment therefor against D., the surviving partner, execution was issued thereon and returned unsatisfied. Upon the opening of plaintiff's case, defendant's counsel moved for a dismissal of the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, inasmuch as it did not allege that the surviving partner was insolvent. The motion was denied, and defendant's counsel excepted. There was evidence given tending to show that D., the surviving partner, had property liable to levy and sale on execution sufficient to satisfy the judgment. The court below ruled that even if this was proved, in the absence of any proof of collusion, the return of the sheriff was sufficient to sustain the action, and defendant's counsel excepted. Held, no error; that a partnership creditor may enforce payment against the estate of the deceased partner, without bringing an action against the survivor, when he can prove the insolvency of the latter, or he may exhaust his legal remedy against the survivor, and then proceed against the deceased partner's estate. Pope *et al.* v. Cole, executrix, etc., same court. Opinion by GROVER, J.

Railway Aid Bonds—Construction of Statute.—Under the provisions of the act of 1869, authorizing municipal corporations to aid in the construction of railroads (chap. 907, Laws of 1869), as amended in 1871 (chap. 925, Laws of 1871), in order to give the county judge jurisdiction, the petition must show that the petitioners are a majority of the tax-payers of the municipal corporation to which it relates, "not including those taxed for dogs or highway tax only." People *ex rel.* Green v. Smith, County Judge of Ontario Co., *et al.*, same court. Opinion by ANDREWS, J.

Indictment—Larceny.—Brown and Libby were convicted of larceny. The error assigned is insufficient description of the stolen property, *e. g.*, "fifty dollars in money of the value of fifty dollars." Held, that the indictment was good. Brown v. People, and Libby v. People, Supreme Court of Michigan, April Term, 1874.

———. ———. This general form of charging larceny of money in an indictment would not have been good at common law without alleging the grand jury's inability to describe the money more specifically (Merwin v. People, 26 Mich. 298), and then only on proof of larceny of coin or legal tender of the country. Ibid.

Statutory and Common-Law Indictments.—The constitutional requirement that in every criminal prosecution the accused shall be informed of the nature of the accusation (Const. Mich., art. VI, sec. 28), was not meant to prevent the legislature from so altering the common-law form of charging an offence as to dispense with mere formal description, and unsubstantial particularity. But they can authorize no form of indictment that shall not give the offender fair notice of the particular offence to be proved, and an opportunity to procure his testimony in defence, that he may not be taken by surprise on the trial. Ibid.

Proof of Larceny.—In prosecuting for larceny of money, proof of the larceny of any single piece or bill of any denomination alleged, and of any value whatever, will sustain the indictment. Ibid.

"Money" Subject to Larceny.—The statute (Comp. Laws, § 7930), making it a sufficient indictment to allege generally a larceny or robbery of money, applies to United States legal tender notes. It might, perhaps, be invalid as to promissory notes and bills of exchange generally, and as to the notes of private parties, but valid as to coin and those descriptions of paper usually recognized as money. Ibid.

Specific Performance.—The power vested in courts of equity to compel the specific performance of contracts does not imperatively attach wherever there is a contract relation which the complainant has respected and the defendant has not. The specific peculiarities of the case, the doctrines of equity jurisprudence, and the settled principles and maxims of the court, must in each case be considered. (McMurtrie v. Bennette, Har. Ch. 124; Smith v. Lawrence. 15 Mich. 499; Chambers v. Livermore, 15 Mich. 381; Willard v. Tayloe, 8 Wall. 557). The real equity of the proceeding means performance on both sides, and not a compulsory surrender by one party to another without a present substantial and practical equivalent susceptible of enforcement by the courts. Buck v. Smith. Supreme Court of Michigan, April Term, 1874.

———. **Indefinite Partnership.**—A court of equity will not undertake to compel a party to go into a partnership where the agreement therefor is silent as to its duration, and where it may therefore be dissolved at the will of either as soon as formed. Ibid.

———. **Enforcement of Indefinite Duties.**—A court of equity cannot enforce the performance of daily prospective duties, or supervise or direct in advance the conduct of one who is to manage in the interest of a firm in which he is to be a member, and where the agreement contemplates that his personal skill and judgment shall govern according to the shifting needs of property and business. The doctrine of specific performance will not sanction such one-sided relief as to grant one party the essence of his claim, and decree the other a mere right to exact the consideration through the future performance of duties incapable of being specifically decreed. (Blacket v. Bates, L. R., 1 Ch. Ap. 117; Stocker v. Brockelbank, 5 E. L. & Eq. 67; Johnson v. Shrewsbury & B. R'y Co., 19 E. L. & Eq. 584; Pickering v. Bishop of Ely, 2 Y. & Coll. C. C. 249; Kemble v. Kean, 6 Sim. 333; Kimberley v. Jennings, 6 Sim. 340; Baldwin v. Society, etc., 9 Sim. 393; Gervais v. Edwards, 2 Dr. & W. 80; Bozon v. Farlow, 1 Mer. 459; Flight v. Bolland, 4 Russ. 298.) Ibid.

———. **Case in Judgment.**—Smith was to purchase an interest in a certain lumbering firm for the joint benefit of himself and Buck, he to furnish the money, and Buck, who was to be a partner, the skill and experience. There was between the two a written agreement, with which the other members of the prospective firm had nothing to do, providing for a quit-claim from Smith to Buck, and under this the latter began payment. Smith, however, went into the partnership and Buck was excluded. Buck asks specific performance, an accounting, and such relief by injunction as will protect his interest. His bill was dismissed, and this decree was affirmed, but without prejudice. Ibid.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, AUGUST 13, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

LAW OF MASTER AND SERVANT.—The interesting and valuable paper on this subject which we publish in this number is from the pen of the Hon. Francis Hilliard, of Worcester, Massachusetts, the well-known law writer, and has been prepared at our instance. Upon the topics upon which the article treats he has collected and arranged the cases with care. No lawyer in this country, perhaps, is more familiar with the course of adjudication on the subject he discusses, and we are glad to have an opportunity of presenting our readers with his article.

TEXAS STATE BONDS IN AID OF RAILWAY COMPANY—MANDAMUS TO STATE COMPTROLLER.—We publish in this number the opinion of the majority of the Supreme Court of Texas, holding that the comptroller of that state could not be compelled, by mandamus, to countersign and register 500 bonds of the state, of $1,000 to the International Railroad Company. The case is one of great importance in Texas, and of considerable interest generally. The case was originally argued in May. The court composed of four justices, were divided, and, under the constitution, a special justice was appointed, whose opinion we present to our readers. Two of the justices dissented. We incline in opinion with the special justice. The case was very ably argued by the attorney general of the state, Mr. Geo. Clark, for the comptroller. We do not know who argued the case against him.

STAMP DUTY ON WRITTEN INTRUMENTS—LATE ACT OF CONGRESS.—The following is the text of an important statute on this subject passed at the recent session of Congress: "That all instruments, documents, and papers heretofore made, signed, or issued, and subject to a stamp duty or tax, under any law heretofore existing and remaining unstamped, may be stamped by any person having an interest therein, or where the original is lost a copy thereof, at any time prior to the 1st day of January, 1876; and said instruments, documents, and papers, and any record thereof, shall be as valid to all intents and purposes as if stamped when made, signed or issued; but no right acquired in good faith, shall in any manner be affected by such stamping as aforesaid: *Provided*, That to render such stamping invalid the person desiring to stamp the same shall appear with the instrument, document, or paper, or copy thereof, before some judge or clerk of a court of record, and before him affix the proper stamp, and the said judge or clerk shall indorse on such writing a copy or certificate, under his hand when made by said judge, and under his hand and seal when made by said clerk, setting forth the date at which and the place where the stamp was so affixed, the name of the person presenting said copy, the fact that it was thus affixed, and that the stamp was duly cancelled in his presence."

The Revised Statutes of the United States—The Printing and Distribution of the Laws of Congress.

We elsewhere print in full the text of the recent act of Congress which provides for the printing and distribution of the revised statutes of the United States, and also of the acts of future sessions of Congress, with regard to the sale of these laws to private persons. The act is not as clear as it might have been made, but it is to be inferred that both the revised statutes and the subsequent volumes of statutes at large are to be sold by the secretary of state to private individuals at the cost of paper, presswork and binding, with ten per cent. added thereto.

We have taken the following interesting items with reference to the revised statutes of the United States, from the Chicago Legal News: "Not to exceed one hundred copies of the act revising and consolidating the statutes of the United States, were printed in book form. The object in printing these was to get a perfect copy to present to the president and the proper officers of the house and senate for signature. Mr. Poland, the chairman of the committee on revision in the house, secured one copy for each member of the judiciary committee of the house. Mr. Ward, member from this city, presented his copy to the Chicago Law Institute, where it may now be examined by the members. It is a valuable gift. It makes a volume of 1,035 pages. It will save the profession an untold amount of labor in not requiring them to hunt over the acts of Congress for many years to find any general law. As important questions have already arisen as to the effect of the repealing chapter upon the bankrupt and other laws that are incorporated in the revision, but have been amended at the present session, which amendments have not been published in the revision, we publish below the two sections of the repealing chapter bearing upon these questions:

"'Sec. 5,596. All acts of Congress passed prior to the first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, that the incorporation into said revision of any general and permanent provision taken from an act making appropriations, or from an act containing other provisions of a private, local or temporary character, shall not repeal or in any way affect any appropriation, or any provision of a private, local, or temporary character contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment.'

"'Sec. 5,601. The enactment of the said revision is not to affect or repeal any act of Congress passed since the first day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect as if passed after the enactment of this revision, and so far as such acts vary from, or conflict with, any provision contained in such revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith.'"

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"Councils of Honor."

Regulations have just been issued in Berlin, for the formation of "councils of honor" among Prussian officers. Every officer who considers his honor attacked by a comrade is required to give information to this tribunal, and no duel can come off without its approval, nor until the failure of any other solution. The president of the tribunal is to be president at the duel to see that it is properly conducted. Officers engaged in duels are not to be subject to criminal proceedings unless the occasion or issue of the encounter is a violation of the rules of honor, such as a serious, unprovoked insult. "I will no more," says the emperor, according to the London Times, "tolerate in the army an officer who wantonly attacks the honor of a comrade, than an officer who does not know how to guard his own honor."

The above, which we take from an exchange, reads more like a dream of the feudal ages than like a serious regulation published for the government of the officers of the army of a Christian nation. It seems in the highest degree grotesque that a tribunal should be established in a civilized state, whose function it is to determine whether or not a duel shall be fought, and whose president in the event the question is decided in the affirmative, is to attend upon the field of honor and see fair play. The dictatès of common sense would seem to be satisfied if the functions of such a tribunal were limited to the ascertaining of which party is in the wrong, and to the punishing of the wrong doer.

That an army to be efficient must be led by men who are so punctilious and sensitive that nothing but blood will satisfy their wounded honor, is a conclusion not justified by history. The English Court of King's Bench, has more than once punished as murderers British officers who have killed others on the so-called field of honor. This was done in the case of Captain Alexander Campbell, within the memory of men still living. And yet the soldiers of no nation have surpassed in valor those of Great Britain. Braver troops never confronted an enemy than the eighteen thousand British that defended the cheateau of Hougomont. and stood like a wall of fire on the plateau of Mont Sainte Jean, and, while their allies deserted them on every side, hurled back the legions of him whose name was an army in itself. The men who commanded the armies of Cromwell, which placed their feet upon the necks of the aristocracy of England; which conquered Ireland, and which spread dismay to the hearts of the most resolute legions of the continent, would have scorned any proposal to settle an affair of injured honor by fighting a duel. And yet the great Turenne, under whose leadership they fought on the continent, declared that he, for the first time, beheld in them his boyish ideal of the soldier. They rejoiced at the sight of the enemy, and betrayed on every field the "fierce desire of battle."

* * * "No thought of flight,
None of retreat; no unbecoming deed
That argued fear; each on himself relied,
As only in his arm the moment lay
Of victory." * * *

Fortified places which seemed impregnable could not withstand the fury of their assault; and the most tried and disciplined battalions were scattered before the terror of their onset. And yet so far were they from the spirit of chivalry which fights duels, that they sang psalms through their noses on the field of battle, attributed their astonishing victories not to their own prowess, but to the grace of God; and it was no infraction of discipline for a corporal to preach a sermon upbraiding his colonel for ungodliness.

The common law may perhaps be justly accused of paying too little regard to the honor of the citizen. It is true that a defamation of one's character is actionable, but it is only upon the theory that it has caused him pecuniary damage. The common law in such cases takes no account whatever of his injured feelings. And no matter how grievously one one man upbraids or insults another in private, so that the injury does no extend beyond mere words, the common law affords no redress. Nay, it does not even hold insulting words, in any case, a justification of an assault; although if such words lead to an assault, and the assaulted party brings suit against his assailant for the supposed injury, the opprobrious words which led to the assault will be looked to in mitigation of damages. The civil law, as administered in Germany, and perhaps elsewhere in Europe, appears to be different. It constantly punishes opprobrious language, and thereby protects its citizens against private insult, and in so doing protects the public against breaches of the peace. In this we think it proceeds upon a much more enlightened principle than the common law. We believe that the citizen has as strong a right to demand of the laws of his country protection against the pain and degredation of private insult, as against the pecuniary loss occasioned by public defamation. We place the question also upon the higher grounds of public policy; we assert our strong conviction that the state is as deeply interested in protecting and upholding the *honor*, as the lives and liberties of its citizens. And viewing the matter in this light, the resolution of the old emperor seems grounded upon a liberal and enlightened principle; although we confess that the establishing of a tribunal, judicial in its nature, whose function it is to determine when a duel shall be fought, and whose presiding judge is to preside at the fighting of the same, upsets all our ideas of the purposes for which judicial tribunals are instituted.

Master and Servant.

The responsibility of one man for the contracts or wrongs of another is a subject which has given rise to numerous controversies, and upon which the law in some respects is not fully settled. *Master and servant* is one comprehensive relation under which these questions have arisen; another, is *principal and agent*. Between these two connections the line is not very distinctly drawn, and to some extent, indeed, they may be considered as equivalent or synonymous. In general it may be said that the technical meaning of the word *servant*, substantially in correspondence with its popular meaning, is that of an employment somewhat inferior to an *agency*. A servant is one rather employed to perform some service, with no further *trust* than that necessarily involved in such service; while an agent, in addition to the work which he is to perform, is often or generally entrusted with property of the principal. The servant acts under a *naked power*; the agent has a *power with an interest*. Partly as the result of this difference, legal controversies which grow out of the relation between master and servant are more frequently cases of wrong; those which per-

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tain to agency are actions of *contract*, including, however, the wrong of *fraud*, which may be said to constitute the connecting link between tort and contract.

Some recent cases turn upon the point, what is necessary to constitute the technical relation of master and servant. In Brady v. Giles 1 M. & Rob. 494, Lord ABINGER left it to the jury whether the person guilty of negligence was the servant of the defendant. In Lackawanna v. Chenewith, 52 Penn. St. 382, a railroad company was held liable for an injury where the plaintiff was allowed to attach a freight car to a passenger train, though contrary to the "instructions and rules" of the road, and though agreeing to "run all risks," and although he agreed to attend to the brakes on his car; the last circumstance did not make him their servant. In Flinn v. Philadelphia, 1 Hous. 469, where the defendants, a railroad, were accustomed, when live stock carried upon the road was attended by the owner, to issue a free drover's ticket, upon his paying the freight and releasing them from all liability for the transportation, also to make a discount of 25 per cent. upon the freight, and the plaintiff, a drover, was injured by a collision, he was held to be a *passenger*, not a *servant* of the road, and to have a right of action. In Williamson v. Wadsworth, 49 Barb. 294, the civil engineer and traveling agent of a manufacturing company was held to be a *servant* within the meaning of a statute which makes stockholders personally liable for debts due to their laborers, *servants* and apprentices. One who makes temporary use of the services of another's servant may be liable for the acts of such servant. Wood v. Cobb, 13 Allen, 58.

The same liability arises though a person is not the owner or manager of a steamboat, and has no authority to hire, control, or discharge its employees, if it is navigated by him or for him. And if navigated by him or for him jointly with another person, the acts and negligence of such employees are, in law, those of him and his associates, jointly, and severally. Fay v. Davidson, 13 Minn. 523.

Evidence of the contract between the plaintiff and the defendant corporation, in which the plaintiff agreed to keep defendant's horses and to furnish them with hay and other things, and to board a man in case the defendant should require a man to take care of the horses; and evidence that B was in the defendant's employ, and that he was sent to take care of the horses by another of the defendant's servants, and in accordance with the recommendation of the defendant's general superintendent, is sufficient to leave to the jury the question whether B was the defendant's agent while furnishing hay to the horses, and consequently rendered the defendant liable for B's negligence. Stone v. Western, 38 N. Y. 240.

The defendant, having hired a horse and carriage from the plaintiff, intrusted the horse to A., the servant of B., an inn-keeper, to be fed. In consequence of A's not replacing the bit, the horse became unmanageable, and the horse and carriage were damaged. Held, A. was to be considered as the defendant's servant, and the action was maintained. Hall v. Warner, 60 Barb. 198.

A gas company, having been notified that gas was escaping from pipes which it had introduced into the cellar of a house at the request of A., the occupant, sent S., one of its servants, to ascertain where the leak was. He lighted a match in the cellar, and caused an explosion, which severely injured A's child, seven years old, who was in the house. Held, an action by the child against the company should be sustained, although the pipe was put in by the plaintiff's father, as the duties of S. extended to finding the leak, and the accident originated in the improper method of examination. Lannen v. Albany, etc. Co., 46 Barb. 264.

Where money was sent by express to B., in care of K., with the consent of B., and K. delivered the money to F, who absconded with it, and the jury found that F. was not the agent of the person sending the money; held, it must be taken that B. consented that K. should act for him and that the person sending the money was not responsible if K. failed to deliver the money to the right person. Sykes v. Bates, 26 Iowa, 521.

V. was a passenger on a street horse-car, and, on its arrival at a point of intersection with a steam-railroad, the crossing was occupied by a train of steam-cars, and the horse-car stopped to wait the passage of the train. After the train had crossed the street, the flagman of the steam railroad signaled the driver of the car to go forward, and he did so, and at the same time the train backed and struck the car before it had quite crossed the track, injuring V. Held, in an action against the horse-railroad, the fact, that the driver had been directed to obey the signals of the flagman, and did so obey them, did not make the flagman an agent of the horse-railroad. Chicago v. Volk, 45 Ill. 175.

One receiving his share of the crop for work on land is not a servant. Burgess v. Carpenter, 2 S. C. 7. See further, Killion v. Power, 51 Penn. St. 429.

The distinction between *servant and contractor* has given rise to very numerous cases relating to the liability of an alleged master for the wrong or neglect of his employee. The decided weight of modern authority is, that a contractor is not a servant, chiefly upon the ground that he assumes an independent responsibility, and is not under the control of his employer with reference to the mode of executing his contract. It is obvious, however, that servants working for stipulated wages, are still contractors; and the numerous and conflicting cases upon the subject have turned upon the precise relative position of the parties, on terms of mutual agreement which established one or the other of these relations. That the employee follows an independent occupation in which he may be presumed skillful, is not decisive against the employer's liability. Thus, in Brackett v. Lubke, 4 Allen, 138, the employee was a carpenter, hired to repair an awning, which afterwards fell upon the head of a passenger in the street, and the defendants, the employers, were held responsible. In Sadler v. Henlock, 4 Ell. & B. 570, Lord CAMPBELL says: "What difference can it make that Pearson was an independent laborer to be paid by the job. The defendant might have said 'fill up the hole in the road, *but not as you are now doing it*, lest when a horse goes over the place he may be injured." Ib. 579. In the same case (Ib. 578), CROMPTON, J., says: "It is only on the ground of a contractor not being a servant that I can understand the authorities" that the work, in the prosecution of which an injury was done, was performed upon the land of the defendant, and, more especially, that it nat-

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urally or necessarily produced what the law deems a *nuisance*, are considerations which have sometimes had much weight in charging the owner of such property for the negligence of even a *contractor*. See Chicago v. Robbins, 2 Black, 418; Storrs v. Utica, 17 N. Y. 104; McCamus v. Citizens, etc., 40 Barb. 380; Silvers v. Nerdlinger, 30 Ind. 53. As has been already remarked, however, the weight of authority recognizes the distinction between a contractor and a servant; and the leading case of Bush v. Steinman, 1 B. & P. 404, in which it was noticeably disregarded, may be considered as now overruled.

While the liability of the master for the mere *negligence* of his servant seems perfectly well settled, the cases are not entirely reconcilable with reference to his liability for *wilful wrongs* of the servant, though done in connection with the master's business. The strong tendency, however, of the more recent decisions is, to hold the master equally responsible for both classes of injury. The question has of late been most frequently raised in actions against railroad companies for acts of force, unjustifiable in kind or excessive in degree, committed by their conductors or other officers from violation of the rules of the company.

In Seymour v, Greenwood, 30 L. J. Ex. 378; 7 H. & N. 358, WILLIAMS, J., well expresses the principle of liability upon which the most recent cases seem to proceed. "It is argued that, though it cannot be denied that the defendant authorized his guard to superintend the conduct of the omnibus, generally, and that that authority must include an authority to turn out any passenger who misconducts himself, yet that it gives no authority to turn out an unoffending passenger. But by giving the guard authority to turn out an offending passenger, the defendant necessarily gave him also authority to judge for himself who should be considered an offending passenger." Acc. Goff v. Great, 3 El. & El. 672, where the act complained of was the arrest of the plaintiff for the benefit of the company, there being authority to arrest a passenger for traveling without payment of his fare, and the court held that the station-master and the policeman had implied authority to arrest those whom he believed to be guilty, and if there was a mistake, it was a mistake made within the scope of their authority.

But in the late case of Poulton v. The London, etc., L. R. 2 Q. B. 534, the important distinction was made that when a railroad company would itself have no right to arrest, a wrongful arrest by one of its employees would not render the company liable, as where the plaintiff was detained in custody by two policemen, under the orders of the station master, for non-payment of the freight of a horse, the company would have a right to detain the horse, but not to arrest the owner, and therefore the action for false imprisonment did not lie.

Some other leading cases will show the course of authority upon the same subject.

The general rule is laid down that a master is liable, where an act, though done without special orders, is one which the servant was justified in doing, and was unskilfully done. Gilmartin v. N. Y., 55 Barb. 239.

The plaintiff's horse, in charge of his servant, who was guilty of negligence, was killed in consequence of a span of horses, belonging to the defendant, which had run away with his coachman, it running against a feed wagon. Held, although A. was guilty of no fault or negligence, the action was maintainable if A. caused the injury by running against the wagon, though solely with a view to his personal safety, if the act was a prudent one for the purpose of stopping the horses. Wolfe v. Mersereau, 4 Duer, 473.

A master is responsible where his servant, while felling trees by his order, and in the scope of his business, either wilfully or negligently trespassed upon land of the plaintiff. Luttrell v. Haden, 3 Sneed, 20. The defendant gave a general direction to his servant to clear the snow from a roof, which was done by throwing it into the street, whereby a man was killed. Held, under a statute which authorized an action for an injury causing death, the master was responsible. Althof v. Wolf, 2 Hilt. 344.

A city railroad is liable for the forcible and malicious ejection of a passenger from the platform of a car, it being left to the driver to determine whether a passenger is unlawfully on the platform. Meyer v. Secord, 8 Brown, 305. So an action was maintained where the defendants, omnibus proprietors, directed their guards to remove disorderly passengers, and one of the guards, erroneously considering the plaintiff disorderly, ejected him carelessly and with excessive force. Seymour v. Greenwood, 7 H. & N. 356.

On the other hand it has been sometimes held, though this can hardly be considered the prevailing rule, that, if the servants of a railroad, exceeding their authority, unlawfully expel a passenger from the cars, the company is not liable; nor for any unnecessary violence in ejecting a passenger. Hibbard v. N. Y., 15 N. Y. 455.

The defendant, owner of a bridge, employed A. as toll-keeper. A vicious dog of A. bit the plaintiff, but the defendant had not personally kept or harbored the dog, nor authorized the keeping of him, nor was the dog necessary for the business in which A. was employed. Held, the defendant was not liable. Baker v. Kinsey, 38 Cal. 631.

An action was held not maintainable under the following circumstances: The infant son of the plaintiff asked leave of B., the defendant's servant, to ride on a wagon which B. was driving. B. said he might ride when he got up the hill. A. caught hold of the wagon between the front and hind wheels. B. started the horses into a trot, and A. was thrown down under a wheel and badly hurt. Wright v. Wilcox, 19 Wend. 343.

And the general rule has been laid down that a master is not responsible for the wilful or criminal wrong or trespass of his servant. Jones v. Hart, 2 Salk. 440; Coleman v. Riches, 16 Com. B. 104; Hubbersty v. Ward, 8 Exch. 330. Or that the injury must arise in the execution of some service, lawful in itself, but negligently or unskilfully performed, and not be a wanton violation of law by the servant, though occupied about the master's business. Moore v. Sanborne, 2 Mich. 519.

This was the point decided in the leading case of McManus v. Crickett, 1 E. 109, where the Court of King's Bench went into an examination of all the authorities, and after much discussion and great consideration, held that, by committing a wilful wrong the, servant virtually abandoned his master's business, who, therefore, was not liable to the party injured. And text books of authority have favored this view. See 2

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Greenl. Evi. 52, 1 68; 2 Kent, 5th ed. 258; 1 Sharsw. Blackstone, 431.

The plaintiff, having purchased a railroad ticket, applied to A., the employee charged with that duty, to have his baggage checked, and by abusive language and threatening gestures provoked a quarrel, in which A. struck him with a hatchet. Judgment for the defendant. Little v. Wetmore, 19 Ohio St. 110. An incorporated district is not liable in trespass for illegal service of a horse of the plaintiff, by one of its officers, for alleged violation of an ordinance which did not actually occur. Fox v. Northern, 3 W. & S. 103.

A leading case on this subject is Coleman v. Riches, 16 Com. B. 103. That was action against a wharfiinger for the act of A., his servant. A. fraudulently and falsely signed a receipt, acknowldging the delivery of certain wheat of B. at the wharf, to be shipped to the order of the plaintiff, whereby the plaintiff was led to pay the price to B. It appeared that the plaintiff was accustomed, with the knowledge of the defendant, to pay for all wheat delivered for him at the wharf, upon the seller's producing the defendant's receipt. It was held that the act of A. was not so far within the scope of his authority or course of employment as to render the defendant liable to the plaintiff for the loss sustained by the payment made to B. JERVIS, C. J., says, p. 117: "The defendant's agent had only authority to give receipts for goods which had, in fact, been delivered at the wharf. * * * Numerous actions were brought * * * against news-agents for libels contained in newspapers sold by their servants over the counter; the liability of these persons was put * * * upon the ground that the servant was acting strictly within the scope of his employment, and consequently the master was liable for his act. So, where bakers have been held to be liable criminally for the excessive and exorbitant use of alum in making bread. * * * So, also, in the various cases against brewers for the illegal use of drugs in their trade. So, in the case of a servant negligently driving his master's carriage. * * * When Board gave a receipt for wheat which had never been delivered, * * * he was not acting for his master, but contrary to his duty, and against his master's interest." (See also Grant v. Norway, 10 Com. B. 665; Hubbersty v. Ward, 8 Exch. 330.) In the same case—p. 119, CREPWELL, J., pointedly says, "He was not employed to represent that to be true which he knew to be false."

F. H.

New Bankrupt Amendment—Construction and Practice under it—Judge Blacthford's decision in re Scull.

When the amendatory bankrupt act of June 22, 1874, was passed, the number of petitions in involuntary bankruptcy filed in Judge BLATCHFORD'S court between December 1, 1873, and June 22, 1874, was 346. Of this number 98 were discontinued, and in 118 others adjudications had been entered. This left 130 in which no adjudication had been entered, and which came under the provisions of the act of 1874.

These 130 were in the same situation as the case of *Isaac Scull*, which has made a test case and which owing to the ability and experience in bankruptcy of the learned judge who decided it and by whom it was carefully considered, we regard of no inconsiderable value.

The facts were these:—The petition was filed on the 4th of June, 1874. The order to show cause was returnable on the 13th of June, and personally served on the alleged bankrupt on the 5th of June. On the return day proof of service was filed, but the alleged bankrupt did not appear, and at the request of the petitioning creditors the matter was adjourned from time to time until after the approval of the amendatory act of June 22, 1874, no adjudication being directed to be entered, and, of course, no adjudication being entered. The petitioning creditors now ask for an entry of an order of adjudication as on default for want of appearance. The papers are in due form under the statute as it stood prior to its amendment by the act of 1874, and but for the provisions of the latter act the right to an adjudication would be clear. The twelfth section of the act of 1874 proves that the adjudication in involuntary bankruptcy can be made only on the petition of one or more creditors of a debtor "who shall constitute one-forth at least in number, and the aggregate of whose debts, provable under this act, amounts to at least one-third of the debts so provable, the provisions of the act applying to all cases of compulsory or involuntary bankruptcy commenced since December 1, 1873."

BLATCHFORD, J., after citing the statutes bearing on the question, says that, as in the present case, the petition does not state that the petitioners constitute the requisite number and amount of creditors, it must be held that it appears that the requisite number and amount of creditors have not petitioned. As the case was commenced before June 22, 1874, an order will be entered herein by the clerk, if the petitioning creditors desire, granting twenty days upon the formal entry of such order as the time within which the petition may be amended, so as to show compliance with the requirements of the statutes to the number and amount of petitioning creditors, and providing that, at the expiration of that time, the clerk shall present to the court all papers which shall have been filed, with a view to such amendment of the petition, to the end that the matter in bankruptcy may proceed, or the proceedings may be dismissed, as the case may be. The only act of bankruptcy alleged in the petition is that the debtor, being insolvent, suffered his property to be taken on legal process, with intent to give a preference to a creditor and to defeat the operation of the act. This was an act of bankruptcy when the petition was filed. By the act of 1874 it is no longer made an act of bankruptcy. The debtor being insolvent, must procure his property to be taken on legal process, with the intent to give a preference or to delay or defeat the operations of the act, and all the provisions of the section of the act of 1874, which specifies what are acts of bankruptcy on which a person can be adjudged a voluntary bankrupt, are by it made applicable to the present case, commenced since December 18, 1873. Therefore, if the present petition is to be proceeded with at all, it must, in respect to the matter alleged in it as constituting the act of bankruptcy set forth, be amended by averring that the debtor procured his property to be taken. An amendment to that effect will be allowed to be made within the twenty days before provided for.

—WE regret to learn that Mr. District Judge McCandless, of the United States District Court for the Western District of Pennsylvania, is steadily declining in health, in consequence of a paralytic stroke received about a year ago.

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Negligence — Injuries to Married Women — Evidence.

HARRIMAN *et al.* v. STOWE.

Supreme Court of Missouri, July Term, 1874.

Hon. WASH ADAMS,
" DAVID WAGNER,
" WM. B. NAPTON, } Judges.
" H. M. VORIES,
" T. A. SHERWOOD,

1. **Negligence — Action for Injuries to Wife — Wife Competent Witness.**— When a suit is brought by a wife, jointly with her husband, for injuries sustained by the wife in consequence of the negligence or unskillfulness of defendant, the wife is a competent witness, she being the substantial party in interest.

2. ——. **Declarations Made to Physician.**—The declarations of a person suffering from injuries recently received, as to the cause of the injury, made to a physician called in to see the injured party, are admissible as a part of the *res gestæ*, it appearing that the physician was cautioned by the court not to reveal anything prohibited by the statute.

3. ——. **Respondeat Superior—Responsibility of Agent.**—While, by the maxim *respondeat superior*, the principal is alone responsible for the mere nonfeasance or omission of duty of an agent, the agent is also responsible for his own misfeasance, negligence or positive wrong.

Karnes and *Ess*, for appellant; *Johnson* and *Botsford*, for respondent.

WAGNER, J., delivered the opinion of the court.

The plaintiff, a married woman, in conjunction with her husband, brought this action for damages against the defendant for injuries sustained by her falling through the hatchway, which it is alleged was constructed by the defendant, and by him negligently, carelessly and wrongfully left insecure and unprotected.

The answer denied the allegation of negligence, and as a further defense, set up that the house where the hatchway was built, was the property of defendant's wife, and that defendant, in doing the work, was acting as her agent. There was a replication as to negligence and carelessness, but it was admitted that the property belonged to defendant's wife.

The verdict and judgment were for plaintiff, and defendant appealed. Upon the trial, the plaintiff, Mrs. Harriman, was offered as a witness and excluded by the court. As she was the substantial party in the case under the statute, she was a competent witness, and the ruling of the court was erroneous. Tingley v. Cowgill, 48 Mo., 291; Fugate v. Price, 49 Mo., 441. But the plaintiff is not here as a complainant, and if the judgment is affirmed the error does not injure her. On the trial, E. W. Shauffler was sworn as a witness for the plaintiff, and stated that he was a practicing physician, and as such attended on the plaintiff. The defendant objected to his giving any testimony, because, under the statute, he was incompetent. This objection was overruled,

The witness was then asked to state in what condition he found the plaintiff when he was called in. This question was objected to by the defendant, for the same reason as above given. The court sustained the objection, but permitted the witness to answer under the following restriction: " In answering the question you will not reveal any information you may have received from the plaintiff while attending her in your professional character, which information was necessary to enable you to prescribe for her, a patient, in your capacity as a physician or surgeon." The witness then gave testimony tending to show that plaintiff was injured about noon, what her injuries were, that he was her physician before that time, and that he was called to see her between one and four o'clock of that day. At the same time she stated to him that the trap door in the kitchen had been left in an insecure condition, and that she stepped on it and fell through.

The statute says that a "physician or surgeon" shall be incompetent to testify " concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." 2 Wag. Stat., p. 1374, § 8. As the court restricted the witness from giving any information forbidden by the statute, the the only enquiry is whether the evidence was admissible on any other principle. The general rule is that evidence, in order to become a part of the *res gestæ*, should consist of declarations made contemporaneously, or nearly so, with the main event by which it is alleged that the principal transaction occurred. Brownell v. Pacific R. R. Co., 47 Mo. 239.

But in the Insurance Co. v. Mosley 8 Wall., 397, where the question was carefully and ably considered, it was declared that though generally the declarations must be contemporaneous with the event, yet where there are any connecting cirumstances, they may even, when made some time afterward, form a part of the whole *res gesta*.

So, in Commonwealth v. McPike, 3 Cush., 181, the indictment was for manslaughter — the defendant was charged with killing his wife. It appeared that the deceased ran up stairs from her own room in the night, bleeding and crying " murder." Another woman, into whose room she was admitted, went at her request for a physician. A third person, who heard her cries, went for a watchman, and on his return proceeded to the room where she was. He found her on the floor bleeding. She said the defendant had stabbed her. The defendant's counsel objected to the admission of this declaration in evidence. The objection was overruled. The court decided that the evidence was properly admitted. It was said that it was of the nature of *res gestaæ*. It will be observed that the declarations were not contemporaneous, but that considerable time must have elasped between the time the act was committed and the declarations were made; but the screams of the injured woman, her running into another room, her being found bleeding upon the return of the person who went for the watchman, all formed connecting links and rendered the declarations equally as satisfactory as if they had been made at the time the wounds were given. In the present case, the witness came within a short time after the plaintiff received the injuries, he found her suffering, and she told him how she was hurt, namely, by falling through the trap door.

The accident and the declarations formed connecting circumstances, and, in the ordinary affairs of life, no one would doubt the truth of these declarations or hesitate to credit them as evidence. I can perceive no valid objection to their admissibility. The instructions given by the court submitted the case with unquestionable fairness. For the defendant the court declared the law:

First. Before the jury can find for the plaintiff it devolves on the plaintiffs to prove that the defendant constructed the trap-door and hatchway mentioned in plaintiffs' petition, carelessly, negligently and unskillfully, or so left it, and that Maggie M. Harriman, the plaintiff, fell through the trap-door and hatchway, and that such falling was occasioned by the careless, negligent and unskillful construction of said trap-door and hatchway by the defendant, or in so leaving it.

Second. If the jury believe from the evidence that the defendant, in the construction of said hatchway and trap-door, and in leaving it, exercised such care as an ordinary prudent man would exercise doing similar work, to prevent injuries to persons passing over the same, then they will find for the defendant, and it devolves on the plaintiffs to prove that defendant failed to exercise such care.

These instructions were sufficiently favorable to the defendant, and there is nothing in those given by the court on the part of the plaintiff which in anywise conflicts with or militates against them.

But it is urged with great pertinacity here that the defendant, in doing the work, was acting as the agent of another, and that, therefore, he is responsible to his principal only, and not to the plaintiff.

The well settled principle of law is that, where an agent is employed to perform or superintend work, the principal is responsible

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to third persons for injuries caused by the neglect or nonfeasance of the agent in doing the work. Morgan v. Bowman, 22 Mo. 538. And this principle obtains though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment. Douglas v. Stephens, 18 Mo. 362; Minter v. Pacific Railroad, 41 Mo. 503; Garritzen v. Duenckel, 50 Mo. 104.

In such cases the doctrine of *respondeat superior* applies, and the liability is cast upon the master who employed the agent and caused the work to be done. Barry v. St. Louis, 17 Mo. 121; Clark v. H. & St. Jo. R. R., 36 Mo. 202.

Judge STORY says the distinction ordinarily taken is between acts of misfeasance or positive wrongs, and nonfeasance or mere omissions of duty by private agents. The law on this subjeet as to principals and agents is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant in all cases within the scope of his employment. So the principal in like manner is liable to third persons for the like misfeasances, negligences, and omissions of duty of his agents, leaving him to his remedy over against the agent in all cases where the tort is of such a nature that he is entitled to compensation. The agent is personally liable to third persons for his own misfeasances and positive wrongs, but he is not in general liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal; there being no privity between him and such third persons; and the privity exists only between him and his principal. Therefore the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *respondeat superior* (Story on Agency, §308), and such is the general doctrine. 2 Kent Com., 10 Ed. 878, note; Pars. Cuntr. 5th Ed. 66; Colvin v. Holbrook, 2 Comst. 126; Denny v. Manhattan Co., 2 Denio 118; 1 Bl. Com. 413.

The true distinction, as stated by STORY, is between acts of misfeasance or positive wrongs and nonfeasances or mere omissions of duty. In the latter case the master or principal is alone liable to third persons; whilst in the former the responsibility rests upon both the principal and agent. Thus in Wright v. Wilcox (19 Wend. 343), COWEN, J., speaking for the court, says: "In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time and under the same circumstances; the servant in fact and the master constructively by the servant his agent." Lord HOLT, in his celebrated judgment in Lane v. Cotton (12 Mod. 488; S. C., Ld. Raymond, 646, 655), says that for the neglect of the servant third persons can have no remedy against him, but that the master alone is chargable. But for a misfeasance or actual tort an action will lie against the servant because he is a wrong-doer. The same views are confirmed in numerous adjudge cases. Cary v. Webster, 1 Strange, 480; Montford v. Hughes, 3 E. D. Smith, 591; Suydam v. Moore, 8 Barb. 358; Phelps v. Wait, 30 N. Y., 78.

The present case seems to be one, not of mere nonfeasance or omission, but of strict negligence or wrong. The agent undertook and proceeded to build the trap-door, but did it so negligently as to cause the injury; under such circumstances the action would be maintainable against the agent and the principal also. The answer states, and the pleadings admit, that the house upon which the work was done was the property of defendant's wife, and that he was acting as her agent. But it is not averred, nor does the case anywhere show, that it was her separate estate. If she simply owned the fee simple, as is inferred from the pleading, then the defendant, in constructing the trap-door, was acting for himself as well as for his wife, for the uses, rents, and profits of the wife's realty belong to the husband during coverture.

Under any view that we can take of the case, we think that the action was properly brought, that the judgment was right and should be affirmed. The other judges concur.

JUDGMENT AFFIRMED.

State Aid to Railroads—Mandamus against Comptroller of State.

BLEDSOE, COMPTROLLER, v. THE INTERNATIONAL RAILROAD COMPANY.

Supreme Court of Texas, July, 1874.

1. **Railway Aid Bonds—Mandamus against State Comptroller.**—A mandamus will not lie in the District Court of Texas against the comptroller of the State to compel him to countersign bonds of the state which, by an act of the legislature, are authorized to be issued in aid of a railroad.

2. **Nature of Comptroller's Office under Texas Constitution.**—By the constitution of Texas the executive power of the state is not vested in the governor alone, but in the chief officers of the executive department of the government. These constitute the executive magistracy of the state, of whom the comptroller is one, his powers and duties being defined by the constitution. It follows that a mandamus will no more lie against him than against the governor.

J. W. FERRIS, special judge, delivered the opinion of the court:

This case is brought here by an appeal from the judgment of the district court, awarding a peremptory mandamus against the appellant, A. Bledsoe, comptroller of the state of Texas, and commanding him to countersign and register five hundred state bonds, calling for one thousand dollars each.

The action is based upon an act of the legislature of this state, passed August 5, 1870, entitled, "An act to incorporate the International Railroad Company and to provide for the aid of the state of Texas in constructing the same," and more particularly upon the ninth section thereof, which is as follows:

"Section 9. In order to secure and promote the rapid construction of said railway, and thereby afford cheap and necessary facilities for emigration into the state, as well as speedy communication between the northeastern and southwestern boundaries, and with the Eastern and Northern states, and to meet as soon as practicable the wants of the people of this state in promoting the settlement of the vacant lands and the development of its resources, the state of Texas consents, binds and obligates itself to donate, and hereby grants to said company the bonds of the state of Texas to the extent and amount of ten thousand dollars per mile for each mile of said railroad constructed under this charter; said bonds to be of the denomination of one thousand dollars each, payable to the company, or bearer, in thirty years from the date thereof, with interest at the rate of eight per cent. per annum, payable semi-annually, viz., on the first day of January and the first day of July of each year; said bonds to have coupons attached for each installment of interest which may become due, which said coupons shall be made payable upon presentation at the city of New York, through such agents of the state as the governor may select and appoint to pay the same; said bonds shall be signed by the governor and treasurer of the state of Texas, and countersigned and registered by the comptroller, with the seal of the state of Texas affixed thereto, and shall be delivered by the governor to the president, or such other officer of said company as shall be specially appointed to receive and receipt for the same, on the sworn statement of the chief engineer of said company, and the written report of such officers or agents of the state as the governor may have appointed for that purpose, that ten miles of said railroad have been completed in a thorough and substantial manner; which affidavit and report, together with the receipt for said bonds, shall be filed in the office of the secretary of state; provided, that no bonds, under this act, shall be issued to said company until it shall have completed at least twenty miles of said railroad, whereupon said bonds shall be issued and delivered for that amount of said railroad, and thereafter for every ten miles, according to the terms and conditions of this charter.

"The comptroller of the state shall cause to be assessed a tax upon all taxable property, real and personal, in the state, and upon all

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occupations, proportioned to the taxes levied by general law on such property and occupations, a sum sufficient annually to pay the accruing semi-annual interest on said bonds, and two per cent. as a sinking fund, which said sum shall be assessed and collected and deposited in the treasury of the state, subject to the order of the governor, to meet the payment of the interest coupons and the principal of said bonds, as soon as and whenever the same shall become due; provided, that no greater tax shall be assessed and collected by authority of this section than may be needed from time to time to pay said interest and sinking fund."

In the petition of the appellee it is represented that the International Railroad Company is a body politic and corporate, created and established under said act; that there was granted to said company the right to construct and own a railroad, and to maintain the same across the state of Texas, and upon a line designated in said act; that, after being duly organized, the said company raised the necessary means and completed fifty-two miles of railroad, and fully equipped the same within the time required by said act; that the same was duly reported to the governor, who thereupon appointed two persons as agents of the state to examine and report upon the work; that it appeared, from the sworn statement of the chief engineer of said company and the report of said agents, that said fifty-two miles of railroad work was of a superior quality, and was in full compliance with the requirements of said act; that, thereupon, the said governor, under said 9th section of said act, caused five hundred bonds of the state of Texas, each for the sum of one thousand dollars, to be prepared, the same having coupons attached and to run for thirty years; that the said governor signed the said bonds and transmitted them to the treasurer, who also signed them; that when the same were transmitted by the treasurer to the comptroller, he failed and absolutely refused to countersign and register the same; that it was the duty of said officer under said 9th section, to countersign and register said bonds (a copy of one of the bonds and a coupon attached being brought into court); that said company has no other remedy but that which can be afforded by the writ of mandamus commanding the said comptroller to countersign and register said bonds; and thereupon a peremptory mandamus is prayed for at the hearing in the district court.

There were general and special demurrers to the petition and an answer to the merits by the defendant. After the several demurrers were overruled, a trial was had on the facts; and upon a jury verdict, judgment final was rendered against the defendent. There was also an intervention by the state of Texas, but as the same has been abandoned, no further notice need be taken of it.

The questions which first properly come up for consideration by the court, and which have been fully and ably discussed by the counsel, arise upon the demurrers, and are these:

1. Does the record present a proper case for a mandamus, considered on general principles?

2. Has the district court the power and authority to compel the comptroller of the state of Texas to countersign and register the state bonds?

[After quoting from the statute as to the duties of the comptroller in respect to the issue of the bonds, to show that they were not merely ministerial, and from the constitution to show the character of this officer, the conclusion is reached that the case is not, on general principles, a proper one for mandamus. On the second question we give below the opinion in full.]

Second. It is considered that the district court has not the power and authority under the constitution to compel an officer of the executive department of the government to perform an official duty. This conclusion must follow from the structure of our government, and the distribution of powers under the constitution, between the independent departments of government.

This question was first raised and elaborately discussed in the United States court, in the case of Kendall v. The United States, before referred to, and in the opinion of the court it was announced that "the theory of the constitution undoubtedly is that the great powers of the government are divided into separate departments, and, so far as these powers are derived from the constitution, the departments may be regarded as independent of each other." 12 Peters, 609. In the same case, Chief Justice TANEY, delivering a separate opinion, declined to discuss the question, saying that "the office of postmaster-general is not created by the constitution, nor are its powers or duties marked out by that instrument. The office was created by act of Congress, and it may limit its powers and regulate its proceedings." Id. 625. It is noticeable, however, that the court in its rulings in that case, and in all cases since that time touching the subject, has disclaimed any interference with the powers and official duties properly appertaining to the heads of the executive departments of the government. 14 Peters, 515; 17 How. 303; 6 Wheat. 349.

This right of interference was expressly disclaimed by the court, as before shown, in the case of the United States v. Guthrie 17 Howard 303, and it was then said, that whenever the court has assumed to exert its power against any executive officer, it was only as "to acts of a character rather extraneous and required of the individual rather than of the functionary." Id. 303. It would seem that when a want of power in the courts to enforce a mandamus against a high executive officer has not been conceded, nearly the same end has been practically reached by a liberal construction as to the judgment and discretion necessary and proper to be exercised by such officers.

The question may be said to have been authoritatively settled in this state under the constitution of 1845, in the case of The Houston Tap and Brazoria Railway Company v. Randolph, 24 Texas 335. The opinion appears to have been rendered after a contest, showing research and ability, and by a full court. The following quotation from the opinion is here made:

"The second article of the constitution provides, 'that the power of the government of the state of Texas shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: those which are legislative to one; those which are executive to another, and those which are judicial to another, *and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others*, except in instances herein expressly permitted.' Here is a direct prohibition of the blending of the departments. It contemplates that the persons employed in each department will be wise enough and honest enough to discharge the duties entrusted to them, without the aid or interference of the others; and it is a full warrant for each department to disregard and repel such interference. For, as before said, each one of these departments acts under a delegated, limited authority, and if one exceed its authority by usurping powers not belonging to it, its act is a nullity, not binding upon the other departments, and may be totally disregarded by them. If the governor were to dictate to the judges the judgments to be pronounced, and enforce obedience by his power over the militia, the usurpation would be startling indeed, and too plain for discussion, not any more so in principle, however, than for the District Court of Travis County, or the supreme court of the state to require by its mandate that the governor of the state shall sign a patent to land, or the comptroller shall audit an account, or the treasurer of the state shall pay a draft upon the treasury."

Since that ruling was made two constitutions of the state of Texas have been made (that of 1866 and that of 1869), and the same inhibition as to the exercise of power by persons of the different departments of government, is retained, and doubtless with a full knowledge of the ruling of the court on this important question; and as if it were intended by the framers of the constitution now in force, to leave no room for judicial construction, that instrument is made to expressly define the different executive

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officers which constitute the executive department—one of which is the comptroller of public accounts (Art. 4, Sec. 1). And with reference to the comptroller, among others, it expressly defines his powers and marks out the line of his duties (Art 4, Sec 20), which was never done before in any constitution of this state.

It is observable, also, that whereas under the old constitution the supreme executive power was vested in the chief magistrate, under the present constitution it is vested in the entire magistracy composing the executive department, with the powers of each separately defined. Are all these changes meaningless? Surely not. They must have been intended to more clearly define the boundaries of power between the three great departments of the government, and also between the different offices comprising the executive department.

These considerations furnish additional and very strong reasons why the court should adhere to the ruling made in the above case of the Houston Tap & Brazoria Railroad Company v. Randolph.

In the different states of the Union the executive power is vested in the governor, while in this state, as before stated, it is vested in the magistracy composing the executive department. Dennett, Pet'r, 32 Maine, 508; Mauran v. Smith, 8 R. I. 192; State v. The Governor, 1 Dutch'r, N. J. 331; Low v. Towns, 8 Ga. 360; Hawkins v. The Governor, 1 Ark. 570.

If there is no other remedy than by mandamus against the comptroller for the non-performance of official duties, the same could be said of the governor and of a judge of the court. It is as reasonable to suppose that one officer would act up to the performance of duty as faithfully as another. Evidently, this independence of power in the different departments was intended to act as a check and restraint against usurped authority.

The decisions of the supreme court of this State are relied on as authority in support of the jurisdictional right of the court to award a peremptory *mandamus* in this case. It may be well to determine the weight of such authority by examining into their origin and history.

First, it must be considered, that a petition for writ of mandamus has never been sustained in this state against the governor, secretary of state, comptroller, treasurer, or auditorial board, though many have been filed and prosecuted. They have been sustained against the commissioner of the general land office, in very few instances, perhaps three or four, out of the numerous cases wherein it has been attempted. Horton v. Brown, 2 Texas R. 78; Ward, Com., v. Townsend, 2 Texas R. 581; H. & G. N. R. R. Co. v. Kuechler, 36 Texas R. 382.

In the first case, the suit above referred to was between two claimants, and the writ was incidental. In the second, there was no statement of facts, and the rule was adopted that, "in their absence the legal intendment is in favor of the correctness of the judgment." In neither of the two first cases referred to was the question of the right to the writ argued by the counsel, or discussed by the court. The early cases afterwards determined by this court, in which the principles were enunciated as applicable to the remedy by writ of mandamus, were cases in all of which it was held that the writ could not be sustained. And the principles announced were assumed to be drawn mainly from the decisions in these two cases, and from the decisions of the Supreme Court of the United States upon that subject. Glasscock v. Com. Gen'l L. Office, 3 Tex. R. 53; Brackens v. Wells *et al.*, 3 Tex. R. 90; Com. Gen'l L. O. v. Smith, 5 Tex. R. 477; Arberry v. Beavers, 6 Tex. R. 464, and others.

The rule announced by Justice WHEELER, in delivering the opinion of the court in the case of Commissioner of General Land Office v. Smith, as the conclusion thus arrived at, was: that "a mandamus may issue to compel the commissioner of the general land office to issue a patent, when it shall have been made to appear to the court that the right of the party is clear." 5 Tex. 480. Thus holding that however complete the facts or confused the law in the construction of it, *when*, after investigation *in a court*, the right is made to appear to be clear, the writ of mandamus would issue. That this was the exact position assumed may be seen by reference to his opinion in 5 Tex. 479. This, it is believed, extended the remedy far beyond the decisions quoted from the Supreme Court of the United States. Indeed, it has been held by that court that a mandamus could not issue against the commissioner of the general land office of the United States in a case where there were complex facts to be examined into requiring judgment, and which "calls for the exercise of the judicial functions of the officer."

And upon this question as to whether a mandamus can be issued in any case against the commissioner, it is said in that opinion: "We have found no case in which this power has been exercised. Patents are to be signed by the president in person, or in his name by a secretary, under his direction, and countersigned by the recorder of the general land office." United States v. the Commissioner, 5 Wall. 565. It must be recollected, that this remedy was introduced in Texas mainly as an incident to suits between private litigants in the different counties of the state, which caused a statute to be passed requiring such suits against the heads of departments or bureaux to be brought in Travis county. Act of 1846, Hart. Dig. art. 643, p. 237.

However such act may have recognized the legality of such suits, it could not be held, either in its terms or by implication, to have enlarged and extended the remedy by mandamus beyond the enforcement of a merely ministerial act by any of such officers while they were regarded as high executive officers of the state. 5 Tex. 478.

It must be considered also, that the office of commissioner of the general land office, previous to the constitution of 1869 (which made it a constituent portion of the executive department) was a mere commission to aid in perfecting and preserving land titles, and that the commissioner was regarded and treated by the courts as merely a ministerial officer whose office was created and shaped, and whose duties in said office were prescribed entirely by the acts of the legislature, and all of whose official acts and determinations, whether involving the exercise of judgment or not, were subject to be inquired into in a suit by mandamus. Norton's S. v. The Commissioner, etc., 2 Tex. R. 362; Comm'r General Land Office v. Smith, 5 Tex. R. 479, 480; Glasscock v. Comm'r General Land Office, 3 Tex. 53.

The limitations of the remedy to purely ministerial acts, as announced in the decisions of the Supreme Court of the United States (in 1 Cranch, 12 and 14 Peters, 6 Wheat, 6 Howard, 5 Wallace), though quoted as a basis, were never practically applied to the commissioner in any of the decisions, as it was applied to the acts of the heads of departments in the government of the United States.

It must be observed, also, that none of those decisions in reference to the commissioner consider or discuss the question of the division of the powers of government, treating the commissioner as part of, or subject to the executive department of the state, and the late decision, under the constitution of 1869, is rested upon previous decisions, and general principles. Rail Road Co. v. Com'r, 36 Tex. 382.

Under the view here presented it is not perceived that the decisions relating to the commissioner of the general land office can be of any great weight or authority in this case.

At the late session of the state legislature a compromise act, or act of adjustment, with the International Railroad Company was passed, and other questions have been presented for our consideration as if an adjudication thereon was contemplated by said act. There is a provision in the act that the same shall not be considered as in any way interfering with the litigation in this case.

Moreover, there is no expression recognizing the state of Texas as a party to the suit.

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It having been already decided that the court has no jurisdiction over this case, any further opinion on the question presented would be extra-judicial and without authority.

For the reasons given, it is considered by the court that the judgment of the court below be reversed, and that the cause be dismissed.

REEVES and DEVINE, JJ., dissented.

REVERSED AND DISMISSED.

Amended Bankrupt Act—Amendments in regard to Fradulent Conveyances not Retroactive.

HAMLIN, ASSIGNEE, v. PETTIBONE *et al.*

United States District Court, Eastern District of Wisconsin, July Term, 1874.

Hon. JAMES C. HOPKINS, District Judge.

1. The provisions of the amendments of 1874 to §§ 35 and 39 of the bankrupt act which recite that, in order to make certain sales, conveyances, etc., void, they must have been made by the debtor, *knowing* that they were in fraud of the act, do not apply to proceedings commenced before the first day of December, 1873.

Jackson and *Felker*, for Plaintiff; *L. S. Dixon*, for Defendant.

HOPKINS, J.—This action was commenced before the passage of the amendments to the bankrupt law, on June 22d, 1874, and the proceedings in bankruptcy were instituted long before the 1st day of December, A. D. 1873; and the sale sought to be set aside and avoided by the assignee in his case, as fraudulent, was made long before that time.

The case was tried and submitted to the jury without objection or exception, upon the theory that the recent amendatory act did not apply; at least no pretense of that kind was made on the trial.

The jury returned a verdict for the plaintiff for the value of the property claimed, thereby finding that the sale, by the bankrupt, of the property in question to the defendants, who were his creditors, was fraudulent under the law.

In the charge to the jury, no reference to the amended act was made; but they were instructed that the sale would be void if they found from the evidence the several facts and propositions mentioned in the original act; to which charge no exceptions were taken.

On the second day after the verdict, the defendant's counsel filed a motion for a new trial, alleging that the court had charged erroneously upon the 4th proposition mentioned in section 35; that the amended act had changed that section, so that it was now necessary, in order to avoid a sale, that the jury should be instructed that they must find that the party *knew* that the sale was made in fraud of the provisions of the act, instead of that he must have had reason to believe so." It was claimed that, as the last section of the amended act repealed all provision of the old law *inconsistent* with its provisions, the old law was on that point absolutely repealed, and, it being in its nature penal, it could not be considered as existing for any purpose, and hence no sale could now be avoided unless it fell within the provisions of the amended law, irrespective of the time it was made. If this question had been raised at the trial, or there had been a request to so charge the jury, and I had so charged, the result would not, I think, have been different, for the evidence of the guilty knowledge of the defendants was overwhelming, so that, as far as the result of this case is concerned, it would have been, wholly immaterial; and as this was a proposition that might have been charged if the atttention of the court had been called to it at the proper time, and as, in my opinion, it could not have affected the result, it presents a question of a purely technical character. I do not, therefore, feel that it would be right to set aside this verdict for that reason, or to allow that exception to the charge, after verdict. When a charge is wrong in principle, and the error is of such a nature as not to have been avoided, if the attention of the court had been called to it at the time, by a proper exception or request, I allow an exception to be filed after verdict, but when it relates to a matter that might have been corrected on the spot, without overthrowing the whole theory of the case, I think it due to the court and to the adverse party, that the attention of the court should be called to it at the proper time. The rights of the successful party are involved and the court should not sacrafice them.

This is a sufficient ground for denying the motion, but, as the question is one of great importance and of general interest, I may as well state a further reason for the denial, which covers the ground upon which the motion was based. This was a case of involuntary bankruptcy, and the right of the assignee to recover back property transferred by the bankrupt, in payment of his debts, from the creditor so receiving it, is not alone conferred by the 35th section of the act, but such right was given by section 39 also. So it bebecomes necessary to ascertain what the effect of the amendments is nupo that section as well as upon section 35. Sec. 12 of the amended act, changes section 39 by inserting the word "*knew*" where the words "reasonable cause to believe" were understood in the original section, being like the third amendment to section 35. But section 39, as amended, provides that its provisions shall apply to cases commenced since Dec. 1, 1873, so that, as to cases like this, commenced before that time, the original act was not changed. The class of cases to which it should apply being designated, it left all others to proceed as if it had not been passed. It, in that respect, was restrictive of its operation, and section 21, the repealing section, does not change or effect the original section as to cases commenced before that time, for that only repeals such acts and parts of acts as are *inconsistent* with the provisions of the amended act, and as the amended act, or this section of it, by its terms, only applies to cases commenced since December 1st, 1873, it is not inconsistent with the original act except as to cases commenced since that time. Cases commenced before that time were excepted from its operation, and are not therefore, affected by it, or repealed by the repealing section. As the right to maintain this suit, upon the grounds and provisions contained in the original section 39, remains unchanged and is clear, this motion for a new trial should be denied. The charge of the court being in conformity with that section, there was no error of which defendants can complain. In this view, it might be unnecessary to consider the effect of the amendments to section 35. But as I am satisfied that the construction contended for by defendants' counsel cannot be sustained, I will briefly state my reason therefor.

Repeals by implication or by a general clause like the one inserted in the repealing section of this act, which amounts to the same thing, are not favored and are never extended beyond their necessary operation. Repealing clauses of this kind are limited in terms to such provisions as are *inconsistent* with the amendatory act, and are never construed to include or alter provisions not embraced in the amendments. The amended act is not inconsistent with any other parts of the original act than such as are affected by its provisions. The repealing clause is co-extensive with the amendments and only applies where they do and when they do. 1. Pick (Mass.) Spaulding v. Alford, 33. So that the effect of such a repealing clause is very different from what an absolute repeal of section 35 would have been. 3 How. 636, Daviess v. Fairbairn. Now if it should be held that the amendments to section 35 were intended to apply to cases occuring after the passage of the amended act, the repealing clause would only apply to such cases, for only as to those would there be any repugnancy. The original act as to cases occurring before its passage would remain unaffected by the repealing clause. Congress fixed the time for certain portions of the act to take effect before the passage (section 12), and for certain others (section 10) after; so, I think, the fair intendment is, that in cases where no other time was mentioned, they meant that the amendment should only apply to cases arising after its passage. This, under the circumstances, should be so considered as to such portions of it as changes the substantial rights of parties. I

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do not believe Congress intended to change the act so as to make good contracts that were void under the original act, or to change those provisions of the statute so as to affect contracts theretofore made. It would require a very clear expression by the legislature to give it such effect, or as being intended to vary the relations of litigant parties. 4 Denio, Palmer v. Conly, 374; 6 Adol & Ellis, Hitchcock v. Way, 943; 3 ib, Paddon v. Bartlett, 884; 9 Barn. & Cress., College of Physicians v. Harrison, 954. If they had, I think they would have expressed it, in unequivocal language, as they did in the amendment of section 39.

There are many provisions of the act of a practical character that may properly be applied in further proceedings in all cases such as those relating simply to the administration of the law, and as do not affect existing rights or the validity of contracts. Such provisions are of a remedial character, and may be presumed to have been intended to be applied to all cases, but such parts as relate to the substantial rights of parties, acquired under the original law, like the amendments to section 35, I think it must be held Congress did not intend to apply to cases occurring before the adoption of the amendments.

The question was suggested as to what extent this amendment had changed the original act in the respect heretofore noticed, and I must confess it is not without its difficulties.

But it seems to me in almost every case, where the jury would be warranted in finding that the party "had good reason to believe," under the old statute, they would be justified in finding that he "knew" under the amended law, so that practically the amendment is merely a verbal one in that respect. It is a rule of universal application, in all cases of fraud on the part of the debtor or seller of property, that notice of facts sufficient to put a paty upon enquiry, amounts, in judgments of law, to notice, and is sufficient to charge the purchaser with *knowledge* of the matters and things it is reasonable to suppose such inquiry or investigation would have discovered. Inquiry on the part of the purchaser having such notice, becomes a duty, and diligence an act of justice. A *scienter* may be shown by circumstances, and whatever fairly puts a party upon inquiry, when the means of knowlegde are supposed to be at hand, if he omits to inquire, he does so at his peril, and he is chargable with a knowledge of all facts which, by a proper inquiry, he might have ascertained. 4 vol. Kent's Com. page 179; May v. Chapman, 16 Mees & Wels. 355; Goodman v. Simonds, 20 How. 343; The "Lulu," 10 Wal. 202; Hill v. Simpson, 7 Vesey, 170; Smith v. Lowe, 1 Atkyns 489; Booth v. Barnum, 9 Conn. 286; Pitney v. Leonard, 1 Paige Chan. 461; Carr v. Hilton, 1 Curtis C. C. 390; Hawley v. Cramer, 4 Cowen, 717; Scammon v. Cole, 5 Nat. B. R. 257.

In some of these cases "notice" is used instead of "knowledge," but as is said in Goodman v. Simonds, 20 How. *supra*, it is usually in the same sense and that is one of its appropriate significations. So, if within meaning of the provisions of the original section a party had reasonable cause to believe that, under the foregoing rule, would be sufficient to put him upon inquiry, and, if reasonable enquiry would show that the sale was, in fact, a fraud upon the act, he would be chargeable with knowledge of that fact.

Unless this well settled is ignored, there is no escape from this conclusion.

NEW TRIAL DENIED.

The Mordaunt Case.

The London correspondent of the New York Tribune, and who is evidently accurately informed, thus gives the history and present status of this *cause celebre*:

There have been of late years few more pleasing illustrations of the uncertainties of English law and morals than the Mordaunt case. It was famous when first heard; it has suddenly become famous again by the decision of the House of Lords given yesterday. Lady Mordaunt, you may still remember, was a great beauty; one of several sisters, also great beauties, of good birth and better connections. When she married Sir Charles Mordaunt there were plenty of candid friends who predicted trouble, for reasons not necessary to be repeated. The trouble came soon enough, first in the shape of scandals, then of a divorce suit brought by the husband against his wife, with some well-known names figuring as correspondents—the names, that is, of those with whom Lady Mordaunt was allgeed to have committed adultery. Before the cause could be heard, a plea of insanity was filed by Lady Mordaunt's friends as a bar to the petition for divorce, and Lord PENZANCE, then judge of the divorce court, directed the question of insanity to be first tried. Upon that interim hearing the merits and demerits of the case were much gone into; there was, in fact, such a dish of scandal set before London society as quickened the appetite of the most worn-out old profligate you could meet. Royalty came in for its share, as, to do it justice, it generally does. The Prince of Wales went into the witness-box, and swore that his friendship with Lady Mordaunt was in all honor and propriety, and Mr. Seargant Ballantyne resisted the greatest temptation that ever beset a famous cross-examining counsel, when he suffered the prince to pass from the box with the single remark that he had no questions to ask his royal highness. The jury found that Lady Mordaunt was insane. The judge thereupon ordered a stay of proceedings until she had recovered her mind. Sir Charles was furious. He appealed to the full court, and the full court—that is to say, Lord PENZANCE himself, the lord chief Baron, and Mr. Justice KEATING—affirmed the decision of Lord Penzance by a majority of one. Again Sir Charles appealed, this time to the house of lords. I should be afraid to say how many times and by how many counsel the matter has been argued. There are long purses on both sides. It became certain, meantime, that Lady Mordaunt was permanently and hopelessly insane; the precise contingency upon which the lord chief baron had been of opinion the husband should be permitted to proceed with his petition. The law lords required the attendance of the judge to advise, and six of them heard the arguments, two of the six being the lord chief baron and Mr. Justice KEATING who had sat on the first appeal. Neither of them, as may be conjectured, changed his views. Three of the others sided with the chief baron, and only one with Mr. Justice KEATING. With this majority agreed the law lords, to wit: Lord CHELMFCRD and Lord HATHERLY, the wo ex-chancellors, who, for the purposes of this case, constituted the house of lords in its capacity as court of final appeal. Scotch Lord COLONSAY had sat, but died thereafter—not in consequence, let us hope. They were not obliged to agree with the majority, be it understood; might, had they so chosen, have sided with the minority and dissented from the majority—the judges being in such cases an advising, not a voting body. The two ex-chancellors accordingly gave judgment reversing the decision of the court below, and directing that court to proceed to hear and determine the suit for divorce, notwithstanding the admitted insanity of the wife, and to pronounce a decree upon the same. It is four years since the decision now overthrown was given.

So now we are to have the whole matter over again.

Right of Mortgagee to take Possession of Mortgaged Property, when Levied on Under Execution Against Mortgagor.

In Lewis v. D'Arcy, Chicago Legal News, for July 4, an action of replevin was brought by a mortgagee, to gain possession of personal property which had been mortgaged to him to secure a future indebtedness, but left in the possession of the mortgagor. The mortgage contained a clause giving the mortgagee the right, in case he should at any time, before the indebtedness secured by the mortgage became due, feel "unsafe or unsecure," to take immediate possession and sell the property. The property, by the terms of the mortgage, was to remain in the possession of the mortgagor until the indebtedness secured should become due, or unless the mortgagee should, for any reason, feel "unsafe or unsecure," and elect to take immediate possession.

The case coming before the Supreme Court of Illinois, Mr. Justice SCOTT delivered the opinion of the court as follows:

"The property having been levied upon by the officer and taken into his possession, the mortgagee, in accordance with the provision of the mortgage, elected to treat the conditions as broken, and sought to reclaim the possession. This, we think, he had a clear right to do. As we said in Bailey v. Godfrey, 54 Ills., 507, by the express terms of the mortgage, the mortgagee was invested with the power to elect, and was made the sole judge of the happening of the contingency when he would elect to take possession of the property. It had been levied upon and was about to be exposed to sale. No doubt if the sale had taken place the property would have been bought by different purchasers and scattered to different portions of the country. These facts afford the mortgagee ample reason to feel "unsafe and unsecure" in regard to his debt. The contract between the parties is recognized in the law as valid, and no reason is perceived why he could not as lawfully take possession of the property for this condition broken, as for non-payment on maturity of the indebtedness secured by the mortgage.

"It is insisted that inasmuch as the mortgagor, by the terms of the mortgage, had the possession, he had such interest in the property as was subject to levy and sale. This is no doubt true when the mortgagor has the right to retain the

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possession for a definite period. This is the doctrine of Beach v. Derby, 19th Ills., 617, and Spaulding v. Mozier, 57 Ills., 148. The property was conditionally conveyed to the mortgagee, and is only in the permissive possession of the mortgagor, which may be terminated at any time for condition broken, or when the mortgagee may feel "unsafe or unsecure" in regard to his debt. His right to take possession cannot be defeated by the levy of an attachment or execution, although the levy may have been rightfully made while the property was in the hands of the mortgagor. Still the mortgagee's right to make his election to reclaim it would prevail against the officer making levy, as well as the mortgagor himself.

"There is no hardship in this rule. The mortgagee, upon taking possession, would be compelled to offer the property for sale at once, and when his debt was satisfied, the remainder no doubt would be subject to the levy made by the officer, it should require the sale of all the property to make the mortgagee's debt. If the attaching creditor would not be injured, for the reason his levy was only upon the interest of the mortgagor, and the sale would show he had no interest."

Upon the right of a mortgagee of personal property to maintain trover or replevin in such cases as the above, see Spriggs v. Camp, 2 Speers, 181; Pickard v. Low, 3 Shipley, 48; 2 Hilliard on Mortgages, 451, 452.

The Publication and Distribution of the Revised Statutes of the Unted States, and of Future Statutes at Large.

[GENERAL NATURE — No. 60.]

AN ACT providing for the publication of the revised statutes and the laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the existing contract or contracts between the secretary of state on the part of the United States, and Charles C. Little, Augustus Flagg, Henry T. Miles, and John Bartlett, of Boston, known as the firm of Little, Brown & Company, dated the twenty-eighth day of May, eighteen hundred and sixty-six, and all the other contracts between the United States or any officer thereof with said firm of Little, Brown and Company, respecting the printing or publication of the laws of the United States, are hereby declared to be determined, pursuant to the powers therein reserved.

SEC. 2. That the secretary of state is hereby charged with the duty of causing to be prepared for printing, publication, and distribution the revised statutes of the United States enacted at this present session of congress; that he shall cause to be completed the head notes of the several titles and chapters and marginal notes referring to the statutes, from which each section was compiled and repealed by said revision; and references to the decisions of the courts of the United States, explaining or expounding the same, and such decisions of the state courts as he may deem expedient, with a full and complete index of the same. And when the same shall be completed, the said secretary shall duly certify the same under the seal of the United States, and when printed and promulgated as hereinafter provided, the printed volumes shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States, and of the several states and territories.

SEC. 3. That the revision of the statutes of a general and permanent nature, with the index thereto, shall be printed in one volume, and shall be entitled and labled "Revised Statutes of the United States," and the revision of the statutes relating to the District of Columbia, to post-roads, and the public treaties in force on the first day of December, one thousand eight hundred and seventy-three, with a suitable index to each, shall be published in a separate volume, and entitled and labeled "Revised Statutes relating to District of Columbia and Post-Roads [and] Public Treaties."

SEC. 4. The secretary of state shall cause the two volumes to be stereotyped, and such number of each volume to be printed and substantially bound at the government printing office, as he may deem needful for public distribution, as hereinafter provided, and for sale by his office.

SEC. 5. That he shall, in like manner, cause to be edited, printed, published, and distributed pamphlet copies of the statutes of the present and each future session of congress, to the officers and persons hereinafter provided, and bound copies of the laws of each congress to the number of two thousand copies, to be distributed in the manner now provided by law, and uniform with the said edition of the revised statutes.

SEC. 6. That at the close of every session of Congress, the secretary of state shall cause to be distributed pamphlet copies of the acts and resolves of Congress for that session, edited and printed in the manner aforesaid, as follows: To the president and vice-president of the United States, two copies each; to each senator, representative and delegate in congress, one copy; to the librarian of the senate, for the use of senators, one hundred and twenty-six copies; to the librarian of the house, two hundred and fifty copies, for the use of the representatives and delegates; to the library of Congress, fourteen copies; to the Department of state, including those for the use of legation and consulates, six hundred copies; to the treasury department, two hundred copies; to the war department, including those for the use of officers of the army, two hundred copies; to the navy department, including those for the use of officers of the navy, one hundred copies; to the department of the interior, including those for the use of the surveyors-general and registers and receivers of public land offices, two hundred and fifty copies; to the post office department, fifty copies; to the department of justice, including those for the use of the chief and associate justices, the judges and the officers of the United States and territorial courts, four hundred and twenty-five copies; to the department of agriculture, ten copies; to the Smithsonian Institution, five copies; to the government printing office, two copies; to the governors and secretaries of territories, one copy each; to be retained in the custody of the secretary of state, one thousand copies; and ten thousand copies shall be distributed to the states and territories in proportion to the number of senators, representatives and delegates in Congress, to which they are at the time entitled.

SEC. 7. That after the close of each Congress, the secretary of state shall have edited, printed, and bound a sufficient number of the volumes, containing the statutes at large enacted by that Congress, to enable him to distribute copies, or as many thereof as may be needed, as follows: To the president of the United States, four copies; one of which shall be for the library of the executive mansion, and one copy shall be for the use of the commissioner of public buildings; to the vice-president of the United states, one copy; to each senator, representative and delegate in Congress, one copy; to the librarian of the senate, for the use of the senators, one hundred and fourteen copies; to the librarian of the house, for the use of representatives and delegates, four hundred and ten copies; to the library of Congress, fourteen copies, including four copies for the law library; to the department of state, including those for the use of legations and consulates, three hundred and eighty copies; to the treasury department, including those for the use of officers of customs, two hundred and sixty copies; to the war department, including a copy for the military academy at West Point, fifty copies; to the navy department, including a copy for the library at the naval academy at Annapolis, a copy for the library of each navy yard in the United States; a copy for the library of the Brooklyn Navl Lyceum, and a copy for the library of the naval institute of Charlestown, Massachusetts, sixty-five copies; to the department of the interior, including those for the use of the surveyors-general and registers and receivers of public land offices, two hundred and fifty copies; to the post office department, fifty copies; to the department of justice, including those for the use of the chief and associate justices, the judges and officers of the United States and territorial courts, four hundred and twenty-five copies; to the department of agriculture, five copies; to the Smishsonian institution, two copies; to the government printing office, one copy; and the secretary of state shall supply deficiencies and offices newly created.

SEC. 8. That the said printed copies of the said acts of each session, and of the said bound copies of the acts of Congress, shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several states therein.

SEC. 9. That the said laws of each session of Congress shall also be stereotyped, and printed for sale as provided in respect to the said revised statutes. And the copies of the said revised statutes, and of the said laws of each session of Congress, as issued from time to time, shall be respectively sold at the cost of the paper, press work, and binding, with ten per cent. thereof added thereto, to any person applying for the same. And the proceeds of all sales shall be paid into the treasury.

SEC. 10. That the secretary of state shall cause all the copies of the revision of Indian treaties, made by Thomas J. Durant, now printed, to be bound, and the same shall be deposited with the secretary of the interior, for the use of the departments and officers of the government.

Approved, June 20, 1874.

Book Notices.

THE BANKRUPT LAW, WITH ITS AMENDMENTS, INCLUDING THAT OF 1874. "The Lawyers' Edition." New York: Baker, Voorhis & Co., 1874. Price, 75 cents.

This is the bankrupt law of 1867, conveniently arranged with its subsequent amendments. It is printed without side-notes, but each section is prefixed with a title indicating in general terms its substance. It has a good index.

THE BANKRUPT ACT OF 1867, CONSOLIDATED WITH ITS AMENDMENTS, INCLUDING THE AMENDATORY AND SUPPLEMENTAL ACT OF 1874. Compiled, with an index, by SEYMOUR D. THOMPSON. St. Louis: Soule, Thomas & Wentworth. pp. 74. Price 75 cents.

This is a useful compilation, and embraces all portions of the original act, and the several amendments of 1868, 1870, 1872, 1873, which are in force, and

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the late important amendment and supplement of June 22, 1874. It has been arranged so as to exhibit the law *as it now stands*. It gives accurately the text, pure and simple, well arranged, with an excellent index. It is often convenient and desirable to have the text of existing enactments without the repealed portions, and without an overwhelming mass of glosses, comments and *syllabi*, and this supplies that desideratum. D.

ABRIDGMENT OF IOWA DECISIONS, INCLUDING PRACTICE AND PLEADINGS, WITH PRACTICAL FORMS. By J. D. TEMPLIN, of the Iowa City Bar. Vol. 1. Des Moines. 1874.

This work, to be completed in three volumes, is intended to afford an increased facility for ascertaining the decisions of Iowa upon all the topics which have been brought into the field of the law by the adjudications of its courts since 1839, embraced in 40 volumes of reports. The author is one of the most industrious and painstaking of lawyers, and has occupied several years, since his practical retirement from the bar, in the preparation of this work. The other two volumes will shortly follow. The author has departed from the ordinary alphabetical arrangement (but with questionable advantage) and has classified the topics with reference to their nature.

To those who have the Iowa Reports, this work will be convenient to enable them readily to ascertain the course and present state of decisions on any subject; and to those who have not these Reports it will be found to be a useful substitute—as good as abridgments in their nature can be.

PUTERBAUGH'S CHANCERY PLEADING AND PRACTICE. A Practical Treatise on the Forms of Chancery Suits, Pleading and Practice, now in use in the State of Illinois, and wherever the same System prevails. With Forms of Bills, Answers, Pleas, Demurrers, Exceptions, Petitions, Orders, Decrees, etc. By SABIN D. PUTERBAUGH, late one of the Judges of the Circuit Court. Chicago: Leslie Puterbaugh, Agent. St. Louis: Sold by Soule, Thomas & Wentworth.

Several years ago Judge Puterbaugh published a work on Common Law Pleading and Practice, adapted to the courts of Illinois. The bar of Illinois were not slow to discover its merits, and it has gone rapidly through three editions. In his preface to the work now before us, the author takes occasion to tender his grateful acknowledgments for the favor with which that work has been received by the profession. In doing so, he has been led by his diffidence and goodness of heart into the mistake of many authors, that of supposing that he is under obligations to the public, while it is they who are under obligations to him. We have had frequent occasion to consult Judge Puterbaugh's work on Common Law Pleading and Practice, and always to our satisfaction; and we have never heard it spoken of except in praise. In that work he did for his state, and for those states having the same system of procedure at law, what Chitty did for England.

The work before us bears marks in its general arrangement, and in all its details of being prepared with the same skill and care which mark the later editions of the author's work on practice at law.

In the first fourteen chapters we are conducted by successive steps through the suit in chancery, from the filing of the original bill to the preparation of the final decree. The next five chapters treat of bills not original in their nature, such as supplemental bills, bills of review, etc. The next four chapters are devoted to bills of discovery, of interpleader, for perpetuating testimony, and cross bills. Then follow chapters relating to proceedings in special cases, such as bills for specific performance, to redeem, to foreclose mortgages, creditors' bills, partition suits, proceedings for dower, for separate maintenance; bills to quiet titles, to set aside wills, of *ne exeat*, and to restrain waste; also bills relating to trusts and proceedings to enforce mechanics' liens.

It must not be supposed that this work is drawn entirely from local sources. On the contrary, while Judge Puterbaugh has, perhaps, quoted the reports of Illinois more frequently than those of any other single state, yet he has drawn largely from the decisions of other American courts, and from the English cases, as well as from the leading works on equity pleading and practice.

Although the merits or demerits of a book of practice can only be established by the tests of time and use, we do not hesitate to recommend this work, without qualification, to the profession in Illinois, and in those states which have a similar system of equity procedure.

A THIRD CHAPTER ON THE RULE IN MINOT'S CASE. By a Layman. pp. 48. New York: G. P. Putnam's Sons. Association Building, Fourth Avenue and Twenty-third Street. 1874.

Lawyers frequently make use of the expression "legal reason," in such a manner as to convey the idea that there must be some difference between reason when applied by cultivated lawyers to legal questions, and reason when applied by other persons to other subjects. If we except the fact that a cultivated legal mind, when reasoning on legal subjects, has in his possession a greater number of facts—a greater aggregate of knowledge from which to deduce his conclusions, there is no difference between legal reason and any other reason. Legal reason consists simply in common sense—the sense which people generally possess, guided by an enlarged degree of knowledge as to legal matters, and applied to legal subjects. There is no reason why intelligent persons, who are not learned in the law, should not reason sensibly and even cogently upon many legal questions. And it may sometimes happen that such persons will arrive at more just and enlightened conclusions than trained lawyers, from the very fact that they approach the examination of the question with their minds free and untrammeled by that educated and habitual deference to precedents—that almost childlike acquiescence in the law *as it has been decided*—which is at once the best and the worst trait of our profession. Unless we are mistaken, the pamphlet before us affords a happy demonstration of this fact.

In the case of Minot v. Paine, 99 Mass. 101, determined in the Supreme Judicial Court of Massachusetts in 1868, a testatrix devised her estate to a trustee to hold and manage as to him might seem prudent and judicious, "with full powers of sale and conveyance, and change of investment in the management thereof, and directed him to pay the *net income* as often as convenient to her grand-daughter during her lifetime, remainder to other persons, etc. Now a part of this estate consisted of shares in a certain railway company, and another part the trustee invested in shares in another railway company. These companies declared dividends known as *cash* dividends, and also dividends known as *stock* dividends, or *increase* dividends. Of course there was no question that the cash dividends were "net income," and should be paid over to the life tenant; but whether the stock or increase dividends belonged to the life-tenant or were to be held for the remainder-man, the trustee was in doubt, and asked the direction of the court. There was no dispute upon the pleadings as to the facts; and Chief Justice CHAPMAN reserved the case for a full bench, and it was unanimously held that while the cash dividends were *income* to be paid to the legatee for life, the new shares were *capital* to be held for the legatee in remainder. This case thus established the principle that in Massachusetts stock dividends are to be regarded as *principal*, and cash dividends as *income*; and in the subsequent case of Leland v. Hayden, 102 Mass. 542, this principle is said to be settled.

As nearly as we can understand Layman's argument, he objects to this rule on two grounds, which, if they are "well taken," have, it must be admitted, considerable force: 1. That there is no justice in it. 2. That there is no sense in it.

He urges that there is no justice in it, because it takes one man's property away from him, arbitrarily and capriciously, and gives it to another; and that there is no sense in it, because it makes a flimsy distinction between earnings—surplus accretions, which are divided in *money*, and those which are divided in *stock*.

Whether such accumulations are to be considered as *capital* going to the remainder-man, or as *income*, going to the life-tenant, is not left to depend on the intrinsic nature of the thing itself, but upon the manner in which the directors of the corporation see fit to divide it. If they see fit to divide it in money, it goes to the life-tenant; if they see fit to divide it in additional stock, it goes to the remainder-man. Now, in reason and sense, it cannot make any substantial difference to the life-tenant whether it comes in money or in stock, so that he gets it; for if it comes in money he can convert it into stock, and if it comes in certificates of stock he can convert them into money. In either case he gets his bread and butter, the *income* which the testator intended he should have, and the remainder-man gets the principal, undiminished and unimpaired, which the testator intended he should get.

This appears to be the third pamphlet which Layman has written on the "Rule in Minot's Case." We have not had the pleasure of seeing the other two. The first was entitled "Common Sense *versus* Judicial Legislation," and was noticed in 5 American Law Review, 540. The second was entitled "Stock Dividends; The Rule in Minot's Case Restated with Variations by the Supreme Judicial Court of Massachusetts," and was noticed in 5 American Law Review, 720. This last notice combated at length the position taken by Layman, or rather apologized for the decisions of the Supreme Judicial Court of Massachusetts, which he criticised. As an illustration of the happy manner in which Layman disposes of the arguments of the writer in the Law Review, we may quote the following paragraph from that journal, with the reply which is now made to it in the pamphlet before us:

"A well managed corporation," says the Review, "is not unlike a vineyard in which the vines are each year growing larger and stronger, and more capable of producing fruit, while the annual crop is removed for consumption. And if a vineyard were devised to a tenant for life, and at his death to a remainder-man, the tenant for life would only be entitled to the fruit of each year; while the increase of the vines, the new stalks with the old, would benefit the life-beneficiary only as they became capable of producing, but

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would finally come with their increase to the remainder-man. And in the management of such a trust, the careful and just steward would not fail to set out new scions as well as obtain an increase of the original stalks, which new scions would pass to the remainder-man, as well as the original vines, increased by their natural growth." This position Layman overwhelms with ridicule in the following passages:

"But suppose the steward (being a remainder-man, possibly) should withhold the fruit of one year from the tenant for life and should expend its produce in buying a few contiguous acres, with the view of enlarging and improving the vineyard. And suppose that he should withhold the fruit a second year and invest its proceeds in plowing and planting the newly acquired acres. His vineyard is now, say twenty per cent. larger, and twenty per cent. more valuable than when it came into his hands. But the tenant for life, not fancying this loss of income for a couple of years, calls upon Mr. Steward and reminds him that it is time to account for two crops.

"'Really, Mr. Cestui,' the steward observes: 'I have invested the proceeds in permanent improvements, to perpetuate the vineyard. Observe the enlargement of the plant—it must be gratifying to you to know that your remainderman will be very much benefited by it.'

'"But my dear Mr. Steward," Mr. Cestui instantly replies, "I should like to have my moneys.'

"'Sir, look around. *Si nummos requiris circumspice*—there's your money—won't that satisfy you? It's in the plant—there it is in *terra firma*—all safe—read Minot's Case, sir; it is capital now, it's principal.'

"'But the crop is mine, and the money you received for it is mine,' argues the poor tenant for life.

"'Was yours, my dear sir—was yours—but the moment I expend it, it is yours no longer. But it's all there, every dollar of it.'

"'Then make me a deed of the new property that you have paid for with my money.'

"'That's impossible, sir. That's the vineyard. Why, sir, if I were to give you a deed for that part, the remainder-man would only get four-fifths of the vineyard, instead of the whole."

"'But its my money.'

"'But the proportion, my dear sir, consider the proportion; the remainderman is entitled to five-fifths of the vineyard, and would you give him only four? And your money, sir, is no longer money, it's vineyard, it's plant. Zounds, sir, you are not so unreasonable as to call for your income when I've made capital of it!'

"I think this disposes of the vineyard illustration."

Words could not be devised which could convey to the ordinary mind a clearer view of the workings of the "Rule in Minot's case." If this rule be sound law, a corporation may do business year after year, during the whole lifetime of the life-tenant, turning its income into capital stock, and issuing none but stock dividends, all of which will go to the remainder-man (perhaps a person unborn), and the life-tenant will be left to starve. If, instead of this, the simple principle which we understand to have been decided in Earp's Appeal, 28 Penn. State, 368, the leading American case against Minot v. Paine, is applied, both the life-tenant and the remainder-man get precisely what they would get if the dividend had been declared in cash, and common sense is not dethroned, nor justice violated.

For a full collection of authorities on this interesting question, see chapter 18 of Perry on Trusts.

Summary of our Exchanges.

The American Law Record (Cincinnati, Bloch & Co.), for August, publishes the Amendatory Bankrupt Act. It also contains the final installment of what we should take to be a very learned and interesting article, by A. T. Whatley, B. A., entitled "Historical Sketch of the Law of Piracy." It also reports *de novo* three interesting cases, as to which see our notes of cases.

The Irish Law Times, for July 25, contains the first installment of an article on Life Insurance Frauds, which includes an account of the man who buried the same woman three times, and also an exceedingly graphic description of Udderzook s case, which has already become celebrated in this country. It also contains a number of other readable and instructive papers on various subjects, mostly selected.

The Daily Register, for August 6, publishes Casserly v. Manners, Supreme Court of New York, Special Term, Van Brunt, J., holding that the authority granted by law to an insurance company to re-insure, is granted for the benefit of the company, and not of individual policy holders. See our Notes of Cases for a more extended notice of this decision. The other numbers of the Daily Register contain nothing of interest, except selected matter which we have already noticed.

The Washington Law Reporter, for August 4, reports the case of Hill v. Shoemaker, Supreme Court of District of Columbia, holding that the sale of real estate under a deed of trust, as a whole, when it is capable of being divided, and when serious injury has been occasioned by that way of selling, furnishes just ground for relief in a court of equity; and that if the property has been consolidated and improved into a paper mill (after the deed was made), with fixed machinery and water power to operate the same, the sale will be set aside, if it is made without reference to this altered condition of the property.

Its other cases are selected and have already been noticed by us.

The Pacific Law Reporter, for July 21, publishes Knowles v. Logansport. Gaslight Co., published in our issue for June 25 (*ante*, p 311). Also Lewis v. D'Arcy, selected from the Chicago Legal News, which we notice elsewhere in this number. Also a decision of the secretary of the interior in Born v B. & M. R. R. Co., holding that a settler who in good faith is residing on a tract of land covered by a homestead entry at the date of the cancellation of said entry, has a superior right to said tract, if he file, under the pre-emption law, in time, to a person who merely makes a homestead entry on the land the day the prior entry is cancelled. This decision is to be commended for its good sense and equity. The Reporter also reprints from the Chicago Legal News the case of Chicago & R. I. R. R. Co. v. Town of Lake, on the subject of laying out streets in a town through railway property. See our notes of cases.

The same journal, for July 28, publishes an oral decision of Mr. Circuit Judge Sawyer, in Fisher v. Craig, which was a bill in equity to restrain the infringement of a patent. It also publishes Thompson v. Whitman, published in this journal for June 25 (*ante*, p. 308). It also reprints from the Western Land Owner a decision of the secretary of the interior ruling the following point: "The general route of the Northern Pacific Railroad Company became fixed at the date of filing the map in the office of the secretary of the interior, August 13, 1870. The interior department afterwards recognized the changed line, filed Oct. 12, 1870. Parties who settled on lands outside of the limits of the first fixed line, but within the limits of the changed line, prior to notice of such change, are entitled to protection, and the company will be allowed indemnity under their grant for land so settled upon.

The American Law Register, for August, contains an article on the maxim "*nullum tempus accurrit regi.*" It also publishes the following interesting American decisions, the first three accompanied with notes by Judge Redfield.

Kirschner v. Conklin, Supreme Court of Errors of Connecticut—commercial paper—relative rights and duties of endorsers of accommodation paper, he same as regular business paper—subsequent accommodation endorser may, recover the whole amount of note from prior accommodation endorser, unless there is an actual agreement to share the liability. Opinion by Parke, J.

Boardman's Appeal, same court—Ante-nuptial contract—provision for wife in lieu of dower—funds held by trustee under such contract, and payment of the income from time to time to husband with wife's knowledge—husband's estate held liable for all such income, though received more than the statutory period of limitation before his death. Opinion by Foster J.

Territory of Montana v. Lee, Supreme Court of Montana—Territories are not only not sovereign states, but have none of the attributes of sovereignty, even after they are organized by Congress—cannot pass laws for the forfeiture of the title of aliens to land within their boundaries; nature of such governments discussed. Opinion by Wade, C. J.

Rheem v. Carlisle Bank, Supreme Court of Pennsylvania—Sunday—notice of protest of commercial paper delivered on Sunday is a nullity—receipt of such notice in a sealed envelope, without reply when told what it is, does not amount to a waiver nor does it make a valid notice on Monday, though a new notice would then be in time. Opinion by Sharswood, J.

Taylor v. Steamboat Commonwealth, United States District Court, Eastern District of Missouri—Maratime lien does not depend on character of the port where the repairs are made—in foreign port there is a presumption in favor of a lien, but in the home port otherwise, and it must affirmatively appear that repairs were made on the credit of the vessel—lien created by master in foreign port is limited to repairs necessary to enable the vessel to pursue her voyage, but there is no such restriction on the owners at the home port. Opinion by Treat, J.

Hovey v. Home Insurance Company, United States Circuit Court, Southern District of Ohio—Set-off in bankruptcy—insurance company having failed, another company, which had reinsured certain policies was entitled to buy them in and set them off against the claim for reinsurance—such set off is not against public policy, nor against the law if made before the filing of the petition in bankruptcy against the original insurer. Opinion by Swing, J.

The Abstracts of Recent American Decisions, contained in the American Law Register, for August, embrace only the Supreme Courts of Michigan and Penn-

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sylvania, but include the following subjects: Action, Amendment, Bills and Notes, Check, Constitutional Law, Criminal Law, Damages, Ejectment, Husband and Wife, Mortgage, Municipal Corporations, Navigable Waters, Negligence, Railroad, Riparian Rights, Slander, Specific Performance, Statute, Street, Taxation, Vendor and Purchaser,

Notes and Queries.

HERMAN, Mo., July 24th, 1874.

EDITORS CENTRAL LAW JOURNAL:—A., being a widow, has a right of dower in a valuable tract of land, which dower has never been admeasured or assigned to her. A. conveys her dower-right by deed, for valuable consideration, to B. Can B., by proceeding in equity against C., the present owner and possessor of the land, have the dower, bought from A., admeasured to himself? H.

ANSWER.—In 1 Scribner on Dower, the author, after citing the cases, of which there are many, and among which are Potter v. Everitt, 7 Ired. Eq. 152; Wilson v. McLenaghan, 1 McMillan (Son. Car.), Eq. 35; McCubben v. Cromwell, 2 Har. & Gill. (Md.), 443; Strong v. Clem, 12 Ind. 37; thus states what seems to be the true deduction from them: "The doctrine of these cases, recognizing the power of a court of equity to enforce the contract of a widow for the sale of her dower interest, when fairly made, and to protect the assignee in his rights, seems both reasonable and just, and is undoubtedly supported by the weight of authority." Such would seem to be the law, unless there is something in the legislation or adjudications in Missouri, to the contrary.

CHILLICOTHE, Mo., August 10, 1874.

Mrs Mary Eden has $3,000 cash, inherited, but not settled upon her by any separate instrument. With the verbal consent of her husband, she enters into copartnership, *without* written articles, with Henry Summers, in the live stock business, and embarks all her capital therein. By mutual consent, Mr. Eden acts as agent for, and on behalf of his wife, in the management of copartnership affairs.

The firm failed in a year's time, but not until Mr. Eden succeeds in withdrawing all his wife's capital, leaving Summers to pay the debts, some $2,500, which he does in a year's time, but not until Mrs. Eden has deceased, making her husband, by will, her sole legatee and executor. Summers brings suit in equity against Eden, as executor (alleging also his being sole legatee) to settle up the partnership and make Mrs. Eden's estate pay her share of the losses, and alleging all the facts herein stated.

To this petition a demurrer is filed, the vital point of which is that Mrs. Eden, being a married woman, could not enter into copartnership.

Query. Is the suit well brought, or not? C.

ANSWER.— Unless the common law has been changed, relaxed or modified in the state where the transaction took place, our impression would be that it would be difficult to make the wife or her estate personally liable for losses.

Legal News and Notes.

— LORD O'HAGAN is to preside over the section for Economic Science at the meeting to be held at Belfast on the 19th of August.

— TOWNSEND SCUDDER, Esq., an esteemed member of the bar of New York city, died recently.

— THE attorney general has received and accepted the resignations of J. Newton Temple, district attorney for the western district of Arkansas, and John A. Minnis, for the northern district of Alabama.

— HON. DAVID A. SMALLEY, judge of the United States court for the district of Vermont, recently suffered from a slight stroke of paralysis so that he is partially disabled. His case, however, is hopeful.

EFFORTS are being made before the Pennsylvania Board of Pardons to secure the pardon of Udderzook, the life insurance swindler and murderer. The case has been set for hearing October 8th.

— THE Irish Law Times, of July 25, says that the Right Hon. A. Brewster, ex-Lord Chancellor of Ireland, is still seriously ill at his country residence, Roebuck Grove, Clonskeagh, and that there is hardly any hope of his recovery.

— MR. ATTORNEY GENERAL WILLIAMS decides that a United States marshal, having an attachment against goods for salvage, is entitled to take the property attached into his custody and hold it until disposed of by the court issuing the attachment.

— AT the Warwickshire (English) assizes, recently, Mr. Justice Denman, in charging the grand jury, referring to drink as a prolific source of crime, mentioned, as an illustration of this, that there were thirty-nine prisoners for trial at the last Liverpool assizes, one-third being cases of murder, manslaughter, and unlawful wounding, every one of which was directly attributable to drink.

—IT is stated that the Benchers of Gray's Inn have held anotherconference to consider the case of Dr. Kenealy upon the issues arising out of the Tichborne trial, and for the articles published in the Englishman. It was decided to deprive Dr. Kenealy of his benchership, and to hereafter consider the question of expelling him from the bar if publications in the Englishman are continued.

—THE San Francisco Bar Association is a live institution, embracing over 150 prominent members of the Bar, who occupy a fine *suite* of rooms, extending 120 feet from Commercial to Sacramento streets, embracing dining rooms, billiard rooms, smoking rooms, reading rooms, etc., and is really a social club, where most of its members daily lunch together at the usual recess of the courts, from 12½ M. to 2 P. M.

—IT is said that the estate of the late Chief Justice Chase, settlement of which has been slow, owing to a disinclination of the executor to sell his stocks and other personal property during the period of depression, will amount, when all his debts are paid, to about one hundred and five thousand dollars. Some of the securities, including one hundred shares in the Pennsylvania avenue street railway, have just been sold to pay small creditors, who were pressing. The estate owes Jay Cooke & Co., $121,000, mostly advanced on stocks, and Mrs. Hoyt (Judge Chase's daughter), $5,000.

—THE new constitution of Michigan, which is to be submitted to the people of that state for ratification or rejection on the first of October, confers suffrage upon women; prohibits special legislation on a variety of subjects named; gives the governor power to veto a part of any bill while approving the remainder; extends to ten years the term of the supreme court judges; raises the salaries of the leading state officers, which are now even meagre; prohibits stock "watering;" limits the amount of real estate to be held by corporations within the state; prohibits competing railroads from combining under one management or from "pooling" their earnings, and also forbids any railroad officer or employe, from engaging otherwise in the business of transportation.

—SOME of the opponents of the proposed reciprocity treaty between the United States and Canada, question the constitutional right of the president and senate to regulate duties on imports by treaty, claiming that since the constitution confers upon the house of representatives power to originate all *bills* for the raising of revenue, and gives to congress power to "lay and collect taxes, duties, imports and excises," this necessarily excludes the regulation of duties and imports from the treaty-making power. Our able contemporary, the Financier, takes the opposite view, and quotes from the Federalist, and from Story on the constitution, to show that the view above indicated is not the correct one.

—MRS. BELVA A. LOCKWOOD, the lady lawyer of Washington City, is still pushing business. She has recently entered suit for Mrs. C. Susan Raugh, against Thomas Leake, for $630, borrowed money. It is said that Leake engaged to marry Mrs. Raugh, and she loaned him the money, and also gave her note to enable him to set up in business preparatory to the consummation of the marriage; but that he left and went to another city, and refuses now to fulfill his part of the contract by marrying her. We cheerfully give Mrs. Lockwood the benefit of this gratuitous notice, as, with the exception of Mrs. Bradwell and Miss Huett, she seems to be the only lady lawyer that has done anything, except to swing around the circle and deliver lectures.

—THE San Francisco Bar Association embraced the opportunity of the presence of the distinguished jurist, David Dudley Field, in this city, for forty-eight hours last week, *en route* from Australia to New York, to give him an improvised reception at their club rooms, 634 Sacramento street. On the mere rumor that Mr. Field might visit their rooms on Monday, they were more than usually filled, and the members of the Bar had the pleasure of a brief interview with a gentleman whose connection with the revision of the law has already secured to him a permanent place among historic legislators. The old lawyers, whose labors had been increased by the result of his works, and the younger ones, whose studies had been shortened by them, were equally glad to take by the hand one whom all must recognize as *facile princeps* in his art. If the occasion was as pleasant to Mr. Field as it was to those who met him — and it seemed to be — it was a great success. Mr. Field appeared to be in excellent health and spirits.—*Pacific Law Reporter.*

— ARTIST OR TRADER? — A curious case was recently before the Court of Appeal at Paris. The question arose whether a *chef de claque* was a trader, so as to be liable to the bankruptcy law. It appeared that M. Goudchon was a contractor for dramatic success, and was attached in that capacity to several theatres. It was his duty to form, instruct, and direct a band of men, who every night ensured vigorous applause for the actors and plays. Having been adjudicated bankrupt in his absence by the tribunal of commerce, he now applied to the court to annul the adjudication on the ground

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that he was not a trader. His counsel entered into a learned discussion of the origin of the *claque*, and its history in ancient and modern times. He contended that the *chef* could not in any proper sense be considered a trader. His payment from the managers of the theatres was only in free admissions, which he sold at a low rate to the *claquers*. His gains consisted chiefly in gratuities from actors and actresses who desired specially rapturous applause. Under these circumstances it was contended he was an artist, and not a trader. The court, however, declined to take this view, and confirmed the order of the tribunal of commerce.—*Irish Law Times.*

Notes of Cases.

Our notes of English cases are from the Law Times. Our notes of cases decided in the New York Court of Appeals and in the New York Commission of Appeals are from the Albany Law Journal. Those decided in the Supreme Court of Ohio are from advance sheets of the 24 Ohio State Reports, furnished by Messrs. Robert Clarke & Co., of Cincinnati, or from the American Law Record (Cincinnati). Those decided in the Kentucky Court of Appeals are from the American Law Record. Those decided in the Supreme Court of the United States are from printed opinions in our possession. Those decided by the Supreme Court of Michigan are from Chaney's Quarterly Digest. Others are from cases reported in our exchanges, unless otherwise stated.

Slander—Imputation of Want of Chastity.—Imputation of want of chastity in a female is actionable *per se* (Comp. Laws, § 6176), and no averment of special damages to show a cause of action thereon is needed. The plaintiff may, without claiming special damages, show that in consequence of the slander she had been excluded from the society in which she had moved, and was affected in mind and health. (Phillips v. Hoyle, 4 Gray, 568; Swift v. Dickerman 31 Conn. 285.) Burts v. McBain. Supreme Court of Michigan, April Term, 1874.

———. **Evidence as to Origin of Slander.**—If a witness for the defense in slander testifies to having heard the story before the defendant told it, it is competent on re-examination for the plaintiff to ask from whom the witness had heard it. The plaintiff should be allowed to show whence the story came, and what there was to it. If the object was to mitigate damages by showing that the defendant had only repeated a common rumor, its prevalence becomes a proper subject of enquiry, and the plaintiff may trace it back to the defendant, if possible. Ibid.

———. **Admissions—Evidence of Supposition.**—It was held competent for a witness to testify that one on trial for slander had admitted that she "supposed" she had repeated the slanderous statement. Ibid.

———. **Careless Slanders.**—It was held right to refuse to charge that if the jury believed that a person charged with slandering a woman's chastity, had made the statement as something she (the accused) had heard, adding that she did not believe it to be true, and did not intend to impute a want of chastity, and was not understood to impute it by those who heard her, and if in this way her statement, taken together, was a denial of the imputation, there was no ground for action, and the defendant ought to be acquitted. It was correct to inform the jury that there can be no excuse in law for the circulation of vile, defamatory or slanderous language against another which the utterer does not believe to be true. Ibid.

Rescinding Grants to Railroads.—The Supreme Court of Maine has made an interesting decision, recently, in the suit of the town of Unity against the Belfast and Moosehead Railroad, to recover $30,000 alleged to have been subscribed to the stock of the company. The town had, by the required two-thirds vote, agreed to take this amount of stock, but before the road had accepted the vote, and before the line was located, the town, by a majority vote, rescinded its previous action. The court decided that a majority can reverse action taken by a two-thirds vote.

Right of Church Committee to Refuse to Continue Lease of Pew.—In Johnston v. Minister and Trustees of St. Andrew's Church, in the Superior Court at Montreal, before JOHNSON, J., the following points were ruled:

1. That the minister and trustees of a voluntary organization such as the St. Andrew's Church, Montreal, exercising corporate powers under certain regulations, have a right to refuse to renew the lease of a pew in the church, on the expiration of the term for which it was leased; and such refusal, unless it appear to be a mere cloak for malice, gives the dispossessed tenant no claim for damages.

2. That where the receipt given for the pew-rent clearly defines the term of the lease, Art. 1658 of the Civil Code applies, and no notice is necessary to terminate the lease at the expiration of the term.

3. That the civil courts, as a general rule, will not interfere with the determination of the majority of such voluntary organization, where no civil rights as to property are involved.

The case is reported in the Lower Canada Jurist for July.

Infringement of Patent—Injunction—Damages.—A patentee brought an action for an injunction to restrain the sale of imitations of his patented article, and also for damages. It appeared that his patented articles were put on the market without being stamped as required by § 38 of the law of 1871 (16 Stat. 203), and that, although it would have been expensive, yet it was not impracticable for them to be so stamped. *Held*, that the plaintiff was entitled to perpetual injunction, and also to damages; but that the measure of his damages would be the difference between the prices paid by the defendants for the spurious articles, and those at which the plaintiff sold the genuine ones. Putnam v. Ludhoff, U. S. District Court, Eastern District, Mo., TREAT, J.

Eminent Domain—Power of Incorporated Town to open Street through Railway Property.— In the Chicago, Rock Island & Pacific Railroad Co., v. Town of Lake, Chicago legal News, July 4; S. C., 8 Pacific Law Reporter, 22, the following question was ruled in the Supreme Court of Illinois: The town of Lake was incorporated under a general law of Illinois, with power to condemn land for the purpose of opening streets within its corporate limits. The Chicago, Rock Island & Pacific Railroad Co. owned a block of ground in said town, which they purchased in 1853 for railroad purposes. They had erected freight houses, depots and laid railroad-tracks, side tracks, and switches in different directions, on and across the same, for the convenient handling of cars and freight, and for making connections with each other, and they alleged that the necessities of their increasing business will require more tracks, side tracks, and more rooom for standing cars, etc., on this land. The town of Lake, by and through its board of trustees, passed an ordinance to lay and open a public street through a portion of block. The town, by its supervisor, filed a petition in the Circuit Court of Cook county, in and by which it invoked the law of eminent domain of the state, to compel and enforce the opening of the street, in which it asked that just compensation be made to the railroad company for private property taken or damaged by the opening of the street, and that the damages be ascertained by a jury in the manner required by law. To enjoin this proceeding, the railroad company filed the present bill. They also allege that the opening of the street through block B., would destroy in a great degree, the value of the premises for railroad purposes for which the land was purchased, and the injury to complainants would be irreparable; that the public good and convenience, does not require that the street should be extended through this block; that it will not shorten the distance to parties going either north or south; that even if it should appear that the opening of the street would be a convenience to a few, still the greater good and convenience require that the same should not be opened, and in the exercise of the right of eminent domain, the greater public good must prevail in a court of epuity; that if the street should be opened, it would be practically useless to the public, by reason of the many railroad tracks in and across the same; and that the lives and property of persons attempting to pass over the street would be constantly in peril.

The court apply the principle that, where the *use* for which the property is sought to be taken is clearly a *public* use, the judiciary is without power to enquire into and determine the necessity and propriety of taking it, and therefore affirm the decree of the circuit court in dismissing the bill.

Mr. Justice CRAIG, in delivering the opinion of the court, said: "As we understand the argument of appellants, they claim that they are a corporation, having under the law of eminent domain taken and hold this property for public uses and purposes, and when the appellees undertake to invoke the same law, and take the property for public purposes, they, appellants, have superior equity, and hence the courts ought and should interfere in their behalf. We do not regard the position taken by appellants as sound and tenable. We cannot believe the right of property more sacred in a chartered corporation than the same right in the hands of the private citizen; both must stand upon the same footing. It is impossible, upon principle, to make a distinction between rights acquired to land by a corporation, and the title held by letters patent by the citizens from the government. Over such the same sovereign power exists. The same great law of public necessity, requiring that the private right should yield to public exigency, must be applied to both. The citizen and the corporation alike accept a grant of land, with the reserved right resting over and upon it of the state, to retake it at such time as the public necessity may require, upon just compensation being made. The exercise of this right of eminent domain over franchises and property held by corporations under a charter, is of frequent occurrence; bridges or institutes, free ferries, turnpikes, giv way to railroads and canals. In fact, the whole policy of the country in relation to public roads, railroads, canals, under which lands have been condemned, rests upon this power. The principle contended for by the appellants in this case, once established, one railroad could not be constructed across another, a highway could not be built across a railroad, nor a railroad across a canal, or a stream of water at a ferry; in fact the doctrine contended for would have a tendency to stop the improvement and development of the country."

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. } ST. LOUIS, THURSDAY, AUGUST 20, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.
S. D. THOMPSON, Ass't Editor. }

CONGRESSIONAL LAND GRANTS—CONDITIONS SUBSEQUENT.—A press dispatch from Washington of a recent date, makes the announcement that Mr. Attorney-General WILLIAMS has decided:

1st. That the operations of the conditions subsequent to the congressional grants of public lands does not depend upon the rules of common law applicable to such conditions, but upon the intention of Congress as gathered from the language employed in the grant itself.

2d. That the grant of lands made by Congress to Wisconsin by the act of Congress, June 10, 1856, to aid in the construction of railroads in the state of Wisconsin, in which it was provided that, if the said roads are not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States, is determined as to lands unsold at the time on account of the failure to complete the roads at the time specified in this act, no congressional action or judicial proceedings are necessary, but that such unsold lands shall be remitted to the public domain by the publication of an order by the secretary of the interior, restoring them to settlement and market.

The reverse of the proposition, above stated, was decided by the United States Circuit Court for the District of Minnesota, in 1872, in the case of Schulenburg v. Harriman, 2 Dillon, C. C. R. 398. Mr. Justice MILLER delivered the opinion of the court, in which it was held that the lands granted did not, *ipso facto*, revert to the United States by mere failure to build the road within the time prescribed by the act of Congress, and that to affect the forfeiture, some act on the part of the general government (what, was not determined), evincing an intention to take advantage of the forfeiture, was essential. This case is before the Supreme Court of the United States, by which the question will receive an authoriative settlement, probably at the coming session.

THE MODEL LAW SCHOOL.—The following extract embodies President Woolsey's notions of what a law school should be. Who can say that his ideal is to high? He says:

"Let the school, then, be regarded no longer as simply the place for training men to plead causes, to give advice to clients, to defend criminals, but let it be regarded as a place of instruction in all sound learning relating to the foundations of justice, the history of law, the doctrine of government, to all those branches of knowledge which the most finished statesman and legislator ought to know. First of all, I would have the training essential to the lawyer by profession as complete and thorough as possible. Let that be still the main thing, and let the examinations, together with the appropriate theses, be a proof that every graduate has fairly earned his degree. But with this let there be ample opportunity for those who wish the aid of teachers in studying the constitution and political history of our country, to pursue their studies in a special course by the side of, or after the preparation for the bar. Let law of nations, the doctrine of finance and taxation, the general doctrine of rights and state, the relation of politics and morals, be within the reach of such as wish to prepare themselves for public life, and of those young men of wealth, of whom there is an increasing number who wish to cultivate themselves and take their appropriate place of influence in society. Let there be the amplest opportunity for the study of English institutions, even far back into the middle ages, for that of Roman history and Roman law, for that of comparative legislation, and even for less immediately practical subjects, such as feudal and canon law. Let the plan of the library be expanded so that it shall furnish the best books on all branches and topics connected with law, legislation, and government. Can it be doubted that such an institution, of which I have sketched a faint outline, would be of vast service; that its influence would reach into the halls of Congress, into the departments of government, that it might become a fountain of light through the whole land?"

The Pomeroy Bribery Case.

We publish elsewhere the opinion of Hon. J. T. MORTON, Judge of the Third Judicial District of Kansas, in the celebrated case of the State v. Pomeroy. We do not, as a rule, design to publish decisions of the state courts at *nisi prius*, but the exceptional character of this case, as well as the widespread popular and legal interest which attaches to it, induces us to do so in this instance. It is perhaps the first case in the history of our country where a distinguished citizen, who had sat for several years in the Senate of the United States, has been indicted for an attempt to accomplish, by the bribery of a member of the legislature of his state, his re-election to that high office.

At the conclusion of the reading of this opinion the counsel for the defendant moved for a change of venue, and supported their motion by the following affidavits:

The State of Kansas v. S. C. Pomeroy—Affidavit.

James Rogers, being first duly sworn, deposed, and says that, on the 29th day of January, 1873, he was in Topeka, Kansas, and after Senator A. M. York had made his statement in the joint convention of the legislature of the state of Kansas, in reference to Mr. S. C. Pomeroy paying him $7,000 at a private room in the Teft house, in said city, there being present John Fletcher, John T. Morton, John J. Ingalls, myself and others, the Hon John T. Morton, now judge of the third judicial district of Kansas, in conversation with me relative to the defeat of said S. C. Pomeroy as United States senator, then and there, grasping me firmly by the hand, said, "Rogers, we have got the God damned old scoundrel just where we want him—a poor man will hereafter stand some show for an election to the United States senate;" and said affiant says he never told the said S. C. Pomeroy or any of his attorneys of the said conversation until on Tuesday, July 28, 1874, although affiant did make mention of such conversation to other parties at the time of such conversation, or soon after; and said affiant says that the said conversation of the said Hon. J. T. Morton referred to the said S. C. Pomeroy, and further deponent saith not.

(Signed.) JAMES ROGERS.

Subscribed and sworn to before me this 29th day of July, 1874.

(Signed.) J. P. ENNIS, Notary Public.

State of Kansas v. S. C. Pomeroy—Affidavit.

S. C. Pomeroy, being first duly sworn, deposes and says that Hon. J. J. Morton, judge of the district court above named, is prejudiced against this defendant, and that this defendant cannot have a fair and impartial trial in the third judicial district, on account of the prejudice of the said judge; and affiant says that he is informed and believes that the said judge on or about the 29th day of February, 1873, and after the pretended criminal charge had been made against him, and in reference to the said charge and this defendant, said of, and as to, this defendant, the following words and language, viz.: "We have got the God damned old scoundrel just where we want him—a poor man

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ill hereafter stand some show for an election to the United States senate;" and that this conversation and expression of hatred, ill will and prejudice towards and against this defendant was made to one James Rogers, in Topeka, Kansas, and the said affiant never knew of said conversation and statement until Tuesday, July 28, 1874, and on said July 28, 1874, the said James Rogers informed this affiant of such statement of said judge, and all this information only came to the knowledge of this affiant this week, and further he saith not.

(Signed.) S. C. POMEROY.

Subscribed and sworn to before me, this 29th day of July, 1874.

(Signed.) J. P. ENNIS, Notary Public.

At the conclusion of the reading of these affidavits, Judge MORTON is reported to have said: "In view of the affidavits which have been read upon this motion—in view of the importance and notoriety of the case, there is but one course that I should take in the matter. Those who preside over courts of justice should not only be careful in their decisions, but should so conduct their proceedings that their courts should have the confidence of the public for independence, integrity and fairness. In view of the course which has been taken in this case upon the application and the affidavits presented, I would deem it indelicate for me to retain the case for trial. The cause will be sent to Osage county for further proceedings.

"Having thus diposed of the motion, I have a right to say in reference to the affidavit of Mr. Rogers, that he is grossly mistaken. It so happened that I was in the room of Senator Ingalls, at the Tefft house, when the information of the alleged expose of Senator York was brought to the room. I at first discredited it, but upon being assured that such proceedings as are now matters of history had occurred at the capitol, I instantly left the room and went to my home, with the feeling—perhaps with the remark that some case founded on these proceedings might come before me as judge, and that my place was not there. I may add, too, that I am not in the habit of using such profane language as that stated in Mr. Rogers' affidavit, and that my feelings at that time and since toward Mr. Pomeroy were, and have been, of the most friendly character. I remember distinctly that, on my way home, I met more than one acquaintance who addressed inquiries to me upon the subject that had suddenly awakened so much interest and excitement. My answer in each instance was, that if there was any one man who should not speak upon the matter, I was that man. I closed my mouth at once, and have kept it closed. I trust, in common fairness and in common charity, that Mr. Rogers has, in the intense excitement of that occasion, mistaken some other man for me."

The defendant's counsel then asked that the bond be reduced to $10,000, but Mr. Ryon objected to this, and the court refused to reduce the bail from the original amount, which was $20,000.

The case of ex-Senator Pomeroy will probably come before Judge PEYTON, at Burlingame, in November next.

For the opinion, which we elsewhere publish, and the above facts, we are indebted to Messrs. Guthrie and Brown, counsellors at law, Topeka, Kansas.

Enjoining Collection of Railroad Taxes in Missouri—When Equity will Interfere—How far Action of Board of Equalization is Subject to Judicial Control.

Recently several suits were brought in the federal courts in Missouri by non-resident stockholders in the Iron Mountain, Pacific, Mo. Kansas & Texas, and other railroad companies, against the directors of those companies, and against the state auditor, and the officers of the several counties and municipalities through which the respective roads run, to restrain the collection of taxes levied under the legislation of the state for the year 1873. The bills, in their frame and theory, were like that which was considered and supported by the supreme Court of the United States in Dodge v. Woolsey, 18 Howard, 331.

The cases came before the circuit judge at his chambers, August 5, 1874, upon motions by the respective plaintiffs for the allowance of temporary injunctions. No answers were filed, and the question argued was whether the bills, upon their face, and supposing these allegations to be true, made out a *prima facie* case for a preliminary injunction.

In all the bills there was a common ground of complaint in respect to the action of the state board of equalization in fixing the valuation of the property of the respective companies for taxation.

By the legislation of Missouri it appears that the valuation of railroad property, upon which all taxes, state and local, are levied, is determined by the state board of equalization. The bills charged misconduct and illegal action on the part of the state board of equalization in many particulars, and among others with intentionally, through passion and prejudice, assessing railroad property not only beyond its real value, but at more than one-third higher than other property of equal value against evidence and without evidence. In awarding a preliminary injunction, the circuit judge, after stating the causes of the complaint, concluded his opinion as follows:

Such are the grievances complained of; and the question now is whether, if the allegations of the bills are substantially true, they give a right in equity to relief, and to what extent.

The cases are now before me, after notice to the defendants for an allowance of a temporary injunction. No answers have been filed, and hence the material allegations of the bill, which are sworn to, are, on this hearing, and for the present purpose, to be considered as true, and the enquiry is, supposing the bills to be true, can a court of equity interfere, either preliminarily by an injunction, or finally by a decree?

The decisions as to what will give an equity to enjoin the collection of taxes, are conflicting, and, to my mind, not very satisfactory.

Since all regular governments subsist by means of taxes, which are assessed, levied and collected under laws necessarily stringent and summary, in order to insure prompt payment, it is obvious that the courts should not interfere by injunction with the regular working of these laws, unless an injury to the citizen is thereby inflicted, for which he has no other adequate remedy. When this is the case, however, the courts should not hesitate to interfere to protect the citizen against the action of the state, for the state, acting for all, is under the highest obligations to deal justly with each.

I confess to some doubts as to what will warrant the judicial tribunals in interfering with the results of the actions of such a body as the state board of equalization. It is clear that such interference cannot be justified for reasons merely formal or technical, or for acts which do no substantial injury, or where the wrong could have been avoided or prevented by measures or steps open to the party at the time. Mistakes of judgment on the part of such body in honestly over-valuing property, cannot, ordinarily, if ever, be corrected by a bill in equity.

On the other hand, I am unwilling, without further reflection, to say that in no possible case will a court of equity interfere with the result of the action of an assessing, equalizing body. Suppose local assessors purposely value the property of non-residents two or three times as high as the property of their neighbors, and that this action is confirmed by the local board of equalization, which refuses to interfere because in sympathy with the feelings which actuated the assessors, is there no remedy?

Now, if the charges in the present bill be true, the state board, actuated by passion and prejudice, and with a design to discriminate against railroads, and without evidence, have assessed the property not only higher than it was valued by the companies, on oath, but higher than it was valued by the county courts,

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and much higher than it was valued upon evidence by committees of their own body, the result of which is, as alleged, an excessive valuation of at least one-third more than other property of equal value, thereby compelling the railroads to bear more than their share of the public burdens; if all this can be established, my impression is that equity ought to intervene; not, however, to annul the whole assessment, but only to reduce the inequality.

In stating that such is my impression, I wish to add, that it is not a firm conviction, and that, on a question of so much difficulty and importance, it is but just to both sides that my final views should be reserved until it can be brought up on full argument before the whole court.

It is a fortunate circumstance that the court meets next month, and that these cases can be brought before all the judges, and perhaps a decision then had, or at all events the principles of a decision, so as to involve no great delay the collection of these taxes to the extent of the actual value of the property. Except those roads, if there are any, which have a still subsiding legislative contract of exemption from taxation, the plaintiffs have no equity for an injunction.

In order to bring this matter before a full court, and to give the defendants an opportunity to answer the charges in the bills, if they desire, I have thought it best to allow a temporary injunction to issue, unless the defendants are willing to let the collection of the taxes rest until the views of the court can be had. We will give every facility for bringing the question to a speedy hearing, and the counties, etc., can at any time, if this is deemed desirable by them, have the injunction modified so as to allow them to collect taxes so far as the admitted value of the property shows a liabity, so far, or as we see it to be equitable; or we can refuse to continue the injunction except on condition that such a portion of the taxes be paid into the court for the use of the state, counties and towns entitled thereto. At present, and until the views of the court are settled concerning the right to maintain these bills, it is perhaps best not to complicate the cases by granting only a partial injunction, or by requiring payment of one-third of the assessed taxes as a condition of the injunction. Inasmuch as there exists doubts as to the right to maintain these bills, and in view of the fact that the time is only a few weeks distant, it would seem better on all sides to let the matter rest until the court meets, without requiring injunctions to be formally issued, which will be attended with costs. But if the defendants are unwilling to allow this to be done, a temporary injunction may issue in each case, reserving the right of the defendants to move at the next term to dissolve it, with or without answer, as they may be divided. If answers are to be filed to resist the injunctions, let them be filed by the September rules, and any affidavits in support thereof by September 15, and counter affidavits by September 25. Motions to dissolve or modify the injunction may be set down for the second Tuesday of the term. It is so ordered.

Constitutionality of State Laws Levying Quarantine Fees upon Foreign Vessels.

We have received, through the courtesy of Hon. William Archer Cocke, attorney-general of Florida, an opinion of his, holding that a law of Florida which requires the master or owner of any ship, boat or vessel *under quarantine* to pay to the legally appointed inspectors under the quarantine laws the fees of such inspectors, is not unconstitutional. We regret that, owing to our limited space, we can do no more than briefly notice the points made. The attorney-general quotes the provisions of the federal constitution which prohibits the states, without the consent of Congress, from laying "any duty of tonnage;" also the act of February 25, 1799, which authorizes the states to pass quarantine laws, with two restrictions: 1. That they shall not, without consent of Congress, collect any duty of tonnage; 2. That no part of the cargo of any vessel shall in any case be taken out, or unladen therefrom, otherwise than as allowed by law. He then quotes several authorities, among them Cool. Const. Lim. 584; Steamship Co. v. Joliffe, 2 Wall. 450; Steamship Co. v. Portwardens, 6 Wall. 31; Brown v. Maryland, 12 Wheat. 419; Vanderbilt v. Adams, 7 Cowen, 49; New York v. Miln, 11 Peters, 102, and Cooley v. Board of Wardens, 12 How. 299, and concludes as follows: "The conclusion to which I come is that the quarantine laws of Florida, being neither unconstitutional nor in antagonism to the laws of Congress, should have full force and effect. The fee imposed being no tax on tonnage, no duty on imports nor exports, nor a duty on the ship, but simply a charge against the master or owner of the vessel to sustain a police regulation, it is as constitutional and as legal as the pilot laws, existing in nearly every state in the Union, the requirements of which laws have been always sustained by the Supreme Court of the United States in forcing masters or owners of boats to pay pilot fees. I can see no reason why the law of Florida requiring the master or owner of any ship, boat, or vessel to pay the fees of the port inspectors, should not be enforced, it being but the means of executing the quarantine laws of the state; and the payment of the officers being essential in the enforcement of the police regulations of quarantine, the master or owner of the boat must either conform to the law or remain outside quarantine limits. Any vessel violating quarantine regulations can be attached, and the clerk of the circuit court has no alternative, upon application of the mayor of an incorporated city, or the health officers of any port, but to issue the writ of attachment according to law. Act of June 6, 1870, Sections 1, 2, 3, p. 15."

In the recent case of Peete v. Morgan, determined in the Supreme Court of the United States, and not yet reported, the precise question is considered. Morgan, a citizen of New York, and the owner of two lines of steamers registered and enrolled in New York, running from ports in Louisiana to ports in Texas, and back to the ports in Louisiana, brought his bill in equity in the Circuit Court of the United States for the Eastern District of Texas, to restrain Peete, the health officer at Galveston, from the future collection of quarantine fees which had been exacted from all his vessels coming to the quarantine ground under claim of authority by virtue of the legislation of Texas. This legislation, which had the approval of the governor, on the 13th of August, 1870, declared that every vessel arriving at the quarantine station should pay the sum of five dollars *for the first hundred tons*, and one and a half cents *for each additional ton*. The case was heard on bill and answer, and a decree rendered granting the injunction prayed for and making it perpetual, and this decree the supreme court affirm.

Mr. Justice Davis, in delivering the opinion of the court, holds the following language:

"That the power to establish quarantine laws rests with the states, and has not been surrendered to the general government, is settled in Gibbons v. Ogden, 9 Wheaton, 203. The source of this power in the acknowledged right of a state to provide for the health of its people, and although this power when set in motion may, in a greater or less degree, affect commerce, yet the laws passed in the exercise of this power are not enacted for such an object. They are enacted for the sole purpose of preserving the public health, and if they injuriously affect commerce, Congress, under the power to regulate it, may control them. Of necessity they operate on vessels engaged in commerce, and may produce delay or inconvenience, but they are still lawful when not opposed to any constitutional provision, or any act of Congress on the subject.

"It is evident that the power to establish quarantine regulations cannot be executed without the state possessed the means to raise a revenue for their enforcement, but it is equally evident that the means used for this purpose must be of such a character as the restrictions imposed by the federal constitution upon the taxing power of the states authorize. We are

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not called upon in this case to go into the general subject of the limitations imposed by these restrictions, because the tax in question is manifestly outside the jurisdiction of the state to impose; and it is a "duty of tonnage" within the meaning of the constitution.

"This duty was doubtless imposed to raise revenue, but Chief Justice MARSHALL, in commenting on this subject in Gibbons v. Ogden, *supra*, says: 'It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce; but they may be imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the states from exercising this power.' This power cannot be exercised without the permission of Congress, and Congress has never consented that the states should lay any duty on tonnage. On the contrary, so apprehensive was Congress that its legislation in 1799 (1 Stat. p. 619), directing the collectors of customs and officers commanding forts and revenue cutters to aid in the execution of the quarantine and health laws of the states, rendered necessary on account of the prevalence of yellow fever in New York, might be construed into an admission of the right of the states to lay this duty, that it used the following words of exclusion: 'That nothing herein shall enable any state to collect a duty of tonnage or impost, without the consent of the Congress of the United States thereto.'"

"It is, however, not necessary to discuss this subject, as it has been recently fully considered by this court in the state tonnage tax cases, reported in 12 Wallace, 204. In these cases the law of Alabama levied a tax at so much per ton upon all steamboats. The boats on which the tax was levied were owned by citizens of the state, and were employed exclusively in the internal commerce of the state, over which Congress has no control. The court, while conceding the full power of the state to tax the property of its citizens, held that the inhibition in the federal constitution prevented the state from taxing in this mode. Much more does this inhibition apply when the vessels are owned by citizens of another state, and are engaged in commerce between the states over which Congress has control.'"

In the tonnage tax cases, 12 Wallace, 204, it is ruled that, while a state may unquestionably lay a tax *as property* upon a vessel owned by its citizens, based on the value thereof, yet it cannot impose a tax on such a vessel *at so much per ton of the registered tonnage.*

The proper conclusion, then, would seem to be that while the state possesses the general power to collect fees from vessels in quarantine, yet if these fees are admeasured or apportioned *according to the tonnage of the vessel*, they will fall within the constitutional prohibition against laying a duty of tonnage—a conclusion which, it must be admitted, savors of technicality and refinement. For it would seem that the power to exact such fees in any case, would necessarily carry with it the power to make an equitable apportionment of them according to the size of the vessel; and the most obvious way of attaining such just apportionment would be to impose a tax at so much per ton of the ship's register.

But it seems that a tax which is measured, not according to the tonnage of the vessel, but which is levied directly as a uniform fee upon every vessel arriving at port, may be a "duty of tonnage" within the prohibition of the constitution. Thus, a statute of Louisiana, which authorized the master and wardens of the port of New Orleans to demand and receive, in addition to their fees, the sum of five dollars, *whether called on to perform any service or not*, for every vessel arriving in that port, was held to lay a duty of tonnage. Steamship Co. v. Portwardens, 6 Wallace, 31. Mr. Chief Justice CHASE, in delivering the opinion of the court, said: "In the most obvious and general sense it is true these words [duty of tonnage] describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the states against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on ships which serve as the vehicles of conveyance. This extension was doubtless intended as the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon the whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty. In this view of the case, the levy of the tax is expressly prohibited."

Bribery of Member of Legislature to Vote for United States Senator.

THE STATE OF KANSAS v. SAMUEL C. POMEROY.

District Court of Kansas, Third Judicial District.

Hon. J. T. MORTON, District Judge.

1. **Bribery of State Senator to Vote for Senator in Congress—Sufficiency of Information for.**—A criminal information alleged that Samuel C. Pomeroy did, on the 28th day of January, 1873, directly give to one Alexander M. York, seven thousand dollars, with intent to influence said York to vote for him for United States senator, in an election then pending before the legislature of the state of Kansas, "then and there about to be brought before him, the said York, in his official capacity as senator of the state of Kansas, at which said election it was the duty of said York, as said senator, to vote for a person for United States senator from the state of Kansas;" and that said York was, then and there, "an officer of the state of Kansas, to-wit: a senator of the state of Kansas." *Held*, on motion to quash, that this information is good; that the person to whom it is alleged the bribe was offered, is properly described as "an officer of the state of Kansas," and as "a senator of the state of Kansas."

2. **State Senator—Officer of State—Bribery.**—A senator in the state legislature is "an officer of the state," within the meaning of § 193 of the Kansas crimes act, which defines and punishes bribery.

3. **Election of United States Senator—Kansas Crimes Act—Bribery.**—The election of an United States senator, about to be held by the legislature, is a "question, matter, cause of proceeding," which could properly be charged as "pending," within the meaning of the said statute.

4. ———. ———. ———. Such question, matter, or cause of proceeding may properly be charged as having been brought before *one* of the members of the legislature.

5. **Construction of Criminal Statutes.**—Rules for the construction of criminal statutes discussed.

MORTON, J.—The information in this case alleges that the defendant, Samuel C. Pomeroy, did on the 28th day of January, 1873, directly give to Alexander M. York seven thousand dollars, with intent to influence York to vote for him for United States senator in an election then pending before the legislature of the state of Kansas, "then and there by law about to be brought before him, the said York, in his official capacity as senator of the state of Kansas, at which said election it was the duty of said York, as such senator, to vote for a person for United States senator from the state of Kansas; that said York was then and there an officer of the state of Kansas, to-wit: a senator of the state of Kansas."

This is a plain and concise statement of the allegations of the information, omitting what may be properly called the "verbiage" of pleading.

This information is founded upon section 193, chapter 31, of the general statutes of the state of Kansas, which is as follows:

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"Every person who shall, directly or indirectly, give any money, goods, rights in action, or any other valuable consideration, gratuity or reward, or any promise, undertaking or security therefor, to any officer of this state, or of any county; first, with intent to influence his vote, opinion, judgment or decision, on any question, matter, cause or proceeding which may be then pending, or may by law be brought before him in his official character, or to induce him to neglect or omit the performance of any official duty, or to perform such duty with partiality or favor, otherwise than is required by law; or, second, in consideration that such officer hath given any vote, opinion, judgment or decision, in any particular manner, upon any particular side, or more favorable to one side than the other, in any matter, question, cause or proceeding, or hath omitted to perform any official act or duty, or hath performed such act or duty with partiality or favor, or otherwise, contrary to law, shall, on conviction, be adjudged guilty of bribery, and be punished by imprisonment and hard labor for a term not exceeding seven years."

The information is evidently based upon the first clause of this section above quoted. To this information the defendant interposes a motion to quash. While there are nine reasons assigned as grounds for this motion, I may say that, with the same brevity which I have used in stating the allegation of the information, I may state the reasons to be these:

1. That the facts stated in the information do not constitute a public offence.

2. That there is no such officer known to the constitution or laws of this state, "as senator of the state of Kansas."

3. That York was not at any time shown by the information to be "an officer of the state of Kansas," or shown to be a member of the legislature of the state.

4. That the information ought to state with certainty that an election was held and that at such election York's vote was given.

On both sides the argument has been able and exhaustive, and the court has listened with an attention, interest and patience by no means assumed. The importance of the case and the fact that this is the first prosecution brought under the statute, have rendered the questions raised by the motion of great interest.

To dispose, first, of what must be regarded as the least important points presented by the motion; it is urged that the election of an United States senator is not a "question, matter, cause or proceeding" which could be "pending" either before the legislature or before one of its members, as what might, by law, be brought before one of its members, in his official capacity; that there is no such officer as senator of the state of Kansas, and that the information ought to state with certainty that an election was held, at which York's vote was given.

Words and phrases in a statute are to be construed "according to their context and the approved usage of the language." General Statutes, p. 999. The election of a United States senator is regulated by law. It is prescribed what body shall elect, when the vote shall be taken, and the manner of proceeding. If it is not a "proceeding," "matter," or "question," it is difficult to say what other term would be more commonly or properly applied to it in that popular and plain way of speaking which seems to constitute the "approved usage of language."

Whether such proceeding, matter or question may be considered as "pending" may be determined by the same rule. And it would seem to be as appropriate to speak of the election of a United States senator, just before its actual occurrence, as "pending," as to speak of a state or county election as "pending" just before the day upon which it is appointed by law.

Would such proceeding, matter or question, be properly said to be brought before one of the members of the legislature? It is urged that it is brought before the entire body of which he is only an unit, and that it cannot be said to be brought before one of its members alone. But it is admitted that this section clearly applies to the bribery of a judge of a supreme court, the executive officers of the state, and county commissioners. The judges of the supreme court, a part of the executive officers, when sitting as a board of election canvassers, and the county commissioners, respectively, act as organized bodies. Before each of these bodies, respectively, questions, matters, causes and proceedings, are "brought" and "pending." Is it possible that bribery of any one of these would escape trial because the matter or cause could not be said to be pending or brought before the individual accused, but before him and two or three others? Does not the greater include the less? With such a construction as that claimed, the statute would be clearly inoperative in such a case.

Whether a state senator is a "senator of the state of Kansas," may, it seems, be determined upon about the same principal upon which both parties in arguing this motion have properly agreed, that the terms "state officers" and "officers of the state" mean precisely the same thing, and are convertible terms.

The objection that the information should show that an election was held, and that York voted thereat, does not seem to have been very strongly urged. It is disposed of by the plain statement that the offence is made complete by the statute as soon as the bribery is committed, even if the officer bribed absented himself from the election, or if an adjournment of the legislature prevented such election.

The gravest and most important question raised by the motion remains to be considered. If, under a proper construction of the statute, the term "any officer of this state" does not apply to a state senator, the statute does not apply to the information, and no public offence is charged under section 193 of the "crimes act," above quoted. Under that statute, is a state senator an "officer of the state?" The mere fact that senators are elected by only a portion of the voters of the state, that they are elected in districts, does not, it is conceived, prevent them from being considered state officers. If the constitution permitted the districting of the state for the election of supreme judges, one to be elected in each division, they would be still "state officers" of the judicial department. County commissioners are elected by districts. Yet they are *county officers*. This was decided by the supreme court of this state, when, under the then existing law, only one couniy in the state (Leavenworth) was districted, and the number of commissioners in that county increased by giving one to each township and to each ward in the city of Leavenworth. See Commissioners Leavenworth County v. The State, *ex rel.* Latta; same v. same *ex rel.* Miller, 1 Kansas, 688.

I cannot avoid the conclusion that members of the legislature are, in the fair and reasonable acceptation of the term, "officers of the state;" that the three co-ordinate departments of the government—the executive, legislative and judicial, who transact business for the *whole state*, are "officers of the state." This includes all the members of the first two departments named and the supreme judges. Whether the term is so elastic as to include district judges, as is claimed in the argument, it is unnecessary to enquire.

In the case of the state of Kansas *ex rel.* Hunt v. Meadows (1 Kansas, 90), our supreme court has expressed its opinion to this effect. It may, perhaps, be claimed that this is a mere *dictum*—that the question before it did not require it to meet this point, and that it gave other and broader reasons for its decision. Even if this were not so, the opinion is entitled to consideration.

In that case, where the sole questions were whether the territorial legislature was superseded before the proclamation of the governor convening the state legislature was issued, and whether its acts passed after the admission of the state were valid laws, the court, after alluding to the fact that section three of the schedule of the constitution provided that the governor, secretary and judges, and all the other officers, both civil and military, under the territorial government, should continue to perform the duties of their respective departments until superseded under the authority of the state constitution, says:

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"It was, without doubt, competent for the constitution to provide against an interregnum by adopting the territorial officers and machinery, and by making the existing functionaries of the territory the *officers of the state* for the time being. * * * Members of the legislature, not only in the common use and acceptation, but in the technical and legal sense of the term, are officers of the government."

But if there were a serious doubt whether, with strict propriety and legality, members of the legislature are to be classed as state officers, I think it can be safely assumed that, under reasonable, true and strictly legal construction of the statute under which this information is drawn, the term "officers of the state" must be held to include members of the legislature. I have already quoted from page 999, Gen. Stat., the provision that, in construing statutes, "words and phrases shall be construed according to their *context* and the approved use of the language." It of course follows from this that the same word or phrase may be used in different statutes, or in the constitution and in the stautues, with different meanings for the "context," may differ. The intention of the legislature may be thus arrived at, and this seems to dispose of the objection that, in other statutes, the legislature seemed to understand differently the term "state officers."

"The clear intention of the legislature, as apparent on inspection of the statute itself, will prevail, though in opposition to the strict letter." Bishop on Statutory Crimes, p. 82; 30 Miss. 410.

"And in a statute the meaning of a word may be this or that, according to the subject-context, and other particular circumstances." 94 Bush. Ibid.

"We should, if possible, so construe a statute that its several provisions will harmonize with the general intent; that every word will have a meaning, leaving no useless words. * * * * That it be not eluded or its purpose defeated." P. 82, Ibid.

Applying these plain rules to the section in question, there seems to be little difficulty in determining the meaning of the statute, and the intention of the legislature.

The offence described in the section is the giving money, goods, etc., to the state officer to influence his *vote*, opinion, judgment or decision. Now, it is claimed, in support or the motion, that none but the members of the executive department, and the supreme judges are *state officers*. The term "vote" has a legal meaning. It is plainly and clearly defined. [See Bouvier's Law Dictionary, 14th edition, vol. 2, page 646.] And no one of these officers is entitled to a vote in his official capacity, with the exception of the lieutenant governor, who, as president of the senate, has a casting vote in case of a tie. It would seem strange that the legislature would take such a precaution to prevent *him* from being bribed, and overlook entirely that large body of officers whose daily duties, during the entire session, are to vote on questions of the highest importance to the people of the state, and to individuals. Whether or not there may be ambiguity or doubt as to the meaning of the phrase, or whatever may be its meaning in other places, I am compelled to conclude that in this section the legislature must be held to have used it in the sense which would include their own members, and did not, in using the first word which occurred to them in describing the action, and in using that as the first word, in regard to which an officer could be bribed, select one that could only apply to the president of the senate.

The motion to quash must be

OVERRULED.

Liability of Trustees for Receiving Payments in Confederate Money.

LUCY M. FERGUSON v. SQUIRE LOWRY *et al.*

Supreme Court of Alabama, June Term, 1874.

1. **Investments by Trustees—Confederate Money—Release—Undue Influence.**—The guardian of a female infant, in Alabama, loaned out his ward's estate, and, during the late war, received payment in confederate money, which, becoming worthless, the estate was lost. After the close of the war, his ward, having arrived at the age of twenty-two, was induced, under a strong influence from surrounding friends and from public sentiment, to execute a release discharging the guardian from liability to her on account of his management of the estate. Under the circumstances of the case, a bill to set aside the release and to compel the guardian to account, is sustained; but in the accounting, it is directed that the guardian be charged only with such portion of the estate as could have been saved by due dilligence had he refused to receive payment in confederate money.

——. ——. **Duress.**—A trustee who has loaned out a trust fund on security, and received payment thereof in confederate money, is liable to account for the loss so happening to the fund, although he was compelled to receive such money under pain of being laid under the suspicion of disloyalty to the confederacy, and under the pressure of an overwhelming public sentiment—a mob spirit—which would have made it dangerous to life and liberty to refuse to receive such money.

Appeal from the Chancery Court of Perry County.

B. F. SAFFOLD, J.—The purpose of the suit is to set aside a release given by a ward to her guardian, and to annul the final settlement of his accounts, and his discharge in the probate courts, based upon the result; and also to settle the guardianship.

The appellee was the guardian of the appellant from 1857, and received about $10,000 of her property, which he loaned to others on security. During the late war he suffered the borrowers to pay the amout due from them respectively, in confederate money, whereby the whole property, with the exception of a doubtful note for about $1,000, was lost. In 1867, his accounts being on file in the probate court for settlement, in obedience to a citation issued at the instance of the ward, he procured from her the release mentioned. On his presentation of it to the court his accounts were entered as settled, and an order was made discharging him from further responsibility. The grounds of relief alleged in the bill of the ward are, gross wrong in the settlement made, want of consideration for the release, and fraud and undue influence in its procurement.

The release is elaborately drawn, and is executed with the solemnity of a deed. If it had been thus prepared by the ward herself, or at her instance, additional potency should perhaps be given to it on that account. But it was written and decided on by the guardian's attorneys in council, and signed by the ward without conference with her attorneys, and with no more consideration than if it had been a simple acquittance. She understood it as a bar to her further demands, and signed it for that purpose. She was twenty-two years old, and was possessed of as much ability, independence and culture, as other young ladies of her age. Her principal relatives near her were her maternal grandmother and aunts. Two of the latter were the wives of her guardian and his surety, Dr. Bates, and the other two were single ladies residing with Dr. Bates. She lived with her step-mother, who had several children, her half brothers and sisters, younger than herself. Her deceased father's relatives resided in Virginia.

When she caused the citation to her guardian to be issued, an estrangement from her mother's kindred ensued. It was caused, no doubt, in some measure by her consciousness that she had done what would be displeasing to them, and in part by the displeasure which it did create. They were opposed to her acting, and some of them characterized it as wrong, and highly injurious to her guardian and his family.

Fully a year intervened between the citation and the release. The issue between her and her guardian, which should suffer the loss of the property, was positive, and was protracted throughout this time. She yielded unconditionally,

The relative situation of the two parties may be thus described. The guardian was a man, capable, shrewd and experienced in business. He was exceedingly loth to have the loss fall upon him. He saw in it the probable destitution of his own family, His wife and her sisters, the aunts of the ward, and their mother, all believed that he was not morally responsible, and should not be held so legally. They were disposed to censure the ward, and did so in manner and bearing, if not in words. A public sentiment sufficiently powerful to be incorporated in the legislation of the state after the war (R. C. §§ 11, 4432), declared in favor of the immunity of all fiduciaries who had in good faith so invested trust funds.

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The ward was a young lady without experience, ignorant of business beyond shopping expenditures, isolated from her relatives, upon whom she had been accustomed to rely as her trusted friends, and possessed of the sensitiveness to censure and proscription characteristic of woman; she had nothing to sustain her in the assertion of her right but her interest and her opinion. Under these circumstances, she reluctantly made up her mind to abandon her demand for a settlement, and to comply with such terms as her guardian required.

The law, in cases of this sort, is more easily expressed than applied. A guardian, when his trust has expired, must render an account to his ward. If this is done in the court, the judgment is conclusive of the rights of the parties. When done between themselves, the expression of satisfaction given by the ward, whether in the form of a receipt in full, or a release of further demands, is considered to have very much the same effect. Both are impeachable for fraud. The judgment is subject to review for errors of law or fact occurring without fault or neglect on the part of the complainant. The release may be set aside if the mind of the releasor did not assent to its terms without like fault or neglect. The other party may have remedy against it on similar grounds.

The consideration of a release, such as the complainant gave to the defendant is a just and fair accounting for the matters of which he had charge. The best evidence of its validity is its reasonableness. The conscionableness in a contract may be so great as to demonstrate gross imposition or undue influence. When it shocks the conscience, it amounts in itself to conclusive and decisive evidence of fraud. Accompanied with ingredients of a suspicious nature, or peculiar relations between the parties, it furnishes the most vehement presumption of fraud. 1 Story's Eq. Jur., § 246. Great inequality of consideration, attended with influence or management to mislead, such as the strong persuasions of those in whom confidence is placed, authorizes the interposition of equity. Ib. § 251. There is no law contrary to these propositions.

In application of them: The guardian admits that he received the ward's property, and that it has been entirely lost through his acceptance of payment in the confederate currency. He testifies that he was very unwilling to receive such currency, but it was generally taken, and could not be refused without suspicion of disloyalty to the confederacy.

The refusal would have subjected the person making it to the censure and condemnation of the public, and to the risk of personal harm. He is corroborated in this respect by several witnesses, who say that such refusal would have been attended with danger to life, liberty and property. His excuse, then, is that the mob spirit in the country was too dangerous to be resisted. Repeated decisions of this court hold such defence insufficient. Houston v. Deloach, 43 Ala. 364; Powell v. Knighton, Ib. 626; Hall v. Hall, Ib. 488.

The ward having released him, without any consideration whatever, from his total indebtedness to her, pleads that she was unduly influenced to do so. The gross inadequacy or unconscionableness of the bargain is shown. She, since the war, has been subjected to influences exactly similar to those set up by the guardian. That fierce and intolerant public spirit which he could not withstand, was operating to continue in force the law under which he acted when she signed the release. It is idle to say that it did not influence her. Added to this was proscription by her nearest relatives, producing a sense of abandonment. Strong and brave men have not been able to bear these combined influences. How could a sensitive woman do so, no matter what was her age? Whatever her convictions of her right was, it could not stand unsupported and condemned, and charged to her greed or avarice. She was right in her demand. She yielded it for nothing. Her estate was the price she paid for the love of her kindred and the respect of the community. Her guardian pleads social ostracism and personal danger in defence of his waste of her property. She alleges like ground of relief against her release in support of right, and without injury to him. Why should not the release be taken away and his plea be heard before the proper tribunal? She must submit her cause. He might have escaped from his peril by resigning his trust; or, submiting, have sued the debtors after the war, and replied duress to their defence of payment. The government of the United States treats the late war as a rebellion on the part of the seceding states, and the present government of Alabama can do no less. Compliance with insurrectionary laws, or obedience to the mob spirit which sustained such a cause, cannot be admitted as a defence against violated constitutional rights.

The chancellor, in dismissing the bill, was governed much, if not wholly, by the case of Kirby v. Taylor, 6 Johns. ch. 242. There, the guardian delivered to the ward a bundle of papers purporting to contain accounts of his guardianship, and certain deeds, papers and securities for money; and also a release to him individually, which he requested her to sign, alleging that he had faithfully discharged his trust. She, having the fullest confidence in him, without opening the bundle of papers, executed the release, without counsel. The court held the release valid because there was no allegation or proof of *fraud*, threat, *persuasion*, concealment or misrepresentation. The answer denied any such procurement, and affirmed that it was given voluntarily and of free will. There were three guardians, and another of them was the acting guardian. It did not appear that this gurdian had had a great deal to do with the property, and consequently that the consideration was inconceiveable. The court seized hold of a reservation in the release to preserve the ward's right against the acting guardian, which would not have been just if the liability of the latter had been in any degree on account of the acts of the released parties. Besides this, it was the surety of the released guardian who was claiming the benefit of the release.

In Evans v. Llewellin, 1 Cox, ch. 332, a deed was set aside as *improvidently* obtained, because the consideration was inadequate and the grantor was in indigent circumstances, and not apprised of his rights until the time of the transaction. No misrepresentation or actual fraud whatever appeared to have been used. The court said the opposite parties ought not to have permitted the man to make the bargain without going to consult his friends.

In Johnson v. Johnson, 5 Ala. 90, a purchase of a distributee's share of an estate made by the administrator at a grossly inadequate price, when he had rendered no inventory and stated no account, was considered fraudulent. The distributee was considered by the court to have had a sufficient general acquaintance with his father's estate to have put him on enquiry and induced caution, but he was denied relief because he had delayed eleven years.

In the case at bar, the guardian testifies that the account, which he filed in obedience to the citation, does not show when he received the different sums of money, or what amount he received at different times, nor what amount he loaned out, to whom, or where, or what amounts were paid to him in confederate money. If the ward be charged with her attorney's knowledge of this account, it amounts to no more than the general idea of her property, and the manner of its loss, which she had without it.

The chancellor thought that outside influences, operating on the ward, ought not to affect the guardian. This depends on circumstances. But the guardian was a part of all the influences in this case. He had not shown what his liability would have been without credit for the confederate money, nor with it. He claimed that it was nothing. If he did not frown upon his ward, his bearing towards her was reproachful. Her kindred were his also, and it was on this account that they were estranged. This is putting the case more mildly for him perhaps than the evidence justifies. We think the complainant is entitled to the relief prayed for.

In taking the account, consideration ought to be given to the disposition of the valuable funds made by the guardian before he received the confederate money. If this was on sufficient security,

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and was proper in other respects, what would have been the result if the borrowers had retained them until the close of the war? If due diligence would have availed nothing against them during the war and afterwards, he should be allowed credit for such as were unavoidably lost. He was not an insurer of the property, nor is his liabilities dependent on the simple fact of his receiving confederate money: Houston v. Deloach, 43 Ala. 364.

A lapse of time, not sufficient to bar remedy against the sureties for the default of their principal, cannot be deemed a defence to this action. The same influence continued to operate on the ward, at least until her marriage, in December, 1870. The bill was filed in May, 1871.

The decree is reversed and the cause remanded.

REVERSED AND REMANDED.

Railway Taxation.

OZIAS BAILEY v. ATLANTIC AND PACIFIC RAILROAD COMPANY, *et al.*

United States Circuit Court, Eastern District of Missouri.

Before DILLON, Circuit Judge.

1. Under the circumstances, a temporary injunction against the collection of taxes by and under state authority, was granted.

2. Whether the exemption from taxation granted to the Southwest Branch of the Pacific Railroad by section 12 of the act of December 25, 1852, continues in favor of the Atlantic and Pacific Railroad Company, *quære*.

This is a bill by certain stockholders of the Atlantic and Pacific Railroad Company against that company, its directors, and the officers of the counties through which the road runs, to restrain the collection of taxes levied by state authority on the property of the company for the year 1873. The bill, in theory, is like that in Dodge v. Woolsey, 18 How. 331.

The main ground on which an injunction is asked is that the property of the company is, by legislative contract, exempt from taxation for the year 1873.

Baker & Litton, for plaintiff; *H. Clay Ewing*, attorney-general, and *Mr. Clover*, for the counties.

DILLON, Circuit Judge.—The special ground of relief in this case turns upon the 12th section of the act of the legislature of the state, approved December 25, 1852, by which the Pacific Railroad, and the Southwest branch Railroad, were, for a certain period, exempt from taxation, and upon the question whether the present company, the Atlantic and Pacific Railroad Company, is entitled to the benefit of that exemption, as the successor of the Southwest Branch Railroad. The 12th section, above mentioned, provides that "the said southwest branch railroad shall be exempt from taxation until the same shall be completed and in operation, and shall declare a dividend. * * * Provided that if said company shall fail, for a period of two years after said road shall be completed and put in operation, to declare a dividend, then said company shall be no longer exempt from payment of said tax,"

The undenied allegation of the bill is that the company has never declared a dividend, and that the road was not completed until the month of May, 1871.

The exemption, if it exists in favor of the A. and P. Company, would continue until May, 1873. The taxes now in question are taxes for 1873, and the learned counsel for the state have conceded in argument that, under the decision of the Supreme Court of the United States in the Pacific R. R. Co. v. Maguire (*ante*, p. 228), holding that this 12th section did constitute an irrepealable legislative contract for the temporary exemption from taxation therein provided for; that the property of the A. and P. R. R. was not taxable for 1873, provided that company is entitled to the benefits of provisions of aforementioned 12th section of the act of December 25, 1852. But the counsel for the state denies that the original exemption remains in force, or that it was granted, or after July 1, 1865, could be granted to the present company, or to the South Pacific Company, its vendor or predecessor, and claims that in this respect the case is like that of Trask v. Maguire (the Iron Mountain case, *ante*, p. 175), in which the court held, and whose holding was affirmed by the supreme Court, that the original exemption in that case did not survive or continue in favor of the present company,

Judge TREAT has written an opinion in which he distinguishes the two cases, and seems to think that the A. and P. R. R. Co. is entitled to the legislative exemption from taxation granted by section 12, before mentioned. A. and P. R. R. Co. v. Cleino, 2 Dillon, C, C. R. 175. As the report of that case shows, I formed and expressed no opinion on this point, and placed my judgment distinctly upon another ground.

On the present argument, three recent opinions of the supreme court were produced—*Ex parte* South Pacific Railroad Company, in *re* Laclede County Taxes for 1871; Atlantic and Pacific Railroad Company v. Lawrence County, and the same Company v. Barry County—in which that court, in favor of the company above named, set aside the taxes levied by the counties, on the ground that the company was entitled to the legislative exemption in said section twelve. The opinions were brief, but this was the very point involved, and, although it is not discussed, it is, perhaps, fair to presume it was not overlooked.

I have purposely refrained from examining, at this time, the question, whether, in view of the provision of the constitution of 1865 (art, 11, sec. 16), by which the state was prohibited from thereafter exempting private property from taxation, this case can be distinguished from the Iron Mountain case, because I think the question ought to be brought before a full bench and decided upon a more careful consideration than I am at present able to give to it. In view, however, of the judicial decisions mentioned, particularly those of the state supreme courts in favor of the company on the very point here involved, it would seem the wiser course to grant a temporary injunction against the collection of the tax. This is done, however, with the reservation of a right to the defendants to move to dissolve it on the first day of the next term, or as soon thereafter as counsel can be heard. It is

ORDERED ACCORDINGLY.

Party Wall—Use of Common Flue.

PETER DALY v. WM. H. GRIMLEY.

New York Common Pleas, Equity Term, August, 1874.

1. **Party Wall—What is.**—A wall constructed partly on each adjoining lot, for the common support of the two buildings erected thereon, and so used for over twenty years, is a party wall in the legal sense of the term.

2. ——. **Right to Use.**—Each adjacent owner has the right to use the wall in the improvement of his own property, but at his own peril so far as injury might resul therefrom.

3. ——. **Use of Common Flues.**—A flue built in a party wall so as to extend beyond the centre line, is subject to the rightful and proper use of the adjacent owner in the improvement of his own property.

LARREMORE, J.—The wall between the houses, Nos. 326 and 328 Henry street, was constructed partly on each adjoining lot, in the year 1821, for the common support of both buildings, and has been so used for over twenty years. Halsey's testimony. It thus became a party wall in the legal sense of the term. Webster v. Stevens, 5 Duer, 553; Eno v. Del Vecchio, 6 Duer, 17. Each adjacent owner, therefore, had the right to use said wall in the improvement of his own property, but at his own peril, so far as injury might result therefrom to his neighbor. Brooks v. Curtis, 50 N. Y. 644-5. The actual damage sustained by the plaintiff was of so temporary and slight a character that no pecuniary compensation therefore was attempted to be proved on the trial.

The only question to be decided is that which relates to defendant's right to use said party wall for the purpose of making a connection with the flue of the adjoining house. If said flue had been

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built entirely on plaintiff's own premises (as the witness Baker testified), there could be little doubt as to his right of recovery therein. But the weight of evidence is in favor of the fact that said flue extends beyond the centre line of the party wall, and its back is formed by a single brick on the side towards the defendant's house. See testimony of Palmer, Dickson and Deeves. We have the testimony, then, of three witnesses on the part of the defendant to one on the part of the plaintiff to establish the fact that, by the removal of a single brick on defendant's side of the wall, access to the flue was had. A flue thus consturcted partly through a party wall, is (under the rule laid down in Brooks v. Curtis) subject to the rightful and proper use of an adjacent owner in the improvement of his own property. This right being established, the remedy for its misuses is by an action at law for the damages sustained.

Nor can I infer from the evidence that the present use of the wall is dangerous. All the testimony upon this point is based upon a supposition and not a fact. Over twenty years' use of the flue for the purpose above stated raises a strong presumption of its safety. For any apprehended danger therefrom the plaintiff has an adequate and summary remedy by an application to the public authorities.

The learned counsel for the plaintiff asks in this case for the application of the rule, "*Sic utere tuo, ut alienum non lædas.*" The best answer that can be made to such a request is contained in the admirable and elaborate opinion delivered by Chief Justice BRONSON in Radcliff's Executors v. the Mayor, etc., of Brooklyn (4 Comst. 195), as to what a man may do on his own premises.

After a review of the evidence, and the law applicable to the case, I am of the opinion that the defendant is entitled to judgment. —*Daily Register.*

[From our own correspondent.]

Recollections of Mr. Choate.

BOSTON, August, 1874.

EDITORS CENTRAL LAW JOURNAL:—I said in a former letter that Mr. Choate was exceedingly fond of the beautiful—that symmetry or adaptation and proportion of parts which please the eye. He retained this fondness to the end. In his last illness he occupied a room from the window of which he could overlook the sea. As he was about to lay down to sleep, he said to his attendant: "If a sloop goes by, let me sleep, but if you see a square-rigged vessel, wake me."

He was a true friend. When the nomination of Mr. David Henshaw was before the senate for confirmation as secretary of the navy, Mr. Choate, who was then a senator, a whig, and a friend of Mr. Henshaw, said to him: "There is nothing against you but the original sin of being a democrat. I think they will reject you; but they will all concede, if not now, yet soon, that you understand your business and have the courage to do it."

Mr. Choate was seldom or never disturbed. He had some female clients who occupied a good deal of time and paid little or nothing. As is not unusual with such, they wanted to talk their case all over and be told about their rights and the chances of their recovery, and especially that he should tell them, candidly, what he thought the prospect was, and when their case would be tried, every time they came, no matter how frequently. These clients annoyed Mr. Bell, the partner of Mr. Choate. He had no patience with such nonsense. He called these clients ghosts. One day, finding Mr. Choate occupied with such as these, after waiting until the last one had gone, I said to him: "Ghosts, I believe, are pretty much alike," "O, no," said he, "they differ in excellence. Some are more holy than others."

He was happy in turning a point that apparently made against him. As the sailors say of a good sailing vessel, he tacked handily. In the year 1848, the case of Wyeth v. Wyeth was tried before the supreme court at Cambridge. Wyeth had brought a libel against his wife for divorce, for adultery with one Hastings, as he alleged, in Philadelphia, and at sundry other times in Cambridge. Mr. Choate was for Mrs. Wyeth. The libellant, also, had able counsel; and the case was stoutly contested. The libellant took the deposition of one Keay, who, among other questions, more or less pertinent, was asked if he saw any, and what acts of intimacy between Hastings and Mrs. Wyeth; and whether Hastings took any, and what liberties with her person? In reply to which, the witness said: Hastings and Mrs. W. seemed mutually fond of each other, but he did not think he could say he ever saw Hastings take any improper liberties with her person. The witness was then asked, if he saw them together in the mowing-field, over the hill toward Fresh Pond, and if so, what was their conduct there? To which the witness answered; "I saw them with other persons; Hastings was at work with us in the field. Mrs. Wyeth lost her garter. Hastings said he would put it on. I saw them down together in the hay, scuffling. Enoch Lewis was there. I saw nothing more at that time. They were eight or ten rods from me." The defendant took the deposition of Hastings, who denied the story so far as respected the garter, but admitted "fooling." Mr. Choate, in summing up, among other things, which he did admirably, ridiculed the suggestion that this story was to be taken as evidence of criminality. "All that is true in or about it," said he, "I conceive to be true. And what does it amount to? Just this, a harmless pastime in the general austerity of hay-making." The libellant failed to prove the charge and the libel was dismissed, with costs for the libelee.

He was a ready discoverer of fallacy, and at the same time had a wonderfully quiet and altogether comical way of exposing it. In speaking to him one day, in the presence of a by-stander, who did not know him so well as I did, about a matter in which we were mutually interested, and which had been presented to the governor for his action, and upon which he had acted favorably and with less than the ordinary delay, I said: I suppose our thanks were due to his excellency for what he had done. Mr. Choate looked at me in his significant way, and asked: "Could he have done less and been honest, or acted less promptly and performed his duty?" This for me. Then, apparently to give the impression that he feared what he had said might impair my veneration, he added "But, then, we must not forget that he is governor for two years." This for the by-stander.

I shall be pardoned if I mention his fondness for tea. Sam Johnson was also fond of it, and drank great quantities of it. He liked it for its stimulating properties. Mr. Choate was fond of it because it produced a pleasant distention of the stomach.

He was familiar with coloquial expressions, and the words and phrases exclusively used in a particular art, handicraft or profession, or used in a particular sense in any such art or profession; and he delighted in tracing such words and phrases through their several histories to the source in which they respectively originated. He was especially familiar with sea phrases; employed them oftenest; and, perhaps, his most common, if not best, illustrations, were from the sea and from ships. Getting "under-weigh," "setting courses and topsails," "manning the yards," "turning out the reefs," "going off free, with studding sails set," "struck by a squall," "parting the main brace," "on her beam ends," "rudder carried away," "topmast sprung," "foremast clear gone," "topsail yard away," "cutting away the masts," "rigging jury masts," "gammoning the bowsprit," "weaving," "heaving sails," "lying off and on," "rounding to," "veering and hauling," "standing and running rigging" "ground tackle," "life-boats" and "yawls," "mast head," "try-sail" and "spanker," "hawse-holes" and "dead-eyes," "lee shore" and "breaker under the lee," "awnings," "binnacles," "compasses" and "calls," "dividers" and "drills," "elbows," "buttocks" and "fenders," "gauges" and "grapnels," "hammocks" and "hydrometers," "palm-irons" and "caulking-irons," "jackscrews" and "jewsharps," "ketches and pitch-kettles," "lanterns" and "log-lines," "marline" and "mallets," "needles" and "oakum," "plugs" and "palins," "rivets" and "log-reels," "gunters-scales" and "holy-stones," "trucks" and tarpaulins," "vices," "windlasses," and "wrenches," "packing-yards" and "pig-zinc,"—all these and hundreds of others, like and unlike, were familiar to him as "household words." But the most remarkable part of it was not that Mr. Choate was familiar with these words and phrases, but that he also knew the exact significance, office and use of that which each such word and phrase denoted, so that if any opponent, to whom he had the reply, made use of one such phrase or expression, and in so doing, made a mistake, Mr. Choate was sure to detect the mistake and make the most of it—always, however, acting upon the rule of the great Montesqueieu, never to render his adversary odious, but only what he said ridiculous; and, therefore, unlike the case of a child handling edge-tools, where blood flows, and pain succeeds and lingers, but rather like the partially-skilled and inconsiderate pyrotechnist, who has neglected the second caution of Cromwell, namely, to keep his powder dry, and exposes himself and his fire-works to a summer shower, and so finds himself drenched, and his display ends in a fizzle, but always with the encouraging assurance that over and beyond the cloud out of which the rain proceeds, the sun ever rolls in his circuit, and on the morrow will shine and glow on the victor and the discomfited, and with equal tenderness.

PELHAM.

[Communicated.]

Law Schools.

DENVER, COLORADO, Aug. 10, 1874.

EDITORS CENTRAL LAW JOURNAL:—

In coming in from the mountains, the first St. Louis paper I enquired for was the CENTRAL LAW JOURNAL, and I find that you have been discussing, of late, the influence of Western law schools in multiplying incompetent law-

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yers. There are but two in Missouri, one in St. Louis, and one in Columbia. Of the first I cannot speak, although I have a high opinion of its professors and lecturers. But in regard to the law department of the State University, its objects, its aims and its tendency, I feel well advised. It was established for the purpose of elevating, rather than depressing the standard of legal education; to that end the professors work, and they believe their work will not be fruitless.

I fully appreciate the evil of admitting every one to the bar without regard to qualification. The consequent tax upon the people is grievous, perhaps the heaviest they have to bear. We see creditors swindled, estates ruined, and crimes go unpunished through the blundering ignorance of judges and legal practitioners. To permit one to make a stove, or build a house, who had not learned the trade, would be a folly patent to all, but almost every one may engage in a business which requires more knowledge, more patient labor, stronger intellectual perceptions and a keener moral sense than any other.

The circuit courts of Missouri are greatly to blame in this regard. I do not believe that, in general, young applicants are subjected to any examination worthy to be called such. I know that some who have been so admitted, have entered our school and find it impossible to master the ordinary studies of the course, and others, who have only passed their junior year, leaving many of the most important subjects untouched, find the door of every court-house open to them. The favor — I should rather say the unkindness thus shown by the circuit courts — renders it more difficult for us to impress upon the student the necessity of full preparation. If every applicant was subjected to an examination as thorough as that given the graduates of our school, the courts would do their whole duty. No one can receive a degree who does not answer correctly the usual proportion of the questions submitted, and they cover the whole curriculum of law-study. And these questions are in writing, to which written answers on the spot are required, and they are not to be drawn or submitted by the faculty, but, so far as we can secure their attendance, by the best representatives of the bar. I presume the examinations at St. Louis are equally thorough.

I do not see how law schools like these can be subject to your criticism. I know that in some of the older and more popular Eastern schools, the instruction is by lectures merely, and the examinations are nominal. If the student has attended the required lecture courses, he receives his degree almost of course. A statute admitting to practice all whose degree is thus acquired, must, necessarily, however learned and able the lecturers, cover many who understand or remember but little of what they have had an opportunity to hear. But it is different, where the student is compelled to master the best text books, and where he is subjected to a daily, and to a final and thorough examination upon their contents. If only those were admitted who have carefully passed such a similar examination, the evil would be at least greatly lessened.

P. B.

REMARKS.—The above is from the pen of Hon. PHILEMON BLISS, dean of the law faculty of the University of Missouri, and formerly one of the justices of the supreme court of this state. In most of his views we cordially concur. We fully believe that the law school with which he is connected, notwithstanding the shortness of its course of instruction, which in the aggregate equals but one year, is exerting a healthy and favorable influence upon the bar of Missouri. We know this to be the fact with reference to the law school at St. Louis. As we have said before, the burden of our criticism is not upon law schools as such, but upon what we consider a fault in many of them, a period of instruction too short to acquaint the average student even with the essential rudiments of the law. So far as our local interests in the bar of Missouri prompts us to speak, we should be glad to see the course of instruction in its two law schools extended to three years, or else their annual terms lengthened to nine months. We are utterly unable to understand how it can he expected that a young man can become fitted, by a course of study whose aggregate duration is but one year, either to advise clients on questions of legal right, or to pursue for them in the courts, with safety and good judgment, their appropriate remedies. In this connection we are glad to note that the Boston University School of Law, lately established, has wisely followed the example of Cambridge, and fixed its course of graduation at three years.

Summary of our Exchanges.

The Daily Register, for August 11, contains an article by William Struss, of the New York bar, on the "Potter" Wisconsin railroad law.

The Daily Register frequently publishes good cases, decisions of the Supreme Court of New York, in General Term, and of the local courts of New York city, but it generally publishes them without a syllabus. This detracts greatly from their usefulness.

The Albany Law Journal, for August 15, has a leader on Insanity; reprints with comments, Dr. Hammond's communication in this journal (*ante*. p. 390); reprints from the New York Tribune an extremely interesting article on the Revised United States Code; contains a digest of recent English decisions, and also a digest of decisions of the Supreme Court of the United States, from the advanced sheets of 18 Wallace; prints a short article by C. H. T., on Fraudulent Statements as to Value, and reprints, from the Legal Intelligencer, the case of Glendon Iron Co. v. Uhler, holding and applying the doctrine that the name of a town or city cannot be used as a trade-mark.

The Albany Law Journal, for August 8 (received too late to notice last week) contains an interesting paper by John Proffatt, Esq., on The Liability of a Married Woman on Contract; another by the editor, on "*Secundum Allegata et Probata*;" another by John F. Baker, on The Province of Oratory, who lays it down as almost certain that a speaker, whether he be before a popular audience or before a jury, who begets a "smoothness" in his plea or speech, will the more thoroughly and completely sway and carry his hearers with him, and thereby achieve conviction and success. It also reprints from this journal of July 30, the case of Jacobs v. Chicago and St. Paul Railway Company, and besides contains its usual amount of interesting and instructive matter, consisting of notes and abstracts of recent decisions, etc.

The Legal Gazette, for August 7 (received too late to notice last week), publishes the following decisions of the Supreme Court of the United States, at its last term. 1. Westray v. United States, holding that notice of a government collector's liquidation of duties upon imported goods at the time of the withdrawal entry, need not be given to the importer; and that the obligor of a warehouse bond can only be relieved from the forfeiture thereof by the payment of all the duties, to secure which he gave the bond. 2. Nunz v. Dautel, holding that, where a due-bill stipulated that it was to be paid "as soon as the crop can be sold, or the money raised from any other source," the reasonable time to be allowed for its payment was to be determined by the court.

It also publishes The People v. Chicago and Alton R. R. Co., published in this journal for July 9 (*ante*, p. 340). Also the case of The Bondholders v. The Railroad Commissioners, "Potter" Wisconsin railroad law, published in this journal for July 16 (*ante*, p. 348), also Udderzook's case, published in this journal, same number (*ante*, p. 352), also notes of cases, statutes, etc.

The Chicago Legal News, for August 15, publishes Simpson v. Greeley, in which the Supreme Court of the United States discuss the question of the joiner of parties in suing out writs of error. The following points are ruled:

1. Where the interest is joint, and no severance has been effected in the judgment, either by subsequent summons and severance, or by some proceedings of an equivalent character, all the parties united in interest must join in suing out the writ.

2. That, where some of the parties in interest refuse to join in the writ of error or appeal, the others are entitled to resort to the process and proceeding of summons and severance, to enable them effectually to remove the case from the subordinate into the appellate court.

3. In cases where only one of several defendants are affected by the judgment or decree, the party whose interest only is affected may carry up the case without joining the others in the appeal or writ of error.

It also publishes Garratt v. Seibert, in which the same court held that if the subject of a patent is a combination of several processes, parts or devices, the use of any portion of the combination less than the whole cannot be an infringement.

It also publishes Mayor, etc., of Monroe v. Hoffman, in which the Supreme Court of Louisiana held that, where the right to establish fire-limits is among the municipal powers granted to corporations, the right to prohibit the erection of wooden buildings carries with it, necessarily, the right to *remove* them when constructed in violation of the prohibition.

It also publishes Toledo, Wabash & Western R. R. Co. v. Frederick, in which the Supreme Court of Illinois consider and apply the familiar doctrine of the liability of railroad companies for injuries to their employees, caused by defective machinery and cars used in operating their roads, and also the question of the measure of damages in such a case—the case being that of an injury to a switchman, through a defective appliance for coupling cars.

It also reprints from the Law Times (London) *ex parte* Jolliffe, holding that county judge, under the British statute, has no power to punish for a contempt in publishing in a nswspaper an article reflecting upon the judge's conduct.

It also publishes the case of Taylor v. Kearn, assignment of dower under the Illinois statute, and a variety of other interesting matter.

The Forum, for July (Baltimore, Henry Taylor & Co.), contains papers on the following subjects: The Forum and its Chances; The Nature and Effect of a Seal upon a Written Instrument; Foreign Divorces; Colorable Domicile; The Civil Law, Its Consummation and Decline under the Roman Empire; Charles O'Conor. It also contains a portrait of Mr. O'Conor—a lithograph, rather badly executed. We think Mr. O'Conor was deserving of a steel engraving—that or nothing.

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The Forum also reports the case of Lewis v. Baltimore and Ohio Railroad Company, Court of Appeals of Maryland, in which it is ruled that, where the plaintiff has been guilty of a plain act of carelessness, which has contributed to an accident, it is the duty of a court, as a matter of law, to say that he cannot recover. The plaintiff in that case, desiring to cross a street in Baltimore, after dark, the street-lamps being lighted, found a train of railroad cars blockading the crossing, a crowd had collected, waiting for an opportunity to cross, and, while plaintiff was waiting two women had been prevented by the police from creeping under the couplings, but several persons had climbed up the platforms and thus crossed. After waiting about five minutes, plaintiff started to get on the platform, with the intention of crossing in the same manner, when the train started and his leg was crushed between two cars. *Held*, that such an act was contributory negligence, and he could not recover. The fact that the railroad company was negligent in thus blockading a street crossing, contrary to the city ordinances, did not relieve plaintiff from the duty to use ordinary care to avoid danger.

The remaining matters in this number of the Forum consists of Decisions in the United States in May, June and July, 1874; Abstracts of the English Reports for April and May, 1874; Red Tape; Book Notices, and The Green Bag. If the editor of the Forum would arrange his digest of recent decisions by *topics* instead of by *states*, and prefix each subdivision with the appropriate title, it would facilitate reference and add greatly to its value. We recognize many of these abstracts of decisions as being taken from current legal periodicals, where they are published in full. The editor of the Forum would greatly enhance the value of such by quoting the periodical from which they are taken, since, in many instances, his readers will want to see the case in full. Besides, this would enable him to give the credit usual among journals in such cases.

The Legal Intelligencer, for August 7, contains nothing but reports of cases. We note the following:

In Cochran v. Gowan, the Supreme Court at *nisi prius*, held that an attachment will not be issued against a plaintiff in equity, who has failed in his suit, for his neglect to pay the costs of the suit.

In Glendon Iron Co. v. Uhlen, the same court affirm the familiar doctrine that the name of an incorporated town cannot be appropriated as a trade mark by one or two persons, who are engaged in carrying on the same business therein. See the following authorities:

High on Injunctions, sec. 673; Bispham's Eq. 411; Woolf v. Goulard, 18 Howard's Prac. Rep. 64; Brooklyn White Lead Co. v. Massey, 25 Barb. 416; Newman v. Alvord, 49 Barb. 588; Candel v. Deere, Supreme Court of Illinois, 10 Am. Law Reg., 3 N. S. 694; Del. and Hudson Canal Co. v. Clark, 13 Wallace, 311. And the court hold that this is so although the person claiming the trade-mark made use of it before the incorporation of the town.

In Northampton County v. Lehigh and Susquehanna Railroad Company, the same court hold that the Pennsylvania act of 1873, repealing all laws exempting real estate from taxation, does not apply to land necessary to the franchise of a railroad corporation; that the object of the statute was simply to repeal the numerous special laws which had been enacted, exempting particular parcels of real estate from taxation.

In Foster's appeal, the same court hold that where a deceased partner's interest in land is bought by the surviving partner, and conveyed to him by decree of court under the act of 1853, the proceeds are to be distributed as real estate and not as personality. The widow takes the income only.

The other decisions, except such as will be found in our notes of cases, are only of local intesest.

The Chicago Legal News, for August 8 (received too late to notice last week), reprints from the Albany Law Journal, Heine v. Levee Commissioners, Supreme Court of the United States—subject, Louisiana Levee Bonds.

It also publishes Dubuque & Sioux City R. R. Co. v. Richmond. where the same court hold that, a contract with a railroad company to erect an elevator, and receive and discharge at certain prices all grain brought by the company's cars, is not repugnant to the commercial power of Congress, and will be enforced by the courts; and that the power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse, against the discriminating state legislation; that it was never intended the power should be so excercised as to interfere with private contracts, not designed at the time they were made to create impediments to such intercourse.

It also publishes *re* Burnett, in which Mr. District Judge Blodgett holds, that a chattle mortgage, made by a resident of Chicago, may be acknowledgd before any justice of the peace of that city—a position in which the editor of the Legal News does not concur. Also Hopkins v. Snedacker, in which the Supreme Court of Illinois affim a decree refusing to rescind a contract for the exchange of lands, the ground on which relief was prayed being fraudulent representations. Also Friebroth v. Mann, same court—a case under the mechanic's lien law of Illinois.

The Legal News also prints the case of the Northwestern Distilling Co. v. Brant, where the same court discusses the interesting question, under what circumstances an instrument executed by the president of a corporation will bind. The corporation, the action was covenant brought by Brant against the N. W. Distilling Co. to recover for not restoring premises, etc., according to the terms of a written lease. In the lease, Edward F. Lawrence, president of the Northwestern Distilling Company, is stated to be "party of the second part," and the pronouns *he his* or *him* are everywhere used in referring to the party of the second part. The covenant to restore the premises in good condition, for the breach of which the action is brought, is: "And the said party of the second part further covenants with the said party of the first part, that at the expiration of the term *he* will yield up, etc., in as good condition as when the same were entered upon by the said party of the second part." It is signed "Northwestern Distilling Co. [SEAL.] By EDWARD LAWRENCE, President:" *Held*, that it might be shown by the declaration and proof that the company intended to make the covenant, and that the action was well brought against the Northwestern Distilling Company.

The Legal News also publishes The People *ex rel.* Graff v. The Institution of Protestant Deaconesses, a case of some interest to religious and charitable societies. The title of the act incorporating the society, was "An act to incorporate the Institution of Protestant Deaconesses, and to provide for the management and control of an hospital in Chicago." *Held*, that the corporation has no right to maintain, as a corporation, an orphan asylum at Jacksonville, and that the exercises of the right and franchises of a corporation at Jacksonville is an usurpation.

It also publishes Strasburger v. Burk, City Court of Baltimore, of which the syllabus is as follows: "That, under the Maryland statute, a person could not recover for beer or refreshments furnished to voters at a regular election, under contract with a candidate. *Held*, That the same principles of public policy which apply to elections ordained by law, must, for the same reasons, be applicable to the primary elections, and that a person who, under a contract with a candidate, furnishes liquors and cigars to voters at a primary election, in order to influence them in favor of such candidate, cannot recover on such contract to furnish such refreshments, as the contract is against public policy and void."

It also publishes notes of the decisions of the Supreme Court of Illinois, and of the Supreme Court of the United States, and other interesting matter.

Notes and Queries.

OTTUMWA, IOWA, August 7, 1874.

EDITORS CENTRAL LAW JOURNAL:—The liquor law of this state provides that no person shall sell, without license, any intoxicating liquors in the sate, and should he do so, he is guilty of a misdemeanor, and is liable to be fined and imprisoned. The same law further provides that no action shall be maintained for the recovery or possession of any intoxicating liquors, or the value thereof, except in cases where persons owning or possessing such liquors, with lawful intent, may be illegally deprived of them.

A., who held intoxicating liquors in this state, with intent to sell the same in violation of the law, makes a sale of such liquors to B., without license. This sale is made on credit to B., who knows A. is not authorized to sell.

Within less than four months of this sale, A. is declared a bankrupt, and an assignee is appointed.

What interest has the assignee in these liquors, thus illegally sold?

If B. has disposed of the liquors, can the assignee recover the value from B.? As between the assignee representing creditors of A. and B., what interest has the latter in the liquors, growing out of the illegal sale, from A. to him?

Is is not claimed the sale was made in violation, especially, of any section of the bankrupt law.

Your opinion on the questions here suggested, together with a reference to any authorities you may be able to cite, will oblige a subscriber. IOWA.

ANSWER.—The assignee in bankruptcy represents the interest both of the bankrupt and his general creditors. So far as he represents the bankrupt, he has no more interest in the liquors than the bankrupt had, or could have had, if the bankruptcy had not taken place, and as the representative of creditors, who had no specific lien, or indeed, any lien at all upon the liquors, it would seem that the rights of the assignee in bankruptcy, in the case supposed, were the same, p ecisely as the rights of the bankrupt would have been if bankruptcy had not supervened. It results that if the bankrupt had no interest in the liquors which he had illegally sold, which could be asserted by an action of law, his assignee in bankruptcy would be in the like predicament. And so if the bankrupt could not have received the value of liquors illegally sold by him, his assignee would be in like manner disentitled to do so. If these views are correct, they dispose of the questions propounded by our respected corres-

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spondent, so far as they arise out of, or are complicated by the bankruptcy proceedings.

We are not aware of any adjudications on the exact point. Some light is thrown upon the general subject by the discussions in Davis v. State, 17 Iowa, 250; State v. May, 20 Iowa, 305; Sommer v. Cate, 22 Iowa, 385; Carlin v. Heller, 34 Iowa, 256; Cooley v. Davis, lb. with which our correspondent is familiar.

Our impression, formed, however, without much reflection or examintion, is that, upon the case as stated, the legal rights of the assignee are not such as would enable this officer to promise more than the *usual dividends*.

ST. LOUIS, MO., July 29, 1874.

EDITORS CENTRAL LAW JOURNAL:—"A subpœna, issued by a justice of the peace, shall be valid to compel the attendance, in a justice's court, of a witness being in the same county where the cause is to be tried; or, being in an adjoining county, and within *twenty miles* of the place of trial." Wag. St. p. 827, § 1.

Depositions, it would seem, can be used as evidence, on the ground of distance of witness from place of trial, *only* "if he reside at a greater distance than *forty* miles from the place of trial." Wag. St., p. 528, § 28.

Suppose plaintiff's witness to live in an adjoining county, more than twenty, but less than forty miles from the place of trial, must plaintiff institute suit in the circuit court? Suppose such witnesses are defendants; can judgment go against him, in their absence before the justice, and his only remedy an appeal?

F. W.

ANSWER:—The man who drew the statute certainly deserves a leather medal. If the plaintiff's witnesses live in an adjoining county, more than twenty miles from the place of trial, the plaintiff should cast about and see if there is not some justice in the county within twenty miles of the witnesses, *or forty miles away from them*, before whom he can bring his suit. If he can find uo such justice, then, if his demand is large enough, he should sue in the circuit court. If his demand is not large enough to bring it within the jurisdiction of the circuit court, he should sue before some justice, suffer judgment to go against him and appeal to the circuit court. If the witnesses are those of the defendant, he should obtain a change of venue to some other justice of the county, whose office is within less than twenty or more than forty miles from the witnesses. If this could not be done, he likewise should suffer judgment to go against him and appeal to the circuit court. In either case, the plaintiff or defendant could make the statutory affidavit required in order to take an appeal, namely, that the appeal is not for vexation or delay, but for justice.

In answer to several letters of enquiry, we will state that the Vanderbilt University is located at Nashville, Tennessee.

TO W.—We do not publish and answer your enquiry as to liability for "seed corn," because, 1st: We cannot give attention to anonymous communications, and 2d., while as stated, we think there is a liability, this might be affected by the exact character of the letter and what your servant said, neither of which are stated.

Legal News and Notes.

—THE publishers of Wallace's Reports announce that volume 18 will appear by the end of August.

—LORD JERVISWOODE has resigned his position as judge of the Scotch Court of Session, and Mr. Miller, the solicitor-general, has been appointed to the vacancy.

—MR. WILLIAM H. CLIFFORD of the Portland bar, son of Mr. Justice Clifford of the supreme court of the United States, has declined the nomination of the democrats for Congress, in the first Maine district, on account of professional duties.

—THE acting attorney-general of the United States has decided that personal property of individuals, situated in national cemeteries, cannot be levied on by attachment from the state courts, unless the state, in ceding to the United States the land used for the national cemetery, reserved to itself such jurisdiction. The property in question belonged to a government contractor.

—APROPO of the question of admissions to the bar and elevating the standard of the legal profession, we see that the board of health of New York propose taking steps for the suppression of irregular practitioners and quncks, under a recent statute of that state. It is a good move.

—THE last time I met Joaquin Miller, the American poet, says the London correspondent of a contemporary, he spoke of himself as "judge" Miller. I expressed my delight and surprise. I had been unaware of his judicial dignities. Indeeed, I did not even suspect that he knew any law. Upon my expressing my surprise, he replied camly—"Yes, sir, for four years I administered law in Oregon—with the help of one law book and two six-shooters."

—THE discussion in the great Wisconsin railroad case was continued last week, the principal difficulty in the minds of the court being as to their jurisdiction—whether they had power to issue the injunction prayed for. The judges evidently inclined to the opinion that they had no such jurisdiction. Their decision will be given on Wednesday next.

—AT Maidstone (English Assizes July 22) in Tredwall v. Flack, an action for breach of promise of marriage, Bramwell B., in summing up to the jury said: He thought this was a class of actions really almost in one sense dishonest, for if the parties were asked, when the engagement began, whether they intended that it should be enforced by law, they would say "Oh, dear, no, certainly not;" and yet, when it was broken, the wounded party went to law for damages. Moreover, he thought they were a very mischievous class of actions, and that he was very much against large damages in such cases, unless there were some very peculiar circumstances in the case, for surely if either of the parties found that there was not so much affection as was supposed, it was better that the eugagement should be put a stop to.

—THE great Wisconsin railroad case, being an application for an injunction on the information of the attorney-general of Wisconsin to compel the Chicago and North Western Railroad to conform to the Potter law, has been argued at length, and by eminent counsel on both sides, before the supreme court of that state. The singular spectacle was presented of two distinguished jurists, lately retired from the bench, arguing this cause against each other; on the one side, for the state of Wisconsin, ex-chief justice Dixon, lately of the supreme bench of that state; and on the other side, for the railroad company, ex-chief justice Lawrence, who, but a little more than a year ago, delivered the judgment of the supreme court of Illinois in the celebrated Chicago and Alton Railroad case. We can well believe that these distinguished jurists find such great contests as this more lucrative and more engaging than the hard work, poor pay and no thanks of their late judicial positions.

—IT appears from the Charleston News and Courier that during the month ending July 22 last, Governor Moses of South Carolina granted 421 pardons, without counting some twenty five or thirty criminals turned loose one day in a abtch. The News and Courier particularize by giving the following statement of the 421 pardons, which it says was obtained from the secretary of state: Murder, 21; Manslaughter, 25; Rape, 16; Infanticide, 5; Burglary, 33; Forgery, 4; Arson, 24; Highway robbery, 3; Perjury, 4; Larceny, 110; Bigamy, 6; Assault and battery, 107; Horse and mule stealing, 6; Libel, 1; Kidnapping, 1; Abduction, 1; Trespass, 4; Miscellaneous, 38; Official misconduct and malfeasance in office, 12; Total 421. The twelve persons convicted of official misconduct are described by name and offense. Eight of them are county treasurers or county commissioners, and sentenced for three to thirteen months in the penitentiary; one however, was sentenced to nine years, and one to ten. This presents a record of corruption and infamy unprecedented in the annals of our country.

—RIGHT Honorable Abraham Brewster, ex-Lord Chancellor of Ireland, died on the 26th of July, at his residence in Dublin. He was born in 1796, and was consequently 78 years old at his death. He entered Trinity College, Dublin, in 1812, and took his degree in 1817. His college career was not brilliant. He was called to the bar in 1819. Although his reputation throughout his long career was that of a hard-working lawyer, he was seventeen years in the practice of his profession before he was called to the Inner Bar. He received silk in 1835, while Lord Plunkett was lord chancellor. In 1842, during the attorney-generalship of the late lord chancellor Blackburne, he was appointed Castle Adviser under Lord De Grey's administration. In 1846 he was elected a Bencher of the King's Inn, and in the same year was appointed solicitor-general for Ireland, during the vice-royalty of the late Earl of Bessborough, who died in the government in 1847. Ou the return of the conservatives to power in 1853, Mr. Brewster was appointed attorney-general for Ireland, and sworn member of the Privy Council. He continued attorney-general until the dissolution of Lord Aberdeen's government in 1855, when, although solicited by Lord Palmerston to continue in office, Mr. Brewster thought fidelity to the Peel party necessitated his refusal, and he accordingly returned to his profession. He was succeeded in the official position by the present Judge Keogh, who had acted as solicitor-general under him. In 1866, when the party were again in occupation of the Treasury Benches, Mr. Brewster (thirty-one years after he had received silk), was appointed lord justice of appeal, in succession to the late Right Honorable Francis Blackburne, who, for the second time had been elevated to the lord chancellorship of Ireland. Again in 1867, on the retirement of Mr. Blackburne from the chancellorship, Mr. Brewster succeeded to the judicial honors, representing that his promotion should not have proceeded from their political friends. Those who have been contemporaries of Mr. Brewster can speak of the strength and power of his handling of cases at either side of the Hall of English Courts.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. }
S. D. THOMPSON, Ass't Editor. }

ST. LOUIS, THURSDAY, AUGUST 27, 1874.

{SUBSCRIPTION: $8 PER ANNUM, in Advance.

U. S. SUPREME COURT DECISIONS.—We are glad to learn that the first volume of Mr. Justice MILLER's continuation of Curtis' Decisions is now in the hands of the printer and will soon be forthcoming. The profession will expect this desirable work to be brought down to date, and not to end with Wallace.

THE BANKRUPT ACT—JUDGE HOPKINS' DECISION IN HAMLIN V. PETTIBONE.—The criticism which we elsewhere print upon a point in Mr. District Juge HOPKINS' recent decision in Hamlin v. Pettibone (*ante*, p. 404), is from the pen of Asa Iglehart, Esq., of Evansville, Indiana. We express no opinion on the point (perhaps only a *dictum*) as to which he differs from the learned judge, but recommend the perusal, both of the opinion and of his criticism, to our readers. We suppose that discussion of this kind, conceived in the proper spirit, and conducted with judgment and discrimination, is always in order, and that there is no judge so able, nor yet any court so high, that may not, at times, be benefited by it. We shall be glad to hear from this writer again on other questions.

THE OSAGE CEDED LAND IN KANSAS.—We publish in this number the opinion of the United States Circuit Court for Kansas, delivered by Mr. Justice MILLER, and in which the circuit judge concurs, respecting the title to the Osage lands. The tract in controversy is 50 by 30 miles in extent, and the lands claimed by the railroads under their grants aggregated 960,000 acres, upon which between 30,000 and 40,000 settlers have their homes, and whose rights were involved in the litigation. The decision is adverse to the railroad companies and will inure to the benefit of the settlers.

This controversy, in amount one of the largest that ever came before the judicial tribunals for settlement, derives additional interest from the fact that the secretaries of the interior department, at different times, have decided different ways—the last decisions being favorable to the railroad companies. And from these considerations the questions of law involved are highly important, and the lucid exposition and treatment of them by the learned justice will be read with interest by all classes of the profession. The cause was argued at the last June term and taken under advisement, and the decision has just been rendered. It gives us pleasure to lay the opinion before our readers at this early date.

RAILWAY NEGLIGENCE—COUPON TICKETS—INJURIES ON ANOTHER LINE.—The Chicago Railway Review, for August 8, publishes the interesting case of Hartan v. Eastern R. R. Company, Supreme Judicial Court of Massachusetts, November, 1873, which holds that, where two railway companies, by mutual contract operate their road as one continuous line, but each manages and operates its own part thereof, and one of them sells a coupon ticket which will take the passenger over the entire line, and on that portion of the line owned and operated by the other company, the passenger is injured, the company selling the ticket is not liable. At the conclusion of the opinion of the court, WELLS, J., says: "The case differs from that of Hill Manufacturing Company v. Boston and Lowell Railroad Company, 104 Mass. 122, in the evidence both of the contract between the parties and of the joint relations between the connecting roads. And, besides, a carrier of persons stands in somewhat different relations to the subject of the service from the carrier of goods." We have examined this last case with considerable care, and are unable to perceive any substantial difference between the contracts between the connecting roads in the two cases. Nor do we perceive any reason why a different rule should be applied to carriers of passengers in such cases, from that applied to carriers of goods. Will a court of justice gravely lay down a rule of law for the preservation of inanimate merchandise in the hands of common carriers, which it will deny for the preservation of human life? See, also, upon the question of the liability of carriers of goods in such cases, Darling v. Boston, etc., R. R. Co., 11 Allen, 295; Burroughs v. Norwich & W. R. R. Co., 100 Mass. 26; Nutting v. Connecticut River R. R. Co., 1 Gray, 502; Judson v. Western R. R. Co., 4 Allen, 520; Perkins v. Saco & Portsmouth R. R. Co., 47 Maine, 573; Bruntnall v. Saratoga & Whitehall R. R. Co., 32 Vermont, 665; McMillan v. Michigan, Southern and Northern Indiana R. R. Co., 16 Mich. 119; Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271.

LAW SCHOOLS—ADMISSION TO THE BAR.—The Albany Law Journal, for August 15, reprints Dr. Hammond's letter in this journal of August 6, with the following remarks:

> Mr. Hammond's memory is at fault as to the exemption of law schools in this state from the provisions of the act requiring a term of study being a temporary one. He is also in error in supposing that the discussions to which he alludes mean hostility to the law schools. A well conducted law school is unquestionably a great aid to the student of the law; but it is folly to suppose tha such a school can fit a young man, with no previous study or experience, for the bar, in the space of a year. We believe it to be a positive injury to students, as well as to the profession, for a school to attempt to do anything of the kind. It enables young men to gain admission to the bar before they are fitted for its duties, and by so doing, in many cases helps them to an untimely professional death. But little stress can be put upon the fact that the graduates of the law department of the University of Iowa are examined by a committee appointed by the court. This method is, perhaps, preferable to that of graduation of course, but examinations as usually conducted are but poor tests. The best prerequisite to admission to the bar is a sufficient *term* of study.

It will be seen that this embodies substantially the views that we have already several times expressed. The opposition is not to law schools, but to too rapid graduation. Or, if it is found impracticable for law schools to lengthen their course of study, then the protest is against admitting their graduates to the bar on the faith of their diplomas, without further examination.

We do not wish to be understood as attempting to lecture the law schools on this subject while passing over in silence the conduct of the courts. We have good reason to believe that the conduct of many of the courts in the West and South with regard to admitting candidates to the bar, has been remiss in the last degree. We are glad to be able to testify that the federal courts at Saint Louis, and the circuit

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court of Saint Louis county, are conspicuous exceptions to this rule. But the painful fact is forced upon us that, as a general thing, the examination by judges, or by committees of the bar, of candidates for admittance to the bar, is a mere sham. We know of instances where a basket of champagne, or even a bottle of whiskey, has secured a favorable report, and where candidates have been admitted who had never read law a week, and who were even ignorant of the names of the leading elementary writers on the law. This state of things, which we believe is not new, but has existed in many quarters for years, is a scandal and a reproach to the legal profession. It inevitiably enforces upon men of sense, the conclusion that a profession which thus admits Tom, Dick and Harry to its honors, has very ilttle honor, and is unworthy either of the confidence or respect of the public.

Some of the Dying Glories of the Common Law.

The district of Columbia is governed by the common law, with very little statutory adulteration. The Washington Law Reporter, for August 11, in an able editorial, exhibits one of the beauties of that "perfection of human reason." One Thomas E. Walker, inflicted a mortal wound upon Michael J. Hillis, in the District of Columbia, but Hillis died at his home at Rosslyn, a place formerly within the jurisdiction of the District of Columbia, but which had been ceded back by Congress to the state of Virginia. The editor of the Law Reporter shows that, had the prisoner been convicted, the judgment must necessarily have been arrested; because, "while there may be some doubt us to whether an indictment for murder would lie, in the states in which the common law prevails, where the offence was partially consummated in different counties, although within the state, there can be no question that, where it was partially comsummated in different sovereign jurisdictions, an indictment would not lie in either." And, in support of this proposition, he cites the following authorities: Chit. Crim. Law, 117–18; 1 East P. C. 361; Bac. Ab. tit. Indictment; Com. v. Linton, 2 Va. Cases, 205; Stoughton v. State, 13 Smedes & M. 255; State v. Carter, 3 Dutch. 499; Orrell's Case, 1 Dev. 139; Riley v. State, 9 Humph, 646. The editor of the Law Reporter adds: "In England, and in most of the states, the failure of justice in this class of cases is prevented by statutory enactment; but the common law, as laid down in the above decisions, is the law of this district to-day." The jury, however, in the case of Walker, resolved the difficulty by acquitting the prisoner.

Another case which strongly illustrates the departing glories of the common law, was that of Pollard v. Lyon, lately determined in the Supreme Court of the District of Columbia. The action was for slander, and the words imputed were, "I saw her [the plaintiff] in bed with Captain Denty." The jury gave the plaintiff a verdict of $10,000. Now, since fornication is not an *indictable* offence in the District of Columbia, the court were obliged, in obedience to a firmly-settled rule of the common law, to arrest the judgment. It is but just to the court that we should quote their opinion. It was delivered by Mr. Justice HUMPHREYS. He said:

The motion in arrest of judgment is heard in general term now in the first instance. The words spoken by the defendant and charged in the declaration are "I saw her (the plaintiff) in bed with Captain Denty." It has been settled that at common law, words which if true, would subject the accused to infamous punishment, or to an indictment for a crime involving moral turpitude, are in themselves actionable without averment or proof of special damage. The rule must have been so settled on the ground that as between men, a charge made by one against another could result in no serious injury, as a general rule, unless the charge if true would subject the party of whom the words were spoken to the inconvenience and danger of an indictment in which the public would be arrayed against him. It may be true that a man suffers no real damage from words which, if true, would not and could not be followed by an indictment and punishment. Be the reason what it may, we find the rule and cannot depart from it.

Rude as the generation that established the rule may be thought to have been, it probably did not occur to them that the same rule would come to be applied in a more refined age so as to protect the defamer of a woman's character from responding in damages for the looseness of his tongue. Or it may not have entered the mind that the time would come when men could wantonly assail the reputation of woman's chastity. But we are bound by the stubborn rule of authority, and the remedy is by legislative action.

The words in this case import nothing else, legally or according to the common acceptation of those words, than a modest way of charging illicit intercourse between a man and a woman. The more delicate and covert the charge, the keener the injury. When the defendant said "I looked over the transom light and saw Mrs. Pollard in bed with Captain Denty," who would doubt his meaning?

If the charge was true, defendant could have justified; if untrue, he should be held to answer for the wrong committed. It is to be regretted that the rule in Ohio and Iowa is not the rule of the common law in governing us.

But we are bound by the rule that the charge must be in words which, if true, would subject the accused to an indictment. There is moral turpitude in the charge made; but the plaintiff could not be indicted even if the truth of the charge was established. The act of Maryland of 1749, removed the infliction of corporal punishment for fornication. and the act of 1786 repealed all proceedings for the punishment of fornication. We think that we are forced, however reluctant to do so, by the mandate of authority, to arrest the judgment.

Instances of this kind must convince the just and reflecting mind, notwithstanding all the encomiums which have been lavished upon the common law, what a rude and barbaric system, in many of its features, it really is. And perhaps its inconsistency and incongruity are nowhere more strikingly illustrated than in this very instance. It justly punishes the ravisher of female virtue with death; but against him who falsely imputes to her in public a want of chastity—who falsely accuses her of having *voluntarily* surrendered that which is dearer than life itself, it awards no punishment and affords no redress. Such maxims seem well adapted to the condition of such a people as the Sandwich Islanders, who are destitute of any due appreciation of female honor, but it is a reproach to the legislative body, wherever they are perpetuated among an enlightened and honorable people. Instances like these tend to convince us that the common law, instead of deserving the encomium of being the "perfection of human reason," deserves rather to be considered such a system of rude justice, combining many just and unjust maxims, as a nation of free islanders, surrounded, and, to some extent, isolated from other nations by a watery wall, have been able to frame for themselves; whose very isolation has led them to despise the systems of other people and to refuse to profit from the study of them, while it has nursed their minds into a bigoted admiration of their own errors and follies.

—FOR the information of a correspondent and others who may not know we would state that the Vanderbilt University, the law school of which is advertised on our outside page, is located at Nashville Tennessee. This institution has been munificently endowed by Commodore Vanderbilt of New York, to the extent, we understand, of three quarters of a million dollars. Its law school opens with a strong faculty, and gives promise of at once having position as the first law school of the south. Among the text-books adopted we notice Bigelow on Estoppel, and Dillon on Municipal Corporations. It is a compliment to these authors.

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Indian Reservation—Railroad Land Grant—Construction of Land Grant Act to Kansas in Aid of Railways, and of Treaties of the United States with the Osage Indians.

THE UNITED STATES v. THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY.

United States Circuit Court, District of Kansas, June Term, 1874.

Before MILLER and DILLON, JJ.

1. **Land Patents—Suits by Government to Set Aside.**—Where patents for lands have been issued without authority of law, the United States may, in their own name, maintain a bill in equity, in the circuit court, to annul and set aside the patents.

2. **Osage Lands—Cancellation of Patents at Suit of Government.**—On a construction of the treaty of the United States with the Osage Indians, of June 2, 1825 (7 Stats. at Large, 240), and the subsequent treaty with the same Indians, proclaimed January 21, 1867 (14 lb. 687), and of the act of Congress of March 3, 1863 (12 lb. 772), granting lands to the state of Kansas to aid in the building of railroads: *Held*, that land which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which were in their actual use and occupancy, did not pass under the said railroad grant, and that the United States were entitled to have concelled patents which had issued to the railroad company under the erroneous assumption that the lands were embraced in the railroad grant.

This is a bill in equity in the circuit court, filed by the direction of the attorney-general, to set aside patents issued by the executive officers of the United States to the defendant company. The ground of the bill is that the patents were issued without authority of law and are void. The substantial question in the cause is whether the defendant company is entitled to the land patented to it. The claim of the defendant to the land is under the land grant act ofMarch 3, 1863 (12 Stats. at Large, 772), which is in the usual form, and under the treaty of 1865, proclaimed January 21, 1867 (14 Stats. at Large, 687), which it is contended ratified or conferred the right. These acts and treaties, so far as material, are referred to in the opinion of the court.

The lands in controversy are within a tract 30 by 50 miles in exextent, containing about 960,000 acres, and embraced in the counties of Neosho and Labette, and part of the counties of Bourbon, Crawford, Allen, Wilson, and Montgomery,in the state of Kansas, and were part of the reservation occupied by the Osage Indians, who have been in possession of it since 1808, until after the treaty of January 21, 1867, when they removed to their new home in the Indian Territory.

By treaty of June 2, 1825 (7 Stats. at Large, 240), the Osage Indians, by article 1, relinquished to the United States their title to a large quantity of lands. The second article of that treaty then provides that, "within the limits of the country above ceded and relinquished, there shall be reserved *to* and *for* the Great and Little Osage Tribe or Nation, aforesaid, so long as they may choose to occupy the same, the following described tract of land." [Here describing the reservation.]

The above tract of country thus reserved to the Osages, facing on the east fifty miles and running back to the western boundary of the tract described in the first article of the above treaty, continued to be the Osage Indian Reservation, and was used and occupied by them as such, and used by the government as provided in the second article of said treaty, until they relinquished their right thereto in 1867. The land in dispute is part and parcel of the reservation described in the second article of the treaty of 1825, and was used and occupied by the Osage Indians and the government until the treaty of 1865 was proclaimed, which took place the 21st of Jan. 1867. This last named treaty is dated the 29th of September, A. D. 1865, and was ratified on the 26th of June, 1866, with the addition of *certain amendments* thereto advised by the senate, and which amendments were accepted by the Indians on the 26th day of September, 1866, and the said treaty was proclaimed by the President on the 21st of January, 1867. There is an express provision in the seventeenth article of the treaty that it shall not go into operation until proclaimed by the President. 14 Stats. at Large, 687.

The nature of this treaty, and the senate amendment relied on by the defendant, sufficiently appears in the opinion of the court.

On the 10th day of April, 1869, Congress passed an act authorizing *bona fide* letters upon any of the lands ceded to the United States by the treaty proclaimed January 21, 1867, to purchase the same in limited quantities, within two years, at $1.25 per acre, whether odd or even numbered sections, saving, however, the legal rights of others. 16 Stats. at Large, 55.

Under this joint resolution a large number of settlers went on the land, made the required improvements, proved up their settlements before the local office, paid their money and received their certificates of entry. Three hundred and fourteen thousand, two hundred and twenty-eight acres of this land was entered under this joint resolution, and the settlers thereon, in addition to the fees and expenses of entering the same, paid the government therefor the sum of $454,072 10. Nearly all the rest of these lands have been settled upon; some under the joint resolution, by persons who were not able to make payment within the two years it was in force, and others under the belief that the trust specified in the Osage treaty, that these lands were to be sold on the most advantageous terms for cash, would be carried out by the Government, and that consequently they would be able to purchase their lands for cash when the government executed the trust.

There are between 30,000 and 40,000 of these settlers upon the land in controversy, who are indirectly interested in the result of the present suits.

The entries of the land under the joint resolution have been ordered to be set aside and canceled by the secretary of the interior, on the sole grounds that these railroads had a prior grant of these lands. They have nearly all been canceled, and are being canceled as they are reached in the regular course of business in the land department. The interior department at different times has been divided in opinion whether the railroad grants included the land in question.

Geo. R. Peck, U. S. district attorney, and *Wilson Shannon*, and *McComas & McKeighan*, for the United States; *S. O. Thatcher*, *T. C. Sears*, and *N. T. Stephens*, for the defendant.

Mr. Justice MILLER.—This case, with that of the same plaintiffs against the Missouri, Kansas and Texas Railroad Company, is submitted to the court on the bills, answers, replications, documentary evidence, and agreed statements of facts. The facts are undisputed, and without complication. The questions to be considered are exclusively questions of law.

The bill is filed by the United States, under the direction of the attorney-general, to set aside and annul certain patents for lands, issued to the defendant by the secretary of the interior; on the ground that they were issued without authority of law. The case of the United States v. Stone, 2 Wallace, 525, is conclusive, so far as any authority is necessary, of the right to the relief sought, if this statement be true.

The defendant, a corporation which has built a road through the lands in controversy, and received of the United States the patents which are assailed in the bill, asserts the validity of these patents under an act of Congress of March 3, 1863, and the treaty with the Osage tribe of Indians, proclaimed Jan. 21, 1867.

In addition to the very able oral arguments on both sides at the bar, and the printed arguments of counsel engaged in the present case, there have been filed copies of printed arguments before the secretary of the interior, which show that his action in issuing the patents was not hasty, or wanting in reflection, but was the result of deliberate judgment after hearing counsel. This circumstance is not without embarrassment in the minds of the court now called on to consider the same question. But the constitutional adviser of the government,the attorney-general of the United States, has felt it to be his duty to ask for a cancellation of these patents, and, as the only question raised is upon the proper construction of the act of Congress and the treaty aforementioned, it is eminently a judicical one, which the

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court cannot avoid, or decline to decide; how high soever may be its respect for the decision of the department of the interior.

The act of Congress referred to, fouud in 12 Statutes at Large, p. 772, by its first section, grants to the state of Kansas, for the purpose of aiding in the construction of certain railroads and branches, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, and each of its branches.

The road, so far as the matter now in issue is concerned, is described in the act as one from the city of Leavenworth, by way of the town of Lawrence and the Ohio City crossing of the Osage river, to the southern line of the state, in the direction of Galveston Bay, in Texas. This description would carry the road through a large body of land, then in the peaceful possession and occupancy of the tribe of Osage Indians, lying within the border of the state of Kansas. By a treaty between the United States and this tribe, made September 29, 1865, before the line of said railroad was located, the tribe ceded to the Uuited States a large body of lands, embracing those in controversy.

The first question, therefore, which presents itself for solution, is whether the grant of lands, as made by Congress in 1863, includes the lands then held by the Osage Indians, by the ordinary tenure by which Indian tribes hold lands in the United States, but afterwards ceded by treaty to the government. I say, by the ordinary tenure by which Indians hold lands, because I do not find anything in the language of the treaty of 1825 with that tribe which changes the nature of their title.

Counsel for defendants have supposed that in considering the effect of the grant under the act of 1863 upon these lands, a material consideration, favorable to their claims, is that the grant is to be construed with reference to the condition of the title of these lands when the line of the road was located and adopted by the company. This argument is based upon what must be conceded to be true, that the particular Congressional subdivisions of alternate sections of odd numbers which are to constitute the specific lands granted by the act, must be determined and can only be determined by the location of the line of the road, by an actual survey, showing its relation to those sections. The counsel have, therefore, argued with much force that the act of Congress is not a grant *in presenti*, but a grant *in futuro*, and that as the particular sections granted must await the location of the road to determine where they would fall; therefore, that *time*, and that *location*, must govern or be looked to as governing all other considerations bearing upon the extent or limits of the grant.

This proposition, however, is obviously unsound, in view of the general course of the road established by the grant. It must be a road from Leavenworth to the southern boundary of the state, in the direction of Galveston Bay, in which Lawrence and the Ohio City crossing are points and the lands upon which it must operate; or, in other words, the *general* location and character of the lands which may be taken under the grant, are either definitely laid down in the act, or are to be inferred from considerations existing at the time the act was passed. And this is true, whether in technical language we call it a grant *in presenti* or a grant *in futuro*. In point of fact it has some of the characteristics of both classes of grants.

As these lands, though then in possession of the tribe, are in the line of the proposed road, and between Leavenworth and the southern boundary of the state, they are lands within the general descriptive terms of the grant, unless they are excepted out of them by other parts of the act, or by other paramount considerations.

I am of opinion that on both these grounds the act can not be held to include these lands.

1. When the act was passed the lands were, and had been for a very long time, in the peaceful and undisputed possession of the Osages. And though the treaty of 1825 between them and the United States did not so far vary their tenure as to give them a fee simple title, or, indeed, anything but a usufructuary right, it did guaranty to them the exclusive possession and use of these lands "so long as they may choose to occupy the same." This treaty was in full force when the act under which defendant claims was passed, and it is not believed that a tthat time any proposition to relinquish this possession had been made by the tribe, or any effort by the United States to induce them to do so. To hold, then, as argued by the defendants, that whenever they might choose to locate the line of their road through the Indian Territory, the title to the land, with all that full title implies, passed to them by virtue of this act, so far as odd sections for ten sections in width on each side would go, is to hold that Congress had violated this treaty provision, had disregarded the generally conceded rights of Indians in such lands, and had authorized a gross injustice to a feeble and ignorant ward of the government. For if the lands were subject to the grant at all, it must be admitted that no provision whatever is made in the act for the protection of Indian rights, nor even for delay in enforcing the title thus passed to defendants.

When I consider, that in the many grants of this character made by Congress, they have never, unless in this case, intended to include lands which, by treaty, or any other contract, or indeed any other equitable consideration, they should not grant, I can hardly believe that they intended, by the use of general terms necessary to a description of the route of the road, to grant away the lands which by all these considerations they were bound to retain within their own control.

In saying this, I do not consider the question of the power of Congress over lands thus situated. I consider only the question of intent, of the actual will of the legislative body, which they designed to put into the form of a statute. It is this, as in all cases of construction, which must govern; and if it were a question now for the first time presented to my consideration, on these general words of description alone, in the grant, I do not see how I could hold that Congress intended to include these Indian lands.

But the case does not rest on these general words of description alone. This was by no means the first act of Congress donating lands to aid in construction of railroads. Millions of acres had been previously granted for the same purpose, and so many statutes of that kind had been passed, that the language in which the grants were made had become reduced to settled formulæ, and one of these formulæ designed to protect rights previously acquired, as found in every other statute of a similar character, is found in this. It is in the shape of a *proviso* to the granting section, in the following words:

"That any and all lands heretofore *reserved to the United States* by any act of Congress, or *in any other manner, by competent authority*, for the purpose of aiding in any object of internal improvement, or *for any other purpose whatsoever*, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States."

It will be thus seen that from the operation of this act, as of all others of like character, and by the settled policy of the government, there is excepted any and all lands which, by act of Congress, or in any other manner, by competent authority, for any purpose whatsoever, is reserved to the United States.

I cannot adopt the criticism of distinguished counsel, that the exception here provided for is limited to lands set apart and reserved for some special use which the government of the United States may have for them. These acts are all dealing with lands which *belong* to the United States—lands over which its ownership and dominion are absolute. There is no occasion, therefore, to make of such lands a reservation for the benefit of the United States. But there were many cases in which, while retaining the title, the government, by some of its branches, had set apart, had reserved for special uses of others, and for other uses than those of the government, lands

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of the United States. Such is the construction placed upon this clause in the cases of Wolcott v. the Des Moines Navigation Company, 5 Wallace, 681, and fully reconsidered and adopted in the more recent case of Williams v. Baker, 17 Wallace, 144. Can it be said, with any show of reason, that the lands under consideration in those cases, which were withdrawn from sale by reason of the disputed claims of the state of Iowa, were reserved to the use of the United States?

If, however, this criticism has any just foundation in its application to the general clause of exception found in this and in all other land grants, it connot affect the present grant; for in proceedings for the probable failure of the grantee, from various causes, to obtain all the odd sections on each side of the road within the prescribed limits, by giving other land in place of them, among the causes of such failure are mentioned previous sales, or grants, homestead rights, "*or that the same has been reserved by the United States for any purpose whatsoever.*" Now if the solemn covenant in a treaty made by the United States with a tribe of Indians, that these lands "shall be reserved to and for the Great and Little Osage tribes or nations aforesaid, so long as they may choose to occupy the same," is not a reservation by the United States for another purpose than building railroads, it is difficult to comprehend the use of language or what kind of reservation that clause was meant to cover.

I am, therefore, of opinion that, by the necessary outlook at the condition of this land when the grant was made, and the gross violation of justice and solemn treaty rights in the Osages which a grant so construed necessarily implies, Congress did not intend to include these lands in the grant. And, 2. That in each of the two clauses reserving ands from the operation of the act, they have by apt words expressed theintention that these lands should not be included in the grant.

The treaty with the Osage Indians, of which we have been speaking, contains a clanse which is relied on by defendants as sufficient to remove any doubt which may arise from the foregoing views, and I now come to consider that branch of the subject. By the first section of that treaty as originally negotiated and signed on the 29th day of September, 1865, the Osages sold to the United States that part of their lands which includes the land now in controversy, with others. And in consideration of this grant and sale to the United States, the government agreed to pay the sum of $300,000, to be placed to the credit of the tribe, in the treasury of the United States, and that interest thereon at the rate of five per cent. per annum should be paid to the tribes. The lands were to be surveyed and sold for cash as public lands, are surveyed and sold under existing laws. After reimbursing the United States, the cost of survey and sale and the sum of $300,000 above mentioned, the remaining proceeds of sale were to be placed in the treasury to the credit of the civilization fund, to be used under the direction of the secretary of the interior, for the education and civilization of Indian tribes residing within the limits of the United States.

When the treaty was under consideration in the senate, that body made numerous verbal amendments, and among others not merely verbal, they inserted after the word "laws" the words, "including any act granting lands to the state of Kansas in aid of the construction of railroads through said lands." To this amendment, made June 26, 1866, the Indians consented. So that this part of the treaty, as finally proclaimed January 21, 1867, reads as follows:

"Said lands shall be surveyed and sold under the direction of the secretary of the interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws *including any act granting lands to the state of Kansas in aid of the construction of a railroad through said lands*, but no pre-emption claim or homestead settlement shall be recognized." 14 Statutes at Large, 687.

The phrase thus inserted and here italicised, is supposed by the defendant's counsel to have reference to the lands now in controversy, and to have the effect of subjecting them to the railroad grant. The difficulty of determining what is their precise meaning in the connection in which they are employed, is very great. As regards their influence on the decision of the question before us, they may be, or rather must be, considered in one of these lights. 1. As granting by treaty, and by force of their own meaning, lands to aid in the construction of this railroad which had not been so granted before. 2. As placing, by means of a treaty with these Indians, a construction upon the doubtful language of the act of Congress which we have already considered. 3. As a recognition, by competent authority, of the existence of such a grant, which must necessarily be the act aforesaid.

1. The first of these propositions is wholly inadmissible. Conceding the doubtful proposition that it was within the power of the president and senate and this tribe of Indians, without the assent of the house of representatives, to have appropriated these lands to such a purpose, they have expressed no such intention. Whatever the language may or may not mean, it is clear that it was not intended to go beyond existing laws. It did not design to make any new law, or confer any new right.

2. Nor is it easy to believe that the senate of the United States would undertake, in a treaty with Indian tribes, to construe an act of Congress. If they did, they certainly could intend to go no further than to express their own understanding of the meaning of statute, without designing to give to that expression the authority of a legislative construction. Neither the senate alone, nor in conjunction with the president, is authorized to construe acts of Congress so as to bind the legislative and judicial departments of the government.

In saying this it is not intended to deny that any contract in such a treaty, by which rights are conferred on either party to the treaty, based upon a construction of an existing act of Congress, may be valid, and the contract be construed as it was understood by the parties. But in this case, neither the state of Kansas nor the defendant corporation were parties in the treaty, nor was it the purpose of the treaty, as amended, to confer any new right on these or either of them.

Nor do the words inserted, or the language of the treaty as amended, imply any intention to construe the act of Congress granting lands to this road. The act is not recited or referred to, except inferentially. No doubt or question of its construction is raised or decided. If referred to at all, it is, hypothetically, as "any law granting lands to aid in constructing a railroad through said lands." Of course, if there was no such law, this treaty did not undertake to make one.

3. But the force of this phrase in the treaty must rest on the third proposition I have suggested, namely, that it is a recognition of the act we have been considering as a grant of these lands.

I have no hesitation in expressing my belief that the senator, whoever he may have been, that suggested that amendment, had in his mind the act which we have already construed, and that his purpose was to incorporate into the treaty a recognition of the *validity of the grant*, so that the treaty should not defeat it. There may have been in his mind, there probably was, a doubt of the right of Congress to make such a grant in the face of the treaty of 1825. The treaty now under consideration, originally presented to the Senate, provided for the sale of *all these* lands, and for the disposition of *all* the money arising from such sales, in a manner inconsistent with such a grant. With these two treaties staring him in the face, he must have felt the doubt whether the grant, even if by its terms it had included these lands, would be upheld as valid. To remove the argument which might be drawn from this treaty as originally made, it was easy to induce the senate and the Indians to recognize any right which may have been acquired by that act, or any other which was an existing law when the treaty was ratified by the senate. In consenting simply to this, the senate would feel that no wrong was done, because no new right was

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conferred by or concealed *in* the amendment, At the same time, as the new words introduced designated no specified statute or law, the attention of the senate was not, probably, directed to this particular statute. But as no other law was then in existence, so far as is shown to us which, by remotest inference, granted lands to aid in constructing a road through these lands, I must believe that the framer of the amendment had this one in his mind.

The true intent and meaning of the clause in the mind of the senate, seems to have been this: that, as the treaty directed *all* these lands to be sold, and made provision for the disposition of *all* the proceeds, and, as it was suggested that there might be a railroad grant, or grants, which covered some of the lands thus directed to be sold, this provision was inserted to remove or prevent a conflict between the treaty and the statute, if any such existed.

But this provision, intended to prevent the treaty from defeating the statute if such existed, is now relied on to give the statute a construction which we have already said was forbidden by its own terms. Leaving out of the case the want of authority in the treaty-making power to construe statutes for the courts, and the improbability that the senate would attempt in this mode to give a construction to the act of Congress, it is clear that they did not *intend* to do this. They meant to say that *this treaty* shall not, by reason of its comprehensive terms in disposing of these lands, destroy existing rights. It recognizes existing laws, and, in the sale ot these lands and disposal of the proceeds, existing laws shall be respected, if any exist, appropriating any part of these lands. But it certainly did not intend to declare what rights existed, or to construe statutes on which rights might depend, or to create rights in that regard which did not exist independent of the treaty.

As I have already expressed my clear conviction, that the act of Congress did not grant any of these lands, but by express language excepted them out of the grant, I cannot give to this ambiguous phrase in the treaty, after conceding to it the meaning most favorable to defendants of which it is susceptible, the effect of creating a grant of these lands where none existed before.

These propositions, in my judgment, dispose of the case. They require that the patents issued by the United States for these lands be set aside, anulled and held for nought, and that the defendants be decreed to have no title in any of the lands in question, and perpetually enjoined from asserting such title.

DILLON, Circuit Judge:—I fully concur in the conclusion reached in the foregoing opinion, and in the reasons advanced to support it.

DECREE ACCORDINGLY.

Land Grant to Aid Railways—Indian Reservation —Treaty with Osage Indians Construed.

THE UNITED STATES OF AMERICA v. THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Circuit Court of the United States, District of Kansas, June Term, 1874.

Before MILLER and DILLON, JJ.

For reasons similar to those in the case of The United States v. The Leavenworth, Lawrence and Galveston Railroad Company (*supra*), the lands reserved for the benefit of the Osage Indians did not pass, nnder the land grant of Congress, to the state, to and in the building of railways, approved July 26, 1866.

The facts in the case appear in the case of the same plaintiff against the Leavenworth, Lawrence and Galveston Railroad Company, *supra*.

George R. Peck, district attorney, *Wilson Shannon*, and *McComas & McKeighan*, for the United States; *T. C. Sears*, for the defendant.

Mr. Justice MILLER.—This case differs from that of the same plaintiff against the Leavenworth, Lawrence and Galveston Railroad Company, in this: that the act of Congress which is the foundation of defendant's claim to the lands in controversy, was passed July 26, 1866.

The significance of this difference in the dates of the grants is found in the assertion of defendants that the lands in question had then been ceded, by the treaty which we have discussed in that case, to the United States.

It is hence argued that, as the United States had then the title to these lands, unincumbered by the Indian right of occupancy, there is no reason to suppose they were not included tn the general granting clause, or that they were reserved within the meaning of the excepting clause.

It will be perceived, by looking at the date of the act of Congress, and the dates of the respective stages of the treaty, that the treaty had passed the senate, but with material amendments, June 26, 1866—one month before the approval of this bill by the president. But it had then to be submitted to the Indians for their action on these amendments. Their approval was given September 21, 1866, two months after the passage of the act of Congress, and the treaty only became valid and operative by the proclamation of the president of January 21, 1867.

There was, therefore, no valid subsisting treaty by which the Indian title to these lands was extinguished when the act of July 26, 1866, became a law.

But if the treaty had been fully ratified at the date of the passage of the act under which defendants claim, that treaty was, itself, as much a reservation of these lands, within the meaning of the excepting proviso, as the treaty of 1825 was in the case we have before considered. It directed a sale of *all* these lands. It disposed of *all* the proceeds of the sale, and, by a necessary miplication in appropriatng them to other purposes, they were reserved for those purposes.

The amendment to the treaty which we have considered, as it regards the other case, can have no application to the act of July 26, 1866, because by its express terms it is limited to existing laws. The amendment had been acted on, and passed from the control of the senate, a month before this bill became a law. It was not an existing law when the amendment was proposed and adopted, and the amendment, therefore, had no reference to it.

The argument that the bill and the treaty must both be considered as pending at the same time, and therefore construed with reference to each other, is not, in my judgment, entitled to much weight. If it had been the intention of the *senate*, in making the treaty, to have consented or contracted that the bill which was then pending, and which might, or might not, become a law granting lands to the state of Kansas, should include these lands, they would certainly have used language that looked to that purpose. Their language has reference only to grants already made to existing laws.

So, if *Congress* had intended to grant these lands, knowing that a treaty for their cession was then under consideration in the senate, which, by its provisions, appropriated the lands and proceeds of their sale to other purposes, they surely would have used some language to specifically include these lands, or at least to take them out of the excepting clause.

A decree similar to that in the other case must be entered.

DILLON, Circuit Judge.—I cc ncur.

DECREE ACCORDINGLY.

[Communicated.]

The Amended Bankrupt Act—Judge Hopkins Construction of the Amendments to the 35th and 39th Sections.

In the CENTRAL LAW JOURNAL, of the 13th, appears an opinion of Hon. J. C. HOPKINS, of the Western District of Wisconsin (Hamlin Assignee, v. Pettibone, p. 404), in which several points of great interest to the profession are discussed and decided. Four points are argued and decided, the decision of either one of which would have determined the motion presented. Two of the questions decided are interesting and important in the administration of

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the law as amended. One of them, however, only applies to pending suits. But the other is of paramount importance, and the decision of it is no less than a discussion and determination of the effect of the amending act upon the 35th and 39th sections of the original act and a construction of the same as amended, and to this point I propose to direct attention briefly.

The amendments to these sections, which are the subject of discussion in this opinion, consist, substantially, in the making of the validity of the transfers of property, forbidden therein, to depend, under the amended sections, upon the question whether the person receiving such transfer has *knowledge* that the same is made in fraud of the provisions of the act, instead of making it depend, as under the original sections, upon whether such transferree *had reasonable cause to believe* that such fraud was intended. In other words, the amendment consists in the substitution of "*knowledge*" for "*reasonable cause to believe.*" The shortest statement of the result of the reasoning of the learned judge, is about this: *Knowledge* and *notice* are convertible terms. Notice is that which puts the party upon enquiry, and this latter is reasonable cause to believe. Hence, reasonable cause to believe is knowledge. If this be the correct construction, then, though there is a change of phraseology in these sections, their meaning remains the same, and the amendment is nugatory. But, notwithstanding the acknowledged ability and learning of Judge HOPKINS, which give his opinion upon these questions great weight, I shall endeavor to show, by reference to a very few simple rules of construction, that he has fallen into error in this case.

One of the elementary maxims of interpretation is, that statutes are to be read according to the natural and obvious import of their language; not so much regarding their propriety of grammar, as their general and popular sense. Sedgwick on Statutory and Constitutional Law, 260; 6 Exch. 328, 333; 20 Wend. 555; 1 Blackstone's Commentaries, 59; Smith's Const. Law, 661, Sec. 513. Taking this as a rule of interpretation, what is meant when it is said that a man *knows* a fact? The answer is, that he has that actual mental consciousness which with certainty assures him of its actual existence. It is the very highest degree of assurance of the existence of the fact. The word itself expresses the superlative degree of mental cognition, and is not, like *notice* and other similar words, subject to the classification of *actual* and *constructive*. This view is, I think, sustained by all lexicographers, as well as by the universal usage of the best speakers and writers in the language. We say we suspect a thing; we have information which tends to make us believe it, and if followed up would reveal it to us. We do believe it, still it may not be true. But when we say we *know* it, that is the end of controversy.

This being the popular and obvious meaning of the word used, it is not only within the maxim we have quoted, but within another well known rule: "It is not allowable to interpret what has no need of interpretation." Smith's Const. Law, 627. If I am right in my view of the meaning of the word used, it is very obvious that *knowledge* is by no means synonymous with *notice*. *Notice* has a technical signification, distinct and different from its popular meaning, which is usually called *constructive notice*, which signifies, not actual cognizance of the given fact, but of such facts as would, upon enquiry and the use of diligence, lead to a knowledge of the given fact. *Actual notice* of course signifies knowledge, but *constructive* notice never was used, in any well considered case, as the equivalent of knowledge, nor was the term knowledge ever accurately used to signify constructive notice.

We quote from the opinion. After citing numerous cases to the point, that notice is knowledge, and among others 20 Howard, 343, the opinion proceeds: "In some of these cases notice is used instead of knowledge, but as is said in Goodman v. Simond, 20 How. *supra*, it is usually in the same sense, and that is one of its appropriate significations." This purports to be language quoted from, or sanctioned by, the case of Goodman v. Simond. But it is very apparent that there is some mistake here. The opinion in that case was delivered by Mr. Justice CLIFFORD, who discusses the rights of a *bona fide* holder of commercial paper, after quoting with approbation, Swift v. Tyson, 16 Pet. 1, in which it is said "that a *bona fide* holder of a negotiable instrument, for a valuable consideration, without notice of facts which impeach its validity, may recover, although, as between the antecedent parties, the transaction may be without any legal validity," he proceeds: "The word notice, as used by the court on the occasion refered to, we think, must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. This case then proves simply, not that constructive notice nor reasonable cause to believe is knowlege, but on the contrary the very reverse, that *actual notice* is *knowledge*, but by a necessary sequence *constructive notice* is not.

All the authorities cited upon this point by Judge HOPKINS relate to the doctrine of *constructive notice*, and contain very elaborate and accurate dicussions of its application in courts of equity, to cases of fraud, but not one of them gives the least sanction to the doctrine announced in the opinion, viz: that constructive notice, or reasonable cause to believe, is knowledge.

Suppose, however, that it be conceded for the sake of the argument, that there is such a thing as *constructive knowledge* as well as *constructive notice*, then there is room for interpretation, and we must look to the usual mode of ascertaining the legislative intent. Treating *knowledge*, then, as a technical term susceptible of two interpretations or significations, and calling the one *actual* and the other *constructive*, as in the case of notice, what was meant by Congress in the given case, by the use of the term? Was it *actual* knowledge, or was it reasonable cause to believe; *i. e.*, knowledge of such facts as would put the party on enquiry—constructive notice merely? The intention of Congress must be obvious from several of the well known rules of interpretation founded in reason and common sense. The interpretation is mainly to be determined, as is said, "inside of the statute." But reference should be had to the whole act in the interpretation of any part or clause in which doubt arises, and such a construction should be given as to give effect to every part. Sedgwick, 237, 1 Binn, 601; 7 Cush. 53–89; 2 Mich. 138, Smith's Const. Law, 647, Sec. 502.

Again, where a statute is remedial or amendatory, reference should be had to the previous state of the law, or the statute amended; and the amendment, or the remedial act, should be so construed as to suppress the mischief and advance the remedy. 1 Blackstone's Com. 61; Sedgwick, 235. Applying these rules to the question under consideration, we see that the act amended (the act of 1867) provides a system of bankruptcy, stringent and highly penal in its provisions, both as to acts of bankruptcy by the debtor, and preferences to the creditor. This excessive stringency rendered the act odious in the estimation of many of both the debtor and creditor classes, so much so, that for two sessions of Congress, the repeal of the act and the entire abolition of the system were iminent; and as a matter of legislative history, proper to be considered, this would have occurred but for the amendatory act, which is in its whole scope *remedial*, altering, amending or repealing, almost, if not quite, all, the penal provisions of the original act; requiring a greater number of creditors to join in involuntary petitions; increasing the length of time commercial paper might remain unpaid without constituting an act of bankruptcy; providing for the discharge of the bankrupt upon greatly easier terms; shortening the length of time prior to the filing of the petition within which a preference should be held invalid; and, in the same sections, striking out "*reasonable cause to believe*," and inserting "*knowledge*"—substituting a term which is susceptible of an interpretation consonant with the general remedial purpose, making preferences less obnoxious to the law, and more easily sustained as valid, that is, more difficult to impeach.

In this view there can be little hesitancy in determining that Congress meant to use the term *knowledge* in its primary and popular sense, if indeed, it is susceptible of use in any other. It were about as rational to say that when Congress struck out "*four*" and inserted "*two*," and substituted "*three*" for "*six*," it still meant "*four*" and "*six*," as to say that when it struck out "*reasonable cause to believe*," and inserted "*knowing*" and "*knew*," it still intended the courts to read it "*reasonable cause to believe.*" A remedial act should be so construed as to meet the beneficial end in view, and to prevent a failure of the remedy; and, as a general rule, a remedial statute ought to be construed liberally. Smith's Const. Law, 692, Sec. 547. I need hardly extend this discussion further, for very clearly, upon principle and authority, the learned judge has fallen into error. If the view be correct that Congress intended so to change the law as to require, in order to defeat a preference, that the person receiving it should have had actual knowledge of the fraudulent intent, the rule which Mr. Justice CLIFFORD laid down in Goodman v. Simond, *supra*, and the rule applied in the interpretation of the term "knowledge," in criminal cases, where its appropriate use is most frequent, will prevail. 1 Bouv. Law Dic. 692. A. I.

The New Pension Laws.

We give below the text of all the pension laws enacted by Congress during the session just ended, with full and complete instructions for obtaining the benefits thereof:

"AN ACT to increase the pensions of soldiers and sailors who have been totally disabled

"*Be it enacted, etc.*, That section four of the act entitled an act to revise, consolidate and amend the laws relating to pensions, and approved March third, eighteen hundred and seventy-three, be so amended that all persons who, while in the military and naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular presence, aid and attendance of another person, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month; and this shall be in lieu of a pension of thirty-one dollars and twenty-five cents per month, granted to such person by said section: *Provided*, That

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the increase of pension shall not be granted by reason of any of the injuries herein specified, unless the same have resulted in permanent, total helplessness, requiring the regular personal aid and attendance of another person.

"SEC. 2. That this act shall take effect from and after the fourth day of June, eighteen hundred and seventy-four.

"Approved June 18, 1874."

Under the provisions of the above act, only those pensioners who require the regular presence of an attendant are entitled to $50 per month. Those who have lost both legs, or a leg and an arm, are evidently not included. Proof of regular attendance will be required, and application must be made on form B. Blanks are furnished free to pensioners on application to the pension bureau. The increase dates from June 4, 1874.

"AN ACT to increase pensions in certain cases.

"*Be it enacted, etc.*, That all persons who are now entitled to pensions under existing laws, and who have lost either an arm at or above the elbow, or a leg at or above the knee, shall be rated in the second class, and shall receive twenty-four dollars per month: *Provided*, That no artificial limbs or commutation therefor, shall be furnished to such persons as shall be entitled to pensions under this act.

"SEC. 2. That this act shall take effect from and after the fourth day of June, eighteen hundred and seventy-four.

"Approved June 18, 1874."

The above law increases to $24 per month, from June 4, 1874, the pensions of those who have lost an arm at or above the elbow, or leg at or above the knee, without reference to the wearing of an artificial limb. In order to obtain the benefits of this act, pensioners have only to return their certificates, accompanied by a letter giving their post-office address, no formal application being required. No medical examination will be ordered, excepting in cases where the evidence on file fails to show the point of amputation. Pensioners receiving the increase will not be entitled to artificial limbs or commutation provided for by the act of June 17, 1874.

"AN ACT to equalize pensions in certain cases.

"*Be it enacted, etc.*, That all persons entitled to pensions under special acts fixing the rate of such pensions, and now receiving or entitled to receive a less pension than that allowed by the general pension laws under like circumstances, are, in lieu of their present rate of pension, hereby declared to be entitled to the benefits and subject to the limitations of the general pension laws entitled 'An act to revise, consolidate and amend the laws relating to pensions,' approved March third, eighteen hundred and seventy-three; and that this act go into effect from and after its passage; *Provided*, That this act shall not be construed to reduce any pensions granted by special act.

"Approved June 6, 1874."

Heretofore, pensioners who were on the roll by special act, the act fixing the rate of their pension, were debarred from increase under the general pension laws. The above act places this class of pensioners on the same footing as other pensioners, so far as rating is concerned, but does not grant arrears, the increase dating from June 6, 1874. The return of the pension certificate to the pension bureau, accompanied by a letter giving post-office address, is all that is necessary.—*U. S. Pension Record:*

Book Notices.

PATTISON'S MISSOURI DIGEST.—A Digest of the Missouri Reports. Volumes 1 to 49, inclusive, beginning with the year 1821, and ending with the year 1872. By EVERETT W. PATTISON, of the Saint Louis bar. 2 vols., pp. 783. Price $15 00. Saint Louis: W. J. Gilbert. 1873. For sale by Soule, Thomas & Wentworth.

One of the most judicious and satisfactory digests of the reports of a state that was ever published was Meigs' Tennessee Digest, published in 1848, and embracing the first twenty-six volumes of the Reports of that state. So complete a picture did it present of what was actually decided in each case, and also of the *ratio decidendi*, that it came to be of almost equal authority with the Reports themselves. It was constantly quoted in the courts of Tennessee, in lieu of the Reports, and was frequently so quoted by the judges of the supreme court of that state in their opinions. But Mr. Meigs could never be induced to make a supplement to it; and the reason why he could not, may, perhaps, be explained by a remark which he makes in his preface, where he declares that the task which he had endeavored to accomplish was "at once *profitless, slavish* and *inglorious*." No juster estimate of the nature of such labor could be conceived. He who expects either to make money or acquire reputation through the labor of digesting the Reports of a state, unless it be an old and very populous state like New York, is pursuing a vain and foolish undertaking. He will discover in such a task little else than the most slavish toil; and the manner in which it must be proceeded with necessarily drives him, during most of the time he is engaged in it, from one title to another; so that he is even deprived of the satisfaction which the mind takes in pursuing to the end the continuous investigation of a single topic. If he works by topics, he is sure to make many omissions. To avoid this, he is obliged to go through each volume of Reports, and digest each case as it comes, and as he proceeds, distribute his notes in the proper parcel or pigeon-hole. The work of finally arranging, re-reading and *squeezing together*, if we might use an expression which every digest-maker will understand, completes the principal part of his task.

For five years Mr. Pattison labored most assiduously with all the time he could spare from his professional duties, in the preparation of the work now before us. Although we understand that he gets the usual copyright paid to authors of books of this kind—perhaps something more, yet, from our knowledge of such matters, we do not believe that he has, as yet, received a thousand dollars as compensation for this exhaustive toil; nor do we believe that his remuneration will ever exceed a dollar a day for the time actually spent upon this work. And yet we are convinced, both from our own examination and use of it, and from the general professional estimate of its value, that is one of the best works of the kind that has been published. Nevertheless, we have heard attorneys, far advanced in their profession, complain of the price at which it is sold — men who would charge a client fifty dollars for doing an amount of work no greater than can be found on any one of its pages.

There is among bookmakers, critics, and the profession generally, considerable difference of view as to how a digest of reports should be made. Some think that it should consist of succinct statements, in the abstract, of points decided, and nothing more. Others would add to such a statement the reason or reasons which influenced the court in so deciding. Others strenuously urge that in digesting cases, the facts of the case ought to be briefly stated, and then the ruling or judgment of the court thereon, and nothing more. Others, again, prefer this mode of abstracting cases, but would add to it the *ratio decidendi*. We are of opinion that the latter would be, if practical, decidedly the preferable way. But, in order to make a digest in this mode, the author must have far more time than is usually allotted to such a task, the publisher must be content to face the probabilities of a heavy loss, and the profession must expect a work three times as large, and costing three times as much, as would be the case if the first method above indicated were pursued. We like very much the views of Mr. Bishop (First Book of the Law, ch. 14), upon the question how a digest should be made. After giving his view of the manner in which the *points* decided should be expressed, he says, § 211: "when a judge announces a principle of special importance with special clearness, the digest should state it in brief form, marking it as a *dictum;* thus, (D). The extent to which this sort of work should proceed must depend upon circumstances; such as the particular object of the digest, and the space which it is deemed justifiable to allot to it. A book, which the profession will not buy, is of no use; therefore, every author, on whatever topic, and whatever the style of his work, has properly some regard for its merchantable quality. It is often necessary to make a smaller book than the subject really demands, for the reason that one fully large enough would not be purchased and used.

When Mr. Pattison commenced his task he saw that it would necessarily include some forty-five or fifty volumes of reports. He therefore felt it necessary, in order to bring it within the proper limits, to adopt the *abstract* form made in fraud of the provisioning of the act, instead of making it depend, as under the original sections upon whether such transferree *had reasonable* of stating the points decided, pursued by Mr. Brightly. This plan he appears to have adhered to throughout, using in all cases as much brevity as was consistent with clearness. The result is that his work makes two small, imperial, octavo volumes, which, with the help of interleaving, are swelled to the size of volumes of 600 pages each.

We could easily demonstrate, if we had space, that most of the paragraphs of any digest could be arranged, not incorrectly, under any one of three or more titles. This being the case, it is obvious that the arrangement of the subject-matter of a digest must be, to a great extent, arbitrary; and that the *best arrangement* will always be attained, when each item is placed under that title and sub-title, where a majority of the profession will be most apt to look for it in the first instance. Mr. Pattison was aware of this; and, accordingly, whenever he was in doubt as to the best arrangement, he consulted largely with the members of the bar, and adopted the arrangement indicated by the views of the greatest number. The result is an arrangement of titles as logical and useful, perhaps, as any that could be devised.

We cannot close our observations upon this excellent work, without referring to what appears to be a feature of great value. Mr. Pattison has devoted seventy one pages of closely printed matter to a table of cases criticised, doubted, explained, affirmed, overruled, etc. This is in addition to the regular table of cases digested, and must have cost great labor and patience in its preparation. In some of the states indexes of cases, not as complete as this, are published and sold in separate volumes at a high price. To give some idea of the manner in which this part of the work has been done, we quote the following:

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" Wear v. Bryant, 5 Mo. 147; see, also, 4 Mo. 113. Owners of injured land entitled to locate, affirmed: McCamant v. Patterson, 39 Mo. 100. As to who are legal representatives, cited: Hammond v. Public Schools, 8 Mo. 84. Commented on: Kirk v. Green. 10 Mo. 254; see Page v. Hill, 11 Mo. 150. As to relinquishment of claim cited: Joeckel v. Eastman, 11 Mo. 126. As to reversion of lands to United States, cited: Holme v. Stantman, 35 Mo. 306; see Moore v. Moore, 14 Mo. 425; Wright v. Rutgers, Ib. 587. Commented on and disapproved, so far as it holds that parties by subsequent assent to location could claim the benefit of New Madrid certificates, issued by the recorder: Holme v. Stantman, 35 Mo. 309, *et seq.* That the owner was the person intended to be benefited, approved: McCamant v. Patterson, 39 Mo. 107."

PLEADING AND PRACTICE, under the Codes of Ohio, New York, Kansas and Nebraska, applicable also to other states having a code, with forms. By SIMEON NASH. 4th edition, greatly enlarged, 2 vols. Cincinnati: Robert Clarke & Co.. 1874. Sold by Soule, Thomas & Wentworth.

This work of Judge Nash, a well known jurist of Ohio, and the author of Nash's Ohio Digest, has been expanded from one volume to two. It sets out the Code of Ohio, and, in immediate connection with each section, the construction it has received by the courts, giving, as the author states, the language of the courts. This edition is full of forms of all kinds of pleadings under the code, and is a useful work of the character.

Summary of our Exchanges.

The Pittsburg Legal Journal, for August 19th, contains nothing but selected matter which we have already published or noticed.

The Legal Intelligencer, for August 14, publishes Chambersburg Savings Fund Association v. McLellan, which discusses what is such negligence as will render an assignee liable for the loss accruing to the trust estate thereby.

The Irish Law Times, for August 1, continues its interesting leader on life insurance frauds, and otherwise prints a large amount of matter, but without interest on this side of the Atlantic.

The Pacific Law Reporter, for August 4, publ shes, without a syllabus, Burton v. Hard, Supreme Court of the United States, which discusses several questions of evidence.

It also reprints from the Internal Revenue Record, the case of Boise County v. Gorman, same court, the syllabus of which is given above.

The rest of its space is filled up with notes of cases collected from various sources.

The Irish Law Times, for August 8, contains a leader (No. 1) on Life Insurance Law and Legislation, the subject of which is warranty on the part of the person for whose benefit the policy is taken. We intend to reprint it. It will be good reading for those judges whose decisions have supported life insurance companies in dishonestly wriggling out of their obligations, after pocketing large sums of money in premiums. The other matter contained in this number of the Irish Law Times and Irish Law Times Reports, is for the most part only of a local interest.

The Pacific Law Reporter, for August 11, reprints from the Washington Law Reporter, the case of Pollard v. Lyon, holding that since the act of Maryland, of 1749, removing the infliction of corporal punishment for fornication, and that of 1786 repealing all proceedings against that offence, words spoken of an unmarried woman, imputing to her that act, are not actionable in themselves.

It also publishes without syllabus, several decisions of the Supreme Court of California—among them Pickett v. Hastings—Beneficiaries of the Van Ness Ordinance classified—The phrases "may be recovered," "legal process," defined—Statute of Limitations considered. Also Rewick v. Goldstone Patent Right—Contract. Also People v. Hunckler—Criminal Law—Twice in Jeopardy. The decision in this case is unintelligible for want of facts. It also publishes Forster v. Pico, Mexican Grant.

The Chicago Railway Review, for August 22, contains, in its legal department, abstracts of a number of interesting discussions on railway law, mostly of the Supreme Judicial Court of Massachusetts.

Also McLellen v. Chambersburg Saving Fund Association, the syllabus of which is as follows: In auditing the third account of a trustee, the auditor examined and re-stated some items which had been contained in or omitted from the former accounts, and thereby established the fact that the former settlements were incorrect. *Held*, not to be erroneous.

Also the Warren Savings Bank v. Palmer, in which Mr. District Judge McCandless rules that under the amendment to the 39th section of the bankrupt law, the debtor will be required to file a list of his creditors, and the amount of their claims, where an involuntary petition was filed against him since December 1st, 1873, to which he had made a denial and a demand for a jury trial, and had since filed a demurrer.

The Albany Law Journal, for August 22, contains an article on Married Women as Attorneys, which is a gently facetious criticism on the opinion of Mr. Justice Nott of the court of claims, refusing to admit Mrs. Lockwood as a solicitor of that court. It also has an article on Supreme Court Reporting, which appears to be a controversy between the editors of the "Supreme Court Reports," New York, and Mr. Hun, the new "official reporter" of the same court. We sincerely hope that Messrs. Thompson and Cook may succeed in getting the "official" reporter by the heels; for their reports are as good as they can well be made, and as cheap as they can be published without loss, and there seems no good reason why, after the signal failure of one "official" reporter of that court, another should endeavor to occupy the same field, which is well occupied already. We have not seen Mr. Hun's first volume, but we have a strong feeling that he is endeavoring, under the prestige of "official" sanction, to crowd out his betters; and we say to him, that unless he expects to make a better "official" reporter than his predecessor, he had better "step down and out."

The Albany Law Journal contains a large amount of other reading matter—brief, various and well written, or judiciously selected.

The Nashville Commercial, Reporter for August 10, publishes Gheen v. Osborne, Supreme Court of Tennessee, of which the following is the syllabus:

1. If A., the owner of part of a lot, by his representations, or silence, induce B. to believe that C. is the owner of the whole lot, and under this belief B. purchased the whole lot, A. is estopped to set up title to any part of the lot, and upon the application of B., a court of equity will divest A. of the title to his part of the lot.

2. Where a bill is filed for the specific execution of a contract by a purchaser against his immediate vendor, and another alleged to be the owner of a part of the land purchased, and the title-bond is only signed by one of the parties, and the bill does not allege that the other party had sold to the other vendor, or had authorized the other vendor to sell the whole property, a specific execution will not be decreed.

In Wilson v. Eiffler, published in the same journal, the Supreme Court of Tennessee reversed and remanded the cause, directing a decree to be rendered against the defendant. After the case was remanded the defendant pleaded his discharge in bankruptcy granted to him pending the suit, and the court sustained the plea and held that no personal judgment could be rendered against him in the case.

The American Law Times reports, for August, contain Excelsior Insurance Co. v. Royal Insurance Co., Court of Appeals of New York, holding that, a mortgagee who has insured his mortgage-interest for his own indemnity, without any agreement with the mortgagor, may, in case of loss, call upon the insurer without first exhausting his remedy under his mortgage.

It also publishes *re* Deckert, noticed in this journal (*ante*, p. 320). Also Walsh v. Barton, from advanced sheets of 24 Ohio State Reportrs—the subject of which was a bill for the specific performance of contracts to convey land.

Also, Commissioners of Boise County v. Gorman, where the Supreme Court of the United States hold that a writ of error does not operate as a supersedeas until the filing of the bond, but that under the act of 1872 the bond may be filed and a supersedeas obtained any time within sixty days after judgment; and that such suspersedeas will have the effect of preventing further proceedings under an execution, but will not affect whatever may have been done prior to its being issued.

Also *re* Soloman, United States Circuit Court, Eastern District of Virginia, in which Chief Justice Waite holds that a statute which permits the head of a family to waive a homestead exemption, is not an infraction of a constitutional provision by which a homestead is created; and that where a part who had, in a negotiable promissory note, waived his right of homestead exemption, and was subsequently adjudged a bankrupt, the homestead was not exempt as against the holder of the note.

Also Warren v. Ives, published in this journal for June 25 (*ante*, p. 312). Also several other interesting cases.

The Canada Law Journal for August (Milling & Williamson, Toronto), contains the judgments of the Election Court in the North Victoria, Cardwell and North Simcoe cases. Extra copies can be had at $1 each. It also contains some other interesting matter original and selected.

The Chicago Legal News, for August 22, publishes an able opinion of Mr. Justice Scott, of the Supreme Court of Illinois, in Buler v. Huestis, expounding a will executed by a married woman, under a power contained in a trust deed. The words in the will, "heirs of her body," are construed. The court

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holds that, so far as estates tail are concerned, the rule in Shelly's case is repealed by the state statute. There are several important questions passed upon this opinion. It will repay a careful reading.

Also an opinion of the same court (by Walker, Ch. J.,) in Carpenter v. Davis. In this case a husband devised a tract of land to his wife, and died, leaving children. The wife married again and had children by the second husband. He promised his wife, if she would sell the land devised to her by her first husband, that he would purchase other land in her name to be held by her for the children of the first husband. She sold the land and the husband purchased the other land; but instead of taking the deed in her name, as he agreed, he took it in his own name. On a bill filed by the children of the first husband, after the death of the wife, *held* that by agreement between the husband and wife, the property became a trust fund, and the husband not having pleaded the statute of frauds, equity would declare and enforce the trust; that the husband had no courtesy in the land, as it was held as trust property under the agreement with his wife, and that he was properly chargeable with the rents.

The Legal News also commences in this number the publication of the opinion of the Circuit Court of Cook County, Illinois, by Williams, J., in what is known throughout the country as the Cheney case. The editor of the Legal News says of this case: "It has been in the courts, in one form or another, for the past five years. A full history of the case will be found in the statement that precedes the opinion. Few cases have been so warmly and ably prosecuted and defended as this one. The late Bishop Whitehouse, from a sense of religious and official duty, pressed the prosecution with all the power and energy he possessed. Mr. Judd, chancellor of the diocese, gave the case years of thought and study, and did all that talent, perseverance and experience could do to sustain what he considered the authority of the church. Mr. Fuller defended Dr. Cheney with an ability that would reflect honor upon the most distinguished member of the bar. He seemed always to be equal to the emergency, and when defeated in the controversy, managed so skillfully as to prevent the defeat from working disasterously to the interests of his client. He deserves great credit for the skill and wisdom displayed in this protracted ecclesiastical controversy. Judge Williams has spent much time and labor in the preparation of his opinion."

[Want of space compels us to hold over several of our exchanges, received this week, for notice next week.]

Notes and Queries.

We are glad to have received the following. It seems that the bungle in the Missouri Statute suggested by F. W. (*ante* p. 422) has been resolved by an act of the last legislature. We hope other subscribers will help each other's difficulties in our column of notes and queries:—

SHELBYVILLE, MO., August 22, 1874.

EDITORS CENTRAL LAW JOURNAL:—In answer to query in your journal, bearing date of August 20th inst., signed "F. W.," you may reply that if plaintiff's witness lives out of the county where the trial is had, whether one mile from the place of trial or forty, his deposition can be taken and used at the trial. See page 45, "Session Acts" of 1873.

Very respectfully yours,

CHAS. M. KING.

HINTON, W. VA., Aug. 12, 1874.

EDITORS CENTRAL LAW JOURNAL:—By virtue of a homestead law, which exempts $1,000 in real estate from sale, can A., who wishes to avail himself of the benefit of such exemption, set apart *two houses*, one in which he and family resides, and the other a business house which he rents to other parties, though both together are only worth $1,000? There has been no decision on the subject, either in Virginia or West Virginia, as the homestead laws in both states are of recent date. Please answer through the JOURNAL, and oblige

A YOUNG LAWYER.

ANSWER.—If our correspondent had been more careful in stating his question, we should be able to give him a more satisfactory answer. First, he should have set out the statute of West Virginia, which gives the homestead exemption. Secondly, he should have iuformed us whether the dwelling-house and store-house are on *the same lot*. We advise our correspondent to consult the following cases, where he will find his question repeatedly answered yes and no, under a variety of statues, and with various reasons given for the answer:—Hubbell v. Canady, 58 Ill. 425; Reinbach v. Walter, 27 Ill. 393; Re Tertelling, 2 Dillon C. C. 339; Rhodes v. McCormick, 4 Iowa, 368; Ragland v. Rogers, 34 Tex. 617, 621; Hancock v. Morgan, 17 Tex. 582; Pryor v. Stone, 19 Tex. 371; Moore v. Whitis, 30 Tex. 440; Gregg v. Bostwick, 33 Cal. 220 (leading case); Ackley v. Chamberlain, 16 Cal. 181; Clark v. Shannon, 1 Nev. 568; Goldman v. Clark, Ib. 607; Hoitt v. Webb, 36 N. H. 158; Buxton v. Dearborn, 46 N. H. 43; True v. Morrill, 28 Vt. 672; Kelly v. Baker, 10 Minn. 56; Kresin v. Mau. 15 Minn. 116.

Legal News and Notes.

—IT is said that ex-Postmaster General Creswell has been retained on behalf of the government, under the Geneva award act, and will represent the interests of the United States in all cases to be considered.

—AT a public meeting recently held at Leeds, it was resolved to petition parliament for the release of Orton the unsuccessful Tichborne claimant, and for a new trial. Mr. Guilford Onslow was one of the speakers.

—THE New York Herald is responsible for the assertion that Judge Mackey of South Carolina, wears a silken gown, and goes to and from court preceded by the sheriff, carrying a drawn sword. The sheriff, we presume, is a colored person, which would make the thing look picturesque.

—THE Chichele professorship of international law at Oxford University, made vacant by the resignation of the Right Hon. Montague Bernard, one of the Washington commissioners, has been conferred on Mr. Thomas Erskine Holland, of Lincoln's Inn, barrister at law, and of All Soul's College, Oxford.

—THE attorney-general of Arkansas has decided that it is the duty of the state treasurer to obey the convention ordinance appropriating the sinking and school fund to pay the expenses of the state government. The treasurer refuses to obey the ordinance until compelled to do so by a mandamus from the court, and a suit is now pending to that effect.

—THE attorney-general has decided that the revised statutes do not change the law as to the toll upon the tonnage of vessels engaged in foreign commerce, and that now, as formerly, the said tax is only collectable upon the entry of such vessels, and not before their clearance, and is only collectable once in each year.

—WE regret to learn that the new constitution for Ohio, recently submitted to the vote of the people of that state, and which embodied so many excellent and needful reforms, has been defeated. The causes of the defeat are said to have been the submitting of four different propositions to a separate vote, which led many of the enemies of these respective propositions to combine for the defeat of the instrument.

—THE commissioner of the general land office has directed that the regulations respecting final proof of homestead settlement in the grasshopper region of Iowa and Minnesota, be so modified as to permit settlers to go before the clerk of their county court to make their depositions, instead of before the local land officers. This order is made on the representation of trustworthy parties that many settlers remote from a local land office, can illy afford the expenses of a long journey, especially in their present impoverished condition.

—WE learn that "the life of Chief Justice Chase," written by Mr. J. W. Shuckers, Mr. Chase's private secretary for ten years, is shortly to appear from the Appleton press. Among the specially interesting portions of the work is a chapter relating to the secret history of the reversion of the legal tender decision, and another giving for the first time various details in the Jefferson Davis case. It will also contain the eulogy of Chief Justice Chase, prononnced by Hon. William M. Evarts, before the Dartmouth Alumni at their last commencement.

—A MASS meeting was held on Saturday night, at Parsons, Kansas, the occasion of which was the promulgation of the news of the decision in the Osage land cases, which we elsewhere print. A press dispatch states that there was great rejoicing. At least five thousand people were assembled to celebrate their deliverance from the railroad companies, and the little city of Parsons was wild with enthusiasm. Speeches were made by Hon. M. W. Reynolds, Mayor Mathewson, Colonel Davis, T. C. Cory and others, and at a late hour the people adjourned, feeling, for the first time, that they could go to their own homes.

—JUDGE BLATCHFORD has decided that the United States district attorney is still entitled to two per cent., and the clerk of the United States District Court to one per cent. on all moneys recovered in custom-house seizure suits in his district. He holds that the law of 1874 abolishing moieties and informers' fees does not cover the allowance of these per centages which are given in lieu of costs and fees that the district attorney and clerk would otherwise be entitled to in the suits mentioned, but which are not allowed by any provisions of law.

—COL. S. S. FISHER, ex-commissioner of patents, and author of Fisher's Patent Cases, was, together with his son, drowned, while passing in a small boat through Conewago rapids, fourteen miles below Harrisburg. He was educated in Philadelphia, and practiced law in Cincinnati before his appointment. In 1871 he resigned, and again entered into the practice of law in that city with great success. By his knowledge of patent law, when commissioner, he did much to improve the administration of business in that office, the patent law of 1870 being mostly of his suggestion. He was also the first to introduce competitive examinations. His son, who was also drowned, was a

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bright boy of twelve years of age. Colonel Fisher was about 43 years of age. He leaves a wife and two children.

—If Comptroller Green of New York City, keeps on, he will acquire the reputation of being a "litigious person." The following are only a portion of the fees paid by him for professional services, during the past month:

Henry L. Clinton, retainer	$1,500
E. L. Paris, professional services	1,336
Lyman Tremain, professional services	12,500
J. C. Carter, professional services	4,000
Martin & Smith, professional services	3,500
James M. Smith, professional services	1,800
William Barnes, retainer	3,100

—THE Irish Law Times publishes the proceedings of the benchers of Gray's Inn, expelling Dr. Kenealy, from which we extract the following: "The following resolutions were moved by Master Manisty, seconded by Master Holker, and carried unanimously: '1st. That the pension find as a fact that Dr. Kenealy is the editor of the newspaper called the Englishman. 2d. That the Englishman is replete with libels of the grossest character. 3d. That Dr. Kenealy, being editor of that newspaper, is unfit to be a master of the bench of this honorable society.' The following resolutions were moved by Master Manisty, seconded by Master Hoiker, and carried by a majority of 10 to 1: '4th. That the call of Dr. Kenealy to this bench be and the same is hereby vacated. 5th. That Dr. Kenealy be prohibited from dining in the hall of this society until further order.'" When these proceedings were had, Dr. Kenealy was at home sick. We are sorry that the learned advocate should thus be deprived of his dinner, without an opportunity to be heard.

DISBARRED—WHAT A STARVING LAWYER WILL DO FOR BREAD.—Mr. Weightman, who, it will be remembered, was convicted at the Central Criminal Court, and sentenced to six month's hard labor for purloining books from Inner Temple Library some time ago, has, since his liberation from confinement, been called upon by his benchers to answer for his conduct, and has been disbarred after an investigation lasting over three days. During the enquiry it transpired that, on being released from prison, a check, representing public subscriptions, amounting to £600, was handed over to him. After the sentence of disbarment had been passed upon him he gave notice of appeal to the judges, but failed to put in an appearance at the appointed day; and notwithstanding every enquiry, no one has since heard of him. It was rumored that of the proceeds derived from the sale of one book which he had taken, he actually applied a portion to the sustenance of a brother barrister (since dead), who, like himself, was, at the time of the commission of the offence, starving and almost dying. Since the disclosure of the privations endured by Mr. Weightman, a fund has been established by all the inns of court to alleviate the wants of the poorer members of the bar.—*Irish Law Times.*

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

Life Insurance Policy not avoided by Failure of Company to Comply with Law regarding Corporations.—A life policy issued by a foreign company, is not rendered void by the neglect of the company to comply with the provisions of the act of April 16, 1867, providing for the incorporation and regulation of insurance companies; nor will such neglect in an action brought against the company on the policy, excuse the policyholder from paying premiums according to the terms of the policy. Union Mutual Life Ins. Co. v. McMillen, 24 Ohio State, 67.

———. **Failure to Pay Premiums.**—Where a life policy is made and accepted, upon the expressed condition that the annual premium is not fully paid within the time specified, the policy "shall be null and void, and wholly forfeited," the failure to pay the premium avoids the policy. Ibid.

———. ———. **Waiver of Forfeiture by Agent.**—Where the policy also provides that no agent of the company, except the president and secretary, can waive such forfeiture, authority conferred upon an agent before the premiums became due to collect them, does not impliedly invest him with authority to waive the forfeiture. Ibid

———. ———. ———. **Burden of Proof.**—Notwithstanding the limitation upon the power of agents, declared in the policy in respect to waiving the forfeiture, the company is competent to invest such authority in any of its agents. The authority may be express, or it may be implied from circumstances, but the burden of showing it, in either case, is on the party claiming the benefit of its exercise. Ibid.

———. ———. ———. **Ratification.**— An agent, having no authority to waive the forfeiture, acting in the interest of the assured, received the unpaid part of a premium on a forfeited policy, after the life insured had ended, for which he gave a receipt antedated, and forwarded the money to the company, concealing the facts as to such payment. *Held*, that the receiving of the money by the company, in ignorance of such facts, was no ratification of the act of the agent in receiving the money. Ibid.

———. ———. ———. **Failure to Return Premium Notes.**—The fact that the company, on tendering back the money so received, omitted to return certain notes given in part payment of premiums, but which the forfeiture of the policy rendered uncollectable, will not affect the rights of the parties in suit on the policy; nor is the fact that the notes are payable to order material, where they show on their face the consideration for which they were given. Ibid.

Bankruptcy—Injunction—Practice—Jurisdiction.—In *re* Fendly, a bankrupt in the federal district court at Tyler, Texas, Mr. District Judge DUVAL, ruled the following points:

1. That a bill for an injunction to restrain the alleged fraudulent vendee of a bankrupt from selling the stock of goods, need not be verified by the oath of the creditor himself, but that it will be sufficient if verified by his agent or attorney.

2. That since the district court is clothed with equity jurisdiction in bankruptcy proceedings, it has jurisdiction to entertain such a bill.

3. That such an injunction is not dissolved by operation of law when the debtor is adjudicated a bankrupt. Upon this last point the learned judge says: "It is true that under section 40 of the bankrupt act there is some reason to suppose it was intended that injunctions should cease to operate when adjudication was had. This, however, is by no means certain. But if such be the correct construction, I confidently believe that it only refers to such injunctions as were granted *simultaneously* with the order to show cause, and it is not applicable to such as might be granted *between the time of the commencement* of proceedings, *and up to the date of adjudication*, or even up to the appointmen t of an assignee. Between those intervals of time, matters may occur, or facts become known, which would render the use of the writ absolutely indispensible to the rights of creditors. And, in my judgment, the section referred to does not preclude the bankrupt court from granting such writs, under summary proceedings had for that purpose, at any time subsequent to the commencement of proceedings and prior to the appointment of an assignee. And I further believe that injunctions thus granted continue until vacated by order of the court.

The Power of a National Bank to Lend Money on Mortgages, or real estate securities, was denied in Fowler v. Scully, 72 Penn. St. 456. Fowler gave to a national bank, not being indebted to it, a mortgage to secure future advances. It was held that, under currency act of June 3, 1864, the mortgage was void. The provisions of the act were very fully examined by AGNEW, J., and the conclusion reached that national banks could loan money on no other security than personal.—[*Albany Law Journal.*

The same point was recently decided in the same way by the Saint Louis Circuit Court, Hon. CHESTER H. KRUM, presiding. Judge KRUM delivered an opinion upon the question which, we believe, was published in the Saint Louis Republican.

Liability of Attorneys and Collecting Agencies for Collections Made by their Agents.—In Bradstreet v. Everson, 72, Penn. St. 124, the court considered, at considerable length, the liability of attorneys and collection agencies for collections made by their agents. In that case Bradstreet had a "commercial agency" at Pittsburgh, to which Mr. Everson delivered acceptances payable in Memphis and took a receipt for them "for collection." Bradstreet sent them to an agent in Memphis who collected the money and kept it. The court held that Bradstreet was liable. After citing and commenting upon Cox v. Livingstone, 2 W. & S. 103; Kraus v. Dorrance, 10 Barr. 462, and Rhines v. Evans, 16 P. F. Smith 192, the court continued: "These cases show the understanding of the bench and bar of this state upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not responsible. He is therefore liable, by the very terms of his receipt, for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client." This doctrine is sustained by the following decisions in other states: Lewis v. Peck, 10 Ala. 142; Pollard v. Rowland, 2 Blackf. (Ind.) 22; Cummins v. McLean, 2 Pike (Ark.) 402; Wilkinson v. Griswold, 12 Smedes & Mar. (Miss.) 669.—[*Albany Law Journal.*

Temperance Legislation—"Civil Damage" Laws.—The "Civil Damage Law" of Illinois, which is substantially identical with that of this state and of Ohio, has several times, recently, come before the Supreme Court of that state for construction. The Chicago Legal News of August 1, contains a late decision of the court in the case of Freese v. Tripp, which illustrates some of the abuses to which the act may be made subservient, as well as the proper rule of construction. The action was brought by the wife of an habitual drunkard against a saloon keeper, to recover damages for his having sold liquor to her husband. Evidence was offered and rejected that the wife was also a drunkard. It was also proved that the wife was in the saloon when liquor was

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man would take the property. That it was Mr. Howell, and that he would sold to her husband, and could have prevented the act had she been so disposed. The court on this point said: "The whole thing seems very much like a concerted plan to entrap the defendant, and was successful. Many like cases will probably occur in enforcing this act. There is nothing easier than for a husband and wife of low morals, as these parties were, to combine and make a case, calculating on the prejudice of jurors for success." The court below, however, charged the jury that they might "consider the anguish or pain of mind, feelings the plaintiff suffered," and the jury might give her "exemplary damages;" if the act of sale was not "willful," and "if it was willful or wanton the jury should annex more damages;" instructions hardly appropriate under the circumstances of the case, even if they had been legal. The court said: "We hold a fair construction of this statute requires a party suing under its provisions should prove to the satisfaction of the jury actual damages sustained. Without this, exemplary damages cannot be awarded. This is the construction placed upon the act by the highest court of the State of Ohio, and it is reasonable to suppose the legislature adopted the law with the construction put upon it as generally held." Schnieder v. Hosiers, 21 Ohio St. 98 (S. C., 8 A. L. J. 135). And that "the 'anguish or pain of mind, feelings suffered by such intoxication of her husband," is not a matter for the consideration of the jury; the statute contemplates injury in person or property, or means of support, and not mental anguish." A minority of the court were not prepared to say that, where the actual damage is shown, mental suffering might not be considered upon the question of exemplary damages.—[*Albany Law Journal*.

Homicide—Negligent Driving—Onus of Proof.—In this case, the prisonor having been convicted at the Commission Court, Green street, of the homicide of an aged woman, by drivjng a horse and cab over her while she was crossing the street, a question was reserved as to whether the mere act of driving, being of itself lawful, lay it upon the crown to prove that the accused was guilty of negligence in the act that caused death, or upon the prisoner to show that he had not been negligent. J. Murphy, Q. C. (with him W. O'Brien, Q. C.), for the Crown; J. A. Curran, *contra*. MONAHAN, C. J., FITZGERALD B., MORRIS and LAWSON, JJ., and DOWSE, B. (O'BRIEN, J. *diss.*) *held* that the onus lay upon the accused to disprove the *prima facie* case against him of having caused the woman's death, and affirmed the conviction. (R. v. Cavendish; C. C. R., Jan. 29, 1874.—[*Irish Law Times*.

Municipal Bonds—Jurisdiction to Enforce Payment—Equity.—There can be no jurisdiction in equity to enforce the payment of corporation bonds until the remedy at law has been exhausted. Heine v. Levee Commissioners, Supreme Court United States, October Term, 1873.

———. ———. **Mandamus.**—Where the law has provided that a tax shall be levied to pay such bonds, a mandamus after judgment, to compel the levy of the tax, in the nature of an execution, or process to enforce the judgment, is the only remedy. Ibid.

———. ———. ———. The fact that the remedy has been shown to be unavailing, does not confer upon a court of equity the power to levy and collect taxes to pay the debt. Ibid.

———. ———. ———. The power to levy and collect taxes is a legislative function in this country, and does not belong to a court of equity, and can only be enforced by a court of law, through the officers authorized by the legislature to levy the tax, if a writ of mandamus is appropriate to that purpose. Ibid.

———. ———. **Liens.**—Taxes are not liens unless declared so by the legislature, under whose authority they are assessed. Still less can a lien be created by the mere duty to assess taxes, which has not been performed. Ibid.

Right of Real Estate Broker to Commissions—Unconditional Sale—Question for Jury.—In Clendenon v. Pancoast, Surpreme Court of Pennsylvania, 31 Legal Intelligencer, 253, the plaintiff brought suit to recover commissions claimed to have been earned by the plaintiff as a real estate broker. When his evidence closed, the court orded a nonsuit. The plaintiff averred that he was authorized to p ocure, and did procure, a person to bargain and buy of and from the defendant the land in question, for the price or sum of $17,000. The question in dispute was whether the sale was unconditional; for, if so, the plaintiff was of course entitled to his commissions. The evidence showed that the plaintiff had some negotiation with a Mr. Howell in regard to purchasing it, and that they had fixed upon a time to go and examine the property. During an interview soon after between the parties, the plaintiff informed the defendant that he thought he had procured a purchaser, but had given him the whole of that week to decide. To this defendant replied, "if your man will take it by Saturday, all right, he can have it; after this week I will not be bouud." The plaintiff communicated this to Howell. The latter examined the property, and on Saturday morning informed the plaintiff he would take it. He, however, requested the plaintiff to ask the defendant whether it would be convenient to take some mortgages on account of the purchase-money. Thereupon the same morning the plaintiff told the defendant that his like to give him some mortgages in part payment of the purchase money. The defendant replied, "that lets me out, I won't sell." The plaintiff said "no, he only said he would like to give you the mortgages if it suited you, but he will take the property anyhow, and will pay you cash if you require it." The defendant persisted in his refusal to close the sale, and Howell insisted upon the purchase, declaring his readiness to pay the cash as soon as the papers could be prepared. On the above facts it was *held* that the question whether the sale was not unconditional should have been left to the jury, and it was error to direct a nonsuit.

Railway Negligence—Evidence to show Extent of Pecuniary Loss.—In Pennsylvania Railroad Co. v. Dale, Supreme Court of Pennsylvania, 31 Legal Intelligencer, 253, which was an action against a railroad company for physical injuries, it was held proper to admit, upon the question of damages, evidence to show that at the time of the accident, one part of the business of the plaintiff was dealing in lands, buying and selling the same; that he had a quantity of land then on hand; and to show the value of the business at the time of the accident, and the profits arising therefrom. The court say: "It is true that merely speculative profits are not to be considered, and against the consideration of such profits, the court carefully guards the jury by saying, "if, however, the business was uncertain and speculative, and not attended with any reasonable certainty of profits, then it would not have a pecuniary value to be estimated in this action. The damages in cases like these are to be arrived at by considering the reduction which the accident has wrought upon one's earning powers, whether mental or physical, or both combined, and in order to do this properly, reference must always be had to the business in which such an one is engaged at the time of the accident. No better rule can be laid down than that adopted by Justice SHARSWOOD, in the case of The iRailroad Co. v. Butler, in which he says: 'The proper measure of damages s the pecuniary loss suffered by the parties entitled to the sum to be recovered; and that loss is what the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditures.' This rule, though immediately applicable to cases brought for damages resulting from the loss of the life of a husband or parent, is nevertheless applicable, *mutatis mutandis*, not only to the case in hand but to all similar cases.

"Human business is as varied as human wants and human ideas. Each one adopts that which suits him best, or from which he can derive the largest profits, and when, by another's negligence, he is deprived of the power of properly conducting such business, the question of what damages he shall have by way of compensation is wholly for the jury."

Fire Insurance—Reinsurance, when a Fraudulent Preference.—Cassery v. Manners. New York Supreme Court, Special Term (Daily Register, July 6), presents the following state of facts: The New Amsterdam Insurance Company of New York, having sustained great losses in the Chicago fire of 1871, resolved to reinsure its remaining risks in the Home Insurance Company of New Jersey, a new corporation with a paid up capital of $100,000, and which had done but little business, and to effect such reinsurance paid the Home Insurance Company, $40,000. The president and secretary of the New Amsterdam Insurance Company, were also president and secretary of the Home Insurance Company, and some of the directors of the former, were also directors of the latter company. The amount of the risks thus reinsured amounted to about $10,000,000. Immediately after effecting this reinsurance the officers of the New Amsterdam Company commenced negotiations with the policy-holders at Chicago for a settlement of their losses as adjusted at fifty cents on a dollar, and procured a composition deed to be signed by most of the policy-holders to that effect. The said losses, if paid in full, would have exhausted the entire capital and surplus of said company, and the remaining policy-holders would have been entirely without security. The Home Insurance Company continued to do business only for a few months, and was then wound up. It paid promptly all losses which accrued upon the risks transferred from the New Amsterdam. On the 19th day of December, 1871, the plaintiff was appointed receiver of the New Amsterdam Company, it being declared to be insolvent, and this action is brought against the directors of said company to recover of them the $40,000 paid to the Home Insurance Company, it being claimed to have been paid in violation of law.

Upon these facts the court (VAN BRUNT, J.) hold that the reinsurance of its remaining risks after the Chicago losses, amounted to a withdrawal from its assets of a fund, namely, the $40,000 paid as premiums, in which all the policy-holders were entitled to share; that since this fund was not withdrawn to effect a reinsurance for the benefit of all its policy-holders, but for the benefit of a portion of them only, it is such a fraudulent preference of policy-holders as is forbiden by the New York statute; and the plaintiff is entitled to recover.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. } ST. LOUIS, THURSDAY, SEPTEMBER 3, 1874. {SUBSCRIPTION: $8 PER ANNUM, in Advance.
S. D. THOMPSON, Ass't Editor. }

RESPONSIBILITIES OF EXPRESS COMPANIES.—We direct attention to the able opinion of Mr. District Judge BALLARD, pronounced in the U. S. Circuit Court for Kentucky, on this important subject. It will be read with interest not only on account of its importance, but for the clear and forcible manner in which he argues questions upon which there exist some diversity of judicial judgment. We are indebted for it to Gen. John M. Harlan of Louisville, Kentucky.

FORFEITED LAND GRANTS.—The decision of the Attorney-General of the United States, to which we have before referred (*ante*, p 411), to the effect that, upon a failure to build the roads within the time prescribed by the act making the grant, the lands, *ipso facto*, revert to the United States without further legislation, will have the effect to open for settlement the lands of the following companies which have failed to construct their roads within the time limited by Congress:

RAILROADS.	No. Miles.	No. Acres.
Jacksonville, Pensacola & Mobile	160	600,000
Pensacola & Louisville	43	165,000
Alabama & Florida	150	394,000
Coosa & Tennessee	35	67,784
Mobile & Girard	140	300,000
North Louisiana & Texas	90	250,000
St. Croix & Lake Superior (Bayfield and St. Croix),	220	1,180,000
Jackson, Lansing & Saginaw	50	150,000
Total,	888	3,106,784

DEFENDANTS AS WITNESSES IN CRIMINAL CASES.—The following is the recent Illinois statute on this subject: "No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility. *Provided*, however, that a defendant in any criminal case or proceeding shall only *at his own request* be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect."

It is seen that it provides that the defendant in a criminal case may not be called upon to testify except at his own request, and contains the usual reservation against his refusal to testify, creating a presumption against him. We have already (*ante* p. 147) alluded at some length to this important question. The writer of that article, speaking only for himself, believes that accused persons ought, to be required to answer questions under such restrictions as the humanity of the judge may suggest. As Daniel Webster said when his namesake, Professor Webster, was accused of the murder of Dr. Parkman, a man that has no statement to make may safely be believed to be guilty. The truth is always near at hand, and, in most cases, will guide the innocent by a short and easy road out of every difficulty; and the law was not made for the protection of the guilty. The writer believes that the maxim, *nemo accusare seipsum tenetur*, is the primordial maxim of law which a convocation of thieves would frame for their own protection if permitted to legislate for that purpose. If the origin of this maxim were traced, it would no doubt be found to be an exaggerated protest against the *criminal question* or mode of extorting confessions from prisoners by torture, which was sanctioned by the civil law, and, indeed, by the practice of most of the nations of antiquity. The writer thinks the proper rule ought to be that the judge may propound to the prisoner such questions as, in his discretion, seems necessary for the elucidation of the truth on any doubtful point; but that the prisoner shall not be compelled by force to answer them, but if he fails to do so, shall be subject to whatever unfavorable presumption the jury may, having reference to his intelligence and situation, draw from such refusal.

Whilst entertaining these views, we do not seek to disguise or pass lightly over the fact that the voluntary confessions of accused persons are of very little value. In repeated cases, persons known to be innocent, and to all appearances sane, have accused themselves of capital crimes. The principle for which we contend is, that the law ought not to stop its ears against any source of evidence which offers additional light upon the subject under investigation, and which may afford additional *means* to the jury of arriving at a just verdict. The gross injustice and inconsistency of the common law is, that while it permits the supposed confessions of an accused person to be detailed against him through the imperfect memory, and perhaps prejudiced imagination of a third person, it cruelly seals his mouth and denies him the privilege of uttering a word in explanation. Such a rule of law is utterly indefensible and essentially wicked, and it is disgraceful to the legal profession that it has been suffered so long to exist.

Railway Negligence—Liability where a Train is Jointly Run by the Employees of Two Companies.

By an arrangement between the Nashville and Chattanooga Railroad Company, and the Memphis and Charleston Railroad Company, the former company transferred the cars of the latter over the road of the former, from Stevenson, the terminus of the latter company's road, to Chattanooga. A passenger train of the latter company got belated in consequence of an accident. The superintendent of the two roads arranged by telegraph for the passage of this belated train. It was run over the section of the Nashville and Chattanooga Railroad, from Stevenson to Chattanooga, by its own engine, in charge of its own engineer and train-men, who were employees of the Memphis and Charleston Railroad Company. While passing over this section of the line, it ran over and killed a "section boss" employed by the Nashville and Chattanooga company. The administrator of this man brought suit for compensation for causing his death, against both these companies; and the case, which was determined in the Supreme Court of Tennessee, in 1872, under the name of The Nashville and Chattanooga Railroad Co. *et al.* v. Carroll, and which is reported in the Nashville Commercial Reporter, for August 27, discusses the interesting question of the joint liability of the two companies. It was insisted on behalf of the Memphis and Charleston company that the other company

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was liable, because they had undertaken as "contractors" to carry its trains through from Stevenson to Chattanooga; but the circuit judge instructed the jury to disregard this contract between the two companies, and to direct their attention to the question whether the deceased was killed by the locomotive, cars or train of defendants, or either one of them, and if so, he charged them that the plaintiff would be entitled to recover, unless precluded on the principles of law, as afterwards explained to them. He then told them, in response to the request of the counsel of the Memphis and Charleston railroad company, that if the proof satisfied their minds that the Memphis and Charleston railroad company at Stevenson, or any other point, before the arrival of the cars at the place where the injury occurred, surrendered all control and custody over the cars and engine, and committed them to the exclusive charge and control of the Nashville and Chattanooga Railroad Company, the Memphis and Charleston Railroad Company would not be liable, notwithstanding it owned the cars used on the track of the other road. But he added that, if the jury were satisfied that employees of both companies were engaged and co-operating in running the cars and jointly controlling them, the companies would both be liable. These rulings and instructions the Supreme Court held to be free from error. FREEMAN, J., in delivering the opinion of the court, said:

We hold this charge was substantially correct. It was a question of fact for the jury to determine whether the injury was done by the one company or the other, or both, through their agents and employees. Mr. Redfield in his work on railways, 591, states the rule to be that "a railway company is always responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, management and control, though belonging to another company; and if such injury results from negligence of another company which has a joint right with defendants to use defendants' track under a lease, and which is running trains over defendants' track on its own account, the defendants are not responsible." The principle is that when one has control and management of the train, whether owner or not of the cars, it is responsible for damages for wrongs—and if this be so, it follows necessarily that if, in fact, that control be joint, and the train jointly under the control of agents of two companies, then both must be held responsible. Two persons may be joint masters, and thereby subject to a joint liability for the acts of servants or employees, and such joint liability may be converted into a several liability by the election of plaintiff to sue only one, which may be done in such a case. See Parsons on Contracts, vol. 1, note 10, p. 106. In fact the liability of two corporations must depend on the same principle, in the main, as in case of private individuals. On this question there is no error in his honor's charge at which the plaintiffs in error can complain.

Politics and the Bench.

The proposed nomination, by the democratic party of New York, of Judge CHURCH as governor of that state, calls forth an article from the able editor of Harper's Weekly, in which he uses the following language:

The question is very serious. The absolute independence of the judiciary is indispensable, and patriotism and good sense alike warn us to avoid any practice which tends to compromise it. Yet, if the bench is to be considered as a stepping-stone to purely political offices, if, indeed, it is not to be regarded as a bar to such positions, its independence is necessarily imperiled. It is true that Washington sent JOHN JAY from the bench of the Supreme Court of the United States to negotiate a treaty with Great Britain, and that he was elected governor of New York while he was chief justice of the United States, and accepted the position. But there is no reason that a man of peculiar and special ability should not be summoned from the bench to discharge precisely such a duty as that for which JAY went to England. The best opinion of the country applauded the nomination by President Grant of Judge NELSON as one of the negotiators of the treaty of Washington. Such a service is the very one for which an exception may justly be made, because a foreign treaty should be absolutely unpartisan.

It is to be regretted, however, that Chief Justice JAY, although in 1795 he was elected governor, during his absence and without his knowledge, had in 1792, consented to be nominated, after declining because of his position as chief justice. It is to be considered, however, that the time itself was exceptional, and that the men who had been most prominent in forming the new system felt it to be their duty to aid its practical operation in every way, and that the duty of absolute separation of the three great powers, and the perils of regarding judges as possible political candidates, were not as evident then as they have now become. The disposition to disregard this peril, and to consider judges as not practically debarred from the seductions of caucuses and conventions ought to be imperatively checked. If Judge CHURCH should accept a nomination as governor, that fact alone should insure his defeat. Party managers and judges should be taught that political candidates are not to be taken from the bench. For judicial deliberations must be guarded, as far as possible, from that most insidious of influences in a free government, party spirit.

The Washington Chronicle, alluding to the same subject, makes the following judicious observations:

When the name of Mr. Justice MILLER was urged in certain republican journals, he very promptly authorized a publication in the New York Times, that, under no circumstances would he allow himself to be a candidate for any political office; that when he accepted his judicial position he abandoned political aspirations, and that he believed it inconsistent with the dignity or purity of the bench for judges to allow themselves to become possible or probable candidates for any political office, however distinguished or honorable; and the consequence was that his answer was accepted. The same has been true in the history of the high courts of this country with other distinguished men. If judges desire it, their names will not be heralded as political candidates. A denial, prompt and conclusive, would stop the clamor of the most indiscreet friend. But so long as judges encourage and countenance the public use of their names as candidates, so long will they be dragged into these offensive discussions, in which they may justly expect their motives to be criticised, their actions watched, their opinions maligned, and their views misrepresented. And grave and serious as we confess this question to be, we have no hesitation in saying that the remedy is in the hands of the judges themselves, and to them the country must look for the remedy.

These, it is true, are not the views of non-partizan journals, and they may have been dictated by motives which they do not exhibit on their face; but they will, nevertheless, in the main, commend themselves to judicious minds, irrespective of party. It is not improbable that the popular confidence in the integrity of the highest court of the nation may have been, to some extent, impaired, within the last few years, by the knowledge that some of its members were possible, or even probable, candidates for the presidency. We cannot believe that the truth justifies the remark which the editor of Harper's Weekly makes concerning the late Chief Justice CHASE, when he says that "his most conspicuous legal opinion—that upon the legal tender—will always be tainted with the suspicion that it was affected by political considerations."

That such suspicions may lurk in the minds of some, there can be no doubt. There are some in whose tainted imaginations the most upright judge will never be above suspicion. But these are human owls that can see only in the darkness—cynics, whose minds are so thoroughly nursed in the habit of surmising evil, that the whole world is doomed to rest continually under the disadvantage of their suspicions. But whenever the integrity of the bench is subject, in any considerable degree, to the misgivings of intelligent hope, it is a public misfortune. The repose of society requires that the popular judgment should rest with confidence in the impartiality of the bench, and this cannot be if the bench comes to be looked upon as a stepping stone to political preferment. Judges, however, are but men, and as long as the people will bring them forward as candidates for high political offices, there are very few that will have the self-denial to resist the temptation. Besides it may not unfrequently happen that

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judges, from the just and impartial habits of thought, and from the integrity and purity of private life which the judicial office has a tendency to develope, as well as from the absence of any strongly expressed political opinions, become the most *available* candidates for political offices; and it is not to be expected that political parties will, when they stand in extreme need of such a candidate, stop to consider the propriety of selecting one from the bench. Such are precisely the considerations which are now urging the nomination of Judge CHURCH. The disposition to nominate him for governor of New York springs from a feeling that there is no other man in his party whose eminent abilities and irreproachable character will make him an available candidate against General DIX. There appears to be but one way to save the bench from the bad influences resulting from the candidacy of judges for political offices; and that is to amend the constitutions, state and national, so as to make them ineligible to such offices. But whenever such a proposition is seriously made, a strong public sentiment will no doubt be developed against it. A strong feeling will doubtless be discovered that there may be exigencies when it will be not only proper, but peculiarly fitting that judges should retire from the bench to except political preferment — when, in short, a Papinian or an Ulpian at the helm of state may be the only choice as against a Nero or a Caracalla.

Our sister republic of Mexico, after having been reduced, under successive military rulers, to the most deplorable anarchy, is now, for the first time, perhaps, since her independence, enjoying a period of repose and prosperity, under the administration of one who laid aside the robes of chief justice to assume the title of president.

Liability of Express Companies for Losses in Railroad Accidents.

BANK OF KENTUCKY v. ADAMS EXPRESS COMPANY.

United States Circuit Court, District of Kentucky, July, 1874.

Before Hon. BLAND BALLARD, District Judge.

1. **Express Company's Liability for Packages Lost in Railroad Accident.**—An express company which receives packages of money to carry from one point to another, on a contract exempting it from liability in case of loss or damage by fire, is not liable for the loss of such packages in consequence of a fire resulting from a railroad accident, which happens without fault of the express company or its agents while such packages are being transported to their destination in the custody of the express company's messenger, upon a railroad train, operated and controlled by the agents and servants of the railroad company, and over which neither the express company nor its agents have any control. The railroad company, in such case, does not stand in the relation of agent or servant to the express company.

2. **Stipulation against Liability in Express Companies' Receipt—Proof of Assent to Terms of.**—Where a bank, through its teller, gives packages of money to an express company to transport to another city, and in so doing the teller fills out the blanks in the express companies ordinary printed receipt, and gives it to the agent of the company to sign, and the receipt contains a printed stipulation exempting the express company from liability for loss or damage occasioned by fire, it is no objection to the validity of this stipulation that the attention of the officers of the bank was not called to it; and it is not error to instruct the jury in such a case that the bank would be bound by it, whether it were known to them or not.

The plaintiff sued the defendant for damages for the loss of a package of money entrusted to the defendant by the Louisiana Bank at New Orleans, Louisiana, for delivery to the plaintiff at Louisville, Kentucky, but which was lost *en route* in consequence of a railroad accident. Under the instructions of the court, the jury returned a verdict for the defendant, and the plaintiff moved for a new trial.

John M. Harlan, Barr, Goodloe & Humphrey, for plaintiff; *I. & J. Caldwell & G. C. Wharton*, for defendant.

BALLARD, J.—On a former day there were in this case a verdict and judgment for the defendant. At the trial the counsel for the plaintiff took several exceptions to the rulings of the court and charge to the jury, and they have now moved for a new trial, assigning for cause that the court erred in refusing to give the instructions asked by them and in giving the instructions which were given.

The learned counsel have submitted no argument on their motion. They stand on the argument made and the authorities cited at the trial.

As both that argument and those authorities received, at the time, the fullest consideration, I think I would be justified in overruling the motion without adding to what was then said, but as the opinion then expressed by me on the main point in the case is apparently opposed to several respectable authorities, and is supposed to present a new and important question, I feel that I ought not to allow this opportunity to pass without attempting a vindication of an opinion, the correctness of which has been confirmed by subsequent reflection.

The facts in the case are substantially as follows: The Southern Express Company and the Adams Express Company are engaged each in the business of carrying money and other articles from one part of the country to another, for hire, at the request of any one who offers such articles to them for carriage. They do not use in their business any vehicles of their own except such as are required to transport the articles, entrusted to them, to and from railroad depots, and to and from steamboat landings. They use railroads, steamboats and the other public conveyances of the country. These conveyances are not subject to their control, but are governed entirely by the companies and persons to whom they belong. The packages entrusted to them are at all times, while on these public conveyances, in the care of one of their own messengers or agents. These companies are engaged in carrying by the railroads through Louisiana and Mississippi to Humboldt, Tennessee, and thence over the Louisville and Nashville Railroad to Louisville, Ky., under a contract by which they divide the compensation in proportion to the distance the article is transported by the respective companies. Between Humboldt, Tenn., and Louisville, Ky., both companies employ the same messenger, but this messenger, south of the northern boundary of the state of Tennessee, is subject entirely to the orders of the Southern Express Company, and north of that boundary is subject entirely to the orders of the Adams Express Company.

These express companies are in the habit of charging one price when they undertake to insure the safe delivery of the articles entrusted to them—that is, when they do not modify their ordinary responsibility as common carriers, and of charging another and lower price when their responsibility is limited. The Louisiana National Bank was aware of these regulations, and had in its possession printed blank receipts, or bills of lading, showing in the body the conditions and exceptions upon which the companies would undertake to carry at the lower rate, and in the margin the printed blank for the rate at which they would insure. Having received a letter from the plaintiff directing the forwarding by express of the sum of $13,528.15, the bank, by its teller, filled the blanks in that part of the bill of lading which contained the conditions and exceptions, and presented it to the Southern Express Company for its signature and delivered the package of money addressed to the plaintiff without stating who was the owner. The bill of lading was signed and redelivered to the teller of the Louisiana National Bank, and forwarded by him to the plaintiff at Louisville. It does not appear that the receipt was read at the time of its delivery, or that the attention of the officers of the Louisiana National Bank was called specially to the exceptions contained in it, but, as before stated, the bank was aware of these exceptions and of the stipulations for the lesser rate of compensation.

This package was carried by the Southern Express Company from New Orleans to Humboldt, Tenn., and there delivered to the

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joint messenger of the Southern and Adams Express Companies. While it was in the custody of this messenger between Humboldt and the northern line of the state of Tennessee, the car in which the package was contained was percipitated through a trustle-work on the line of the Louisville and Nashville Railroad, at or near Budd's creek, and the car and package were destroyed by fire. This was caused by the fallen locomotive, without any fault or neglect on the part of the messenger who had charge of the package.

So much of the receipt as is material to the present controversy is as follows:

"SOUTHERN EXPRESS COMPANY,
"*Express Forwarders*,

"No. 2.—$13,528.15. JULY, 26, 1869.

"Received from the Louisiana National Bank one package, sealed and said to contain $13,528.15, addressed 'Bank of Kentucky, Louisville, Kentucky.'

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and there deliver the same to other parties to complete the transaction, such delivery to terminate all liability of this company for such damage; and also that this company are not to be liable in any manner, or to any extent for any loss or damage * * * of such package or of its contents * * * occasioned * * * by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and veery company or person to whom the Southern Express Company may entrust or deliver the above described property for transportation, and shall define and limit the liability therefor of such other company or person.'"

Upon these facts the court charged the jury:

First—That the Southern Express Company and the Adams Express Company are common carriers.

Second—That the Adams Express Company is liable for the loss of packages delivered to the joint messenger of the two companies at Humboldt, Tenn., although the loss occur south of the southern boundary of the state of Tennessee.

Third—That if the jury believe the facts above detailed in relation to the execution of the receipt, then it, thus signed and delivered, constitutes the contract, and all the exceptions in it are a part of the contract, no matter whether each or all of them were known to the Louisiana National Bank or not; and the plaintiff is bound by this contract, whether it expressly authorized the Louisiana National Bank to make it or not.

Fourth—If the bill of lading contained no exception, it is clear that the defendant would not be excused because the accident occurred without its fault. It would be the insurer, and therefore accountable.' But the bill of lading, among other exceptions, contained this: "That the company are not to be liable in any manner, or to any extent, for any loss or damage * * of such package or its contents * * occasioned * * by fire."

Now, if you believe that the package was destroyed by fire, as above indicated, without any fault or neglect on behalf of the messenger, or the defendant, the defendant has brought itself within the terms of the exception, and it is not liable. It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville railroad and its agents or not, since the uncontroverted testimony shows that the car and train in which the messenger of the Adams Express Company was transporting the package, belonged to the Louisville and Nashville Railroad Company, and were exclusively subject to its control and orders. A common carrier who has not limited his responsibility, is undoubtedly responsible for losses, whether occurring on vehicles controlled by him exclusively, or belonging to and controlled by others, because he is an insurer for the safe delivery of the article which he to carry; has agreed but, when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence or the negligence or his agents, and not the negligence of persons over whom he has no control.

If in his employment he uses the vehicle of others over which he has no control, and uses reasonable care—that is, such care as ordinarily prudent persons engaged in like business use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper—he shall not be liable for the same unless it arises from *his* want of care or the want of care of his employes.

Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it—that is, give no more effect to it than if it had not been adduced.

The first and second instructions were not excepted to, but the third and fourth were. At the trial the plaintiff insisted that it was not bound by the terms of the receipt, because it was not shown that the attention of the Louisiana National Bank was called to them at the time, or that it expressly assented to them, but I am of opinion that there was no error in this portion of the charge. The Louisiana National Bank was aware that the receipt contained some exceptions and conditions. It accepted the receipt without remonstrance or objection, and both authority and reason demonstrate that the receipt must, under these circumstances, be regarded as constituting the contract of the parties. Dorr v. N. J. Steam Navigation Co., 1 Kernan, 485; Wells v. The Steam Navigation Co., 4 Selden, 375, and 2 Comstock, 204; Richard Grace v. Alvin Adams, etc., 100 Mass., 505; Halford v. Adams, 2 Duer, 480; York Co. v. Central R. R., 3 Wallace, 107.

It is now everywhere admitted that a common carrier may limit his responsibility by express contract, and if he may make an express contract with the shipper of goods, I cannot see why the contract may not be shown by the same evidence which would establish a contract between other parties. I cannot see why a writing, delivered by a carrier to an owner of goods, intended by the former to express the terms and conditions of his contract to carry, and received by the latter as such, should not constitute the contract between them.

A common carrier, it is true, is bound to carry all articles within the line of his business upon the terms and conditions imposed by law, if the shipper shall so demand. He has, however, a right to charge in proportion to the risk assumed by him. It is upon this ground the authorities hold, that unless his responsibility is modified by express contract, his undertaking to carry is upon the terms and conditions which are imposed by law. But when he has undertaken to carry at a less rate than he would have a right to charge, and would charge, if he undertook to carry only upon the conditions imposed by law, and has, by his receipt, delivered to the shipper stipulated for, a reasonable limitation of his responsibility, and the shipper has accepted the receipt without objection, the latter is as much bound by the contract thus made as any other party would be.

The correctness of the propositions contained in the remaining portion of the charge to which exception was taken may, I think, be demonstrated in two ways:

First. By the contract between the bank and the express company it agreed that the company should not be responsible for any loss or damage of the package which should be occasioned by fire. The loss of the package was occasioned by fire; hence the carrier, by the terms of the contract, is not responsible. It is not pretended that the contract was violated by using the cars of the Louisville and Nashville Railroad Company to transport the messenger and the package, or was violated in any other respect. It follows, therefore, that if the company is liable at all, it is not so by virtue of the contract, but in spite of it.

The contract, however, does not attempt to exempt, nor could it have exempted, the express company from loss occasioned by the neglect of itself or its servants, but when it is sought to charge the company with neglect, it must be such neglect as it is responsible for upon the general principles of law.

Now, upon these principles, no one is responsible for damage occasioned by neglect, unless it be the neglect of himself or his servants or agents. But the facts stated show that neither the company nor its servant was guilty of any neglect. It follows that the defendant cannot be charged in this account. Though the defendant used the Louisiana and Nashville Railroad to transport its messenger and the package, the railroad company was not, in

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any legal sense, the servant of the defendant. The defendant had no control over the railroad company or over its servants. The railroad company was no more the servant of the defendant than it is of any passenger whom it transports. It was no more the servant of the defendant than is the hack or cab the servant of him who hires it to transport him from one part of the city to another.

Second. All the authorities agree that when a common carrier has, by special contract, limited his responsibility, "he becomes, with reference to that particular transaction, an ordinary bailee—a private carrier for hire," or, "reduces his responsibilities to those of an ordinary bailee for hire." York Co. v. Central R. R., 3 Wallace, 107; N. J. Steam Navigation Co. v. Merchants' Bank, 6 Howard. 382; Railroad Co. v. Lockwood, 17 Wallace, 357.

I prefer the latter form of stating the proposition, because it is less misleading. I do not think that a common carrier, by entering into a contract limiting his responsibility, changes his character. He still remains a common carrier, with his responsibility limited in respect to the matter embraced in his contract, to that of an ordinary bailee for hire. The authorities are equally clear that an ordinary bailee for hire is bound to only ordinary diligence, and responsible only for losses and injuries occasioned by negligence or want of ordinary care. The defendant did, by special contract, limit its responsibility, and neither it nor its servant, the messenger, is chargeable with any neglect or want of care. The loss of the package was occasioned by fire. The contract provides that the defendant should not be liable for a loss so occasioned, and as neither the defendant nor defendant's servant was wanting in care, it follows that it is not responsible for the loss.

Suppose the package had been lawfully entrusted by the Louisiana National Bank to a private person to be carried for hire, and delivered to the plaintiff, and it was contemplated by the parties that such persons would transport the package and himself by the railroads, which, it was contemplated, the defendant would use, and the package had been lost under the same circumstances that the package delivered to the defendant was lost, would it, for a moment be contended that such private person would be responsible.

Suppose again that a person should deliver to his friend, who contemplated coming from New Orleans to Louisville by the ordinary modes of travel, a watch, to be carried and delivered at the latter city, and that while such private carrier, without reward, was proceeding on his way in one of the cars of the Louisville and Nashville Railroad Company, the car should, by gross carelessness of those having charge of it, be thrown from the track, and the watch in charge of the carrier, without any neglect on his part, destroyed. Is it conceivable that such carrier would be responsible for the loss? To hold that he would be responsible would not only violate the plainest principles of law, but would shock the common sense of mankind, and yet, not only the private carrier for hire, but the private carrier without reward is responsible for the loss of a package entrusted to him, under the circumstances supposed, if the defendant is responsible for the loss of the package claimed in this case.

The private carrier for hire is responsible for losses and injuries occasioned by want of ordinary care on his part or on the part of his servants; and a private carrier without any pay is responsible, if not for want of ordinary care, certainly for gross neglect. It can not be maintained with the least show of reason that the Louisville and Nashville Railroad was any more the servant of the defendant in transporting the package sued for in this case, than it is the servant of the carrier for hire, and the carrier without hire in the cases supposed, and if these last are not responsible for the neglect of the servants of the railroad company, it is impossible to conceive that the defendant is responsible for such neglect.

The counsel for the plaintiff attempt to escape this conclusion by insisting that, though the defendant limited its responsibility, it still remains a common carrier, and that such carrier is responsible not only for any want of negligence of himself and his servants, but for the negligence of any agency which he may employ in his business.

This proposition is misleading. It is not strictly correct to say that a common carrier is reponsible for the negligence of any agency in his business, or even for his own negligence or that of his servants, in the sense in which his responsibility is distinguished from the responsibility of another person. A common carrier is bound to deliver goods entrusted to him, unless prevented by the owner, the act of God, or the pnblic enemy. He is, as the law terms him, an insurer for the safe carriage and delivery of goods subject only to the exceptions above mentioned. If he does not deltver goods entrusted to him he is responsible, not because the goods were lost by his neglct, or the neglect of a servant, or by the neglect of some agency which he employed, but because he insured their delivery. His responsibility is wholly independent of the neglect of any one. If goods delivered to him to be carried are lost while in his, or his servants custody, or while in the custody of some other person who is not his servant, he is equally responsible, not because he is liable upon any principle of law for the negligence of any person who is not his servant, but because he is bound by law to carry and deliver safe all goods delivered to him unless prevented, as before stated, by the owner, the act of God, or the public enemy. If he has limited his responsibility by special contract, and the loss has been occasioned by the cause excepted in the contract, then the owner, in order to charge him, must show that though the loss arose directly from the cause excepted, that cause itself was occasioned by the neglect of the carrier. But, when a public or private carrier is sought to be charged with loss occasioned by his neglect, when neglect is the foundation of the plaintiff's claim, I am not aware that he is liable for any negligence, except upon the same principles, and under the same circumstances, that any other person is liable. I am not aware that he, more than any one else, can be made responsible for the negligence of persons who are not his servants.

Undoubtedly the defendant did, notwithstanding its contract, continue to be a common carrier, but its responsibility was limited to that of an ordinary bailee for hire. Now, an ordinary bailee for hire is responsible for only ordinary care, and liable for the neglect of himself or his own servants, and not for the neglect of persons over whom he has no control. Consequently he is not responsible for a loss occurring under the circumstances presented in this case. If it be admitted that the common carrier has by his contract limited his responsibility to that of an ordinary bailee for hire, then it can not be consistently insisted upon that he shall be held liable as a common carrier who has made no express contract. To admit the contract, and to deny any effect to it, is too much for one proposition. The proposition of counsel, reduced to its essence, is simply this: that though the defendant has, by special contract, limited its responsibility to that of a private bailee for hire, it is still responsible as a common carrier. A proposition involving so obvious a contradiction can not require further exposure.

But obvious as the fallacy and error contained in the counsel's proposition appear to me, the proposition itself seems to be supported by the decision of the Supreme Court of California in the case of Hooper v. Wells, Fargo & Co., 27 Californa, 11; by the Sureme Court of Minnesota, in the case of Christenson *et al.* v. American Express Company, 15 Minnesota Reports, 270, and by the learned editor of the American law Register, in his note to the former case (Law Register, November, 1865, p. 30.)

In the first case the carrier made a contract stipulating that he would not be responsible except as forwarder. The court construed the contract as limiting the responsibilty of the carrier to that of a forwarder—that is, of an ordinary bailee for hire—but they held the carriers responsible for a loss occurring on a tug or a lighter which plied between the shore and an ocean steamer, occasioned by the negligence of the managers of the tug, although

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they were not subject to the control or orders of the express company.

In respect to the responsibility of forwarders, the court say: "They are not insurers like carriers, but they are liable for losses of goods while in their custody, resulting from negligence of themselves, and those they employ in their business of forwarders."

The correctness of the first part of this proposition cannot be disputed, nor do I question the correctness of the latter part, if by "those whom they employ in their business of forwarders," the court mean those who are the forwarders' servants, and subject to their control and orders. The court further say, the responsibility of a forwarder is the same as that of a warehouse-man, and "if a warehouse-man, instead of using his own warehouse, and employing his own subordinates, should, for a stipulated sum, paid to the owner, use in his business the warehouse of another person, who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods *entrusted to his care*, occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control."

If by the words "entrusted to his care," the court mean to suggest a case where the warehouse-man has a contract to keep the goods in his own warehouse, I entirely concur in the proposition stated. But, if they mean that a warehouse-man, who violates no contract by removing the goods of his customer from his own warehouse into that of another prudent warehouse-man, is responsible for a loss of the goods resulting from the negligence of the subordinate of such other warehouse-man, I cannot assent to it.

Suppose a warehouse-man's warehouse should be destroyed by fire, it would be his duty to remove such of the goods of his customers as were saved to the warehouse of some other prudent person, and it cannot be insisted that he would be responsible for the loss of goods occurring there, resulting from the negligence of servants of the latter warehouse-man.

If a warehouse-man contract to keep goods in his own warehouse, and he should remove them—in violation of his contract—to another warehouse, I suppose he would be liable for all losses there occurring, just as a bailee who hires a horse to go to a particular place is responsible for loss or injury to the horse, should he drive or ride him to a different place, and the horse be lost or injured in the prosecution of such other journey.

Again, the court say: "The fact that the defendants made use of various public conveyances, their messenger with the treasure traveling a part of the way by stage, a part by steam-tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes, the managers of these various conveyances were their agents and employees."

If, as seems to be conceded, it was contemplated by both the plaintiff and defendants that the defendants would not use in their business their own vehicles, but the conveyances of others, not at all subject to their control or management, and that in the use of those other conveyances the defendants did not violate their contract, I cannot admit that the defendants, who, by the admission of the court, were liable only as ordinary bailees for hire, were responsible for losses occasioned by the negligence of the managers of those conveyances. I cannot admit that the managers of those other conveyances were, in any legal sense, their agents and employees. The relation of master and servant, principal and agent, does not and cannot exist where the master has no control over the servant, and the principal no control over the the agent.

The court further say: "The defendants had the means of holding the proprietors of those various vehicles, used in their business of expressmen, responsible to them, had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault.

But I cannot see how any argument can be drawn from this to show that the defendants were reponsible. Every bailee or depository may hold any one responsible for destroying or injuring goods in his possession, but it cannot be maintained that he is responsible for such destruction or injury unless he by his negligence contribute to the same. Besides, the plaintiff had his remedy against the proprietors of those other conveyances, which occasioned the loss (See the N. J. Steam Navigation Co. v. Merchant's Bank, 6 Howard, 382), and it might be retorted "that if he did not take the proper means to secure himself, it was his own fault."

In the Minnesota case it was stipulated that the carrier "was not to be held liable for any loss or damage, except as forwarders only, or for any loss occasioned by the perils of navigation and transportation. "The goods were received at New York, and were to be delivered to Christinson & Brother, Mankato, Minnesota. When the goods reached St. Paul they were placed by the carrier on board the steamboat "Julia," a boat belonging to the Northwestern Union Pacific Company, and managed entirely by its officers and servants, to be transported to Mankato. The goods remained in charge of the carrier's messenger. The boat at the time of the accident was strong, and in good condition. The carrier was guilty of no want of care in selecting the "Julia" to transport the goods, but, on the way, the "Julia" was, through the carelessness of its officers and managers, run against a snag and sunk, whereby the goods were damaged.

The court say that the carrier is not exempt from the loss by reason of the stipulation in its bill of lading that "it was not to be held liable for any loss or damage except as forwarders," because, they say: "In our opinion" * * the effect claimed for this clause of the receipt by the defendants is inconsistent with and repugnant to the scope and intent of the result, viewed as a whole, and in connection with the fact showing the defendants' real character and mode of doing business."

In other words, the court held that the defendants were common carriers, and that this clause of their receipt did not modify their liability at all. If the court was correct in this, it is indisputable that this clause did not exempt the carrier from responsibility for the loss claimed.

In respect to the other exceptions, "perils of navigation and transportation," the court says: "The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper construction (of such words) is analogous to that which is put upon the words 'perils of the sea' in bills of lading. While thus it would seem very proper to hold that a snag in one of our Western rivers is a peril of navigation, as appears to have been done in Tennessee, if a vessel is wrecked upon one through the negligence of the carrier or of those whom he employs * * * the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to a peril of navigation."

Here again we have the same fallacies and misleading propositions which have been exposed in a former part of this opinion. The sinking of a boat by running on a snag in one of our Western rivers, is undoubtedly a "peril of navigation." It is none the less a peril of navigation though it occur by the fault of the person navigating the boat. It is wholly misleading to say that it is a peril of navigation when it results from accident and without fault, and that it is not a peril of navigation when it results from negligence. When goods are lost by reason of such peril, occasioned by the negligence of the carrier, the carrier is responsible, not because the goods were not lost by an excepted peril, but because he has brought about the peril through his own carelessness or negligence. He is made responsible for his negligence, not because he is a common carrier, but because he is *guilty* of negligence, and has occasioned loss thereby.

In the books which treat of common carriers, only those carriers are treated of who use their own conveyances; hence it is we often find it stated that the exception, "perils of the sea," or "perils of the river," included in the carrier's bill of lading, does not include losses arising from what would be generally understood to be "perils of the sea," when occasioned by the negligence of the servants of the carrier. In such case, the carrier being the owner of the vessel in which the goods are carried, and being responsible

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for its careful navigation, it is not material in effect whether it is held that a loss arising from an excepted peril, brought about by his negligence, is not a peril of navigation within the meaning of the bill of lading, or that the carrier is responsible for a loss occasioned by the negligence of his servants, but it is better and more correct to place the liability in such case on the latter ground, because to place it on the former is misleading.

Certainly, as the court says: "The exception does not excuse the carrier for negligently running into perils, * * * nor shall he be heard to set up his own negligence to excuse him from responsibility." But, in the case before the court, no negligence was imputed to the carrier. He did not attempt to set up his own negligence to excuse himself from responsibility. He set up that by the contract he was not to be liable for losses arising from the perils of navigation, and he showed that the loss did arise from a peril of navigation, without any fault on his part. He was not responsible for the negligence of the managers of the boat, as I have before shown, becasue he had no control or authority over them, and as he could be held responsible in the case only for negligence, it would seem he was not liable at all. I think that the court was misled by the definition of "perils of navigation" which it found in the books.

Clearly, that is none the less a "peril of navigation" or a "peril of the sea," because it is attributable to the agency of man. The very case which is generally used to define and explain what is a "peril of the sea," is that of a collision brought about by negligence. If a carrier's vessel should collide on the sea with another vessel, through the fault wholly of the latter, it is everywhere admitted that he would not be responsible for a loss arising from such collision, of goods which he was carrying under a bill of lading that exempted him from responsibility for loss arising from "perils of navigation" or "perils of the sea," and yet, undoubtedly, the collision in such case is attributable to the agency—nay, to the negligence—of man.

I have a profound respect for the opinions of the learned courts which I have here noticed, but I think that they are opposed to the general current of authorities—that they are founded on fallacious and misleading propositions, and that they disregard the well-settled principles of law.

The motion for a new trial is OVERRULED.

NOTE.—We regard the foregoing case as one of great practical importance, and valuable as a contribution to what cannot, perhaps as yet, be said to be a settled point of law, viz.: whether the railways and vessels, employed by express companies in executing the employment, are, or are not, to be regarded, as respects the owner or shipper of goods, as the agents and servants of the express company by which they are immediately employed. Writers and courts have differed on this question, and the reader will find the conflicting views well presented, and the cases down to 1865 collected in 5 Am. Law Reg. N. S. pp. 1 (article by Judge REDFIELD), 449, 513, 648.

The principal case as we understand it, turns upon the question whether, in a legal sense, as respects the plaintiff, the relation of the principal and agent or master and servant existed, at the time of the loss of the money, between the express company and the railroad company, and it denies that such relation subsisted. It admits that, notwithstanding the special contract, the express company sustained towards the owner of the money the relation of a *common carrier*, with the common law liability of a common carrier attaching to it, except in so far as this liability was reduced or modified by the bill of lading or special contract. And such we consider to be the law, of which indeed, since the decision of the Supreme Court of the United States, in the Railroad Company v. Lockwood, 17 Wall. 357, there can be little doubt. The able and well considered views of Mr. Justice BRADLEY, in that case speaking for the court, cannot fail to meet with general judicial sanction.

Assuming that under the circumstances the special contract was binding upon the plaintiff, as, with some doubt, we think it was, the question of the express company's liability depended upon whether they had a provision in the special contract, just and reasonable in its character, which exempted the express company from responsibility for the loss.

The clause relied on to constitute such exemption, was the one "that this company are not to be liable in any manner, or to any extent, for any loss or damage of such package occasioned by fire." The package was lost by fire, and it was held that the express company was protected, if this fire was not caused by its own agents, but solely by the agents or servants of the railroad company over whom it had no control, but which company it employed to enable it to perform its contract with the plaintiff. The primary and fundamental duty of an express company is to *carry* the articles delivered to it. This is a personal duty resting upon it, which it cannot abdicate. Stipulations in contracts by common carriers for exemption from their common law liability, embodied in printed form and often imposed upon the public, are not to be extended in favor of the company by construction. In view of these considerations, with deference to the learned judge, and fully appreciating the clear and forcible manner in which he argues the view he adopts, we should have reached the conclusion that the special clause relied on by the express company was not broad enough, and clear enough to exempt the company from liability. We confess to being strongly impressed with the general soundness of the views of the Supreme Court of California and of Minnesota in the cases referred to. Hooper v. Wells, Fargo & Co., 27 Cal. 11. S. C., with note, 5 Am. Law Reg. N. S. 16; Christenson v. Am. Express Co. 15 Minn. 270.

As the duty of the express company to *carry* is essential and fundamental, is it unreasonable to hold that all agencies which it employs to enable it to discharge its duty in this behalf, are, *pro hac vice*, *its* servants, and if so, then it would be liable to the owner of the goods for the negligence of the railway company or its employees? We thus state briefly what seems to us the better view of this question; but at the same time we wish to direct the reader to the strong and forcible argument which the principal case presents in support of the opposite view. It is by discussions of this character that the law is at length settled upon just, rational and solid foundations.

Practice in Bankruptcy—Verification of Petition—Amendment.

IN *re* SOLOMON SIMMONS.

United States District Court, Eastern District of Michigan, August 3, 1874.

Before Hon. John W. LONGYEAR, District Judge.

1. **Practice in Bankruptcy—Verification of Petition.**—Under § 39 of the bankrupt act as amended by § 12 of the act of 1874, where there are less than *five* signers to a petition in compulsory bankruptcy, and the petition is verified by an *agent*, it is not necessary for such agent to state the *residence* of his principals, as the foundation of his right to act in the premises. In such cases the law is left as it was before the amendment of 1874.

2. ———. ———. **In Case of Several Petitioners.**—But although this is so, yet when there are several signers to the petition (although less than five) who do not, as in the case of partners, stand in the same right, it is not sufficient that there is a good verification by one of them; but the verification by or on behalf of each must be such that it would be sufficient if standing alone.

3. ———. ———. ———. **Case in Judgment.**—Tested by the foregoing, a verification in the following words is held insufficient, as being a verification by the first petitioning firm only, and no verification by the others:—"I, Samuel Heavenrich, being duly sworn says, that he is one of the firm of Heavenrich Bros., of Detroit, Michigan, and makes this affidavit in their behalf; that he is also agent for L. Morris, Dessar, Stern & Co., and Meyer & Schwab, and has full power and authority from them to make this petition—do hereby make solemn oath that the statements contained in the foregoing petition, by me subscribed, are true of my own knowledge, so far as the same are stated on my own knowledge, and that those matters which are stated therein on information and belief, are true according to the best of my knowledge, information and belief."

4. ———. ———. **Amendment.**—But in such a case the court has jurisdiction of the case, and may allow an amendment supplying a sufficient verification of the petition; which in this case is done, but upon payment of all costs.

On motion of respondent to vacate the order to show cause and dismiss the petition for want of a sufficient verification, and the cross-motion of the petitioning creditors to amend by supplying a sufficient verification.

By the twelfth section of the amendatory act of June 22, 1874, section 39 of the original act was, among other things, amended so as to provide that any person residing and owing debts, and committing any one of certain acts therein specified, shall be deemed to have committed an act of bankruptcy, and subject to conditions therein mentioned, "shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable. * * And the petition of creditors under this section

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may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And, if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers."

The petition in this case was filed July 11, 1874, by four creditors, who are described in the introduction of the petition as follows: "The petition of Simon Heavenrich and Samuel Heavenrich, doing business under the firm name of Heavenrich Brothers, of Detroit Michigan, in said district; of L. Morris, A. Dessar, Stern & Co., a partnership composed of A. Dessar, D. Stern, J. B. Dessar, and D. Dessar; of Meyer & Schwab, a partnership composed of Julius R. Meyer and Jacob Schwab, all of the city, county and state of New York." The petition is signed as follows:

HEAVENRICH BROTHERS,
Per Samuel Heavenrich.
L. MORRIS,
Per Samuel Heavenrich, agent.
DESSAR, STERN & CO.,
Per Samuel Heavenrich, agent.
MEYER & SCHWAB,
Per Samuel Heavenrich, agent.

The verification of the petition is as follows: "Eastern District of Michigan, ss:

"I, Samuel Heavenrich, being duly sworn, says that he is one of the firm of Heavenrich Bros., of Detroit, Michigan, and makes this affidavit in their behalf; that he is also agent for L. Morris, Dessar, Stern & Co., and Meyer & Schwab, and has full power and authority from them to make this petition, do hereby make solemn oath that the statements contained in the foregoing petition by me subscribed, are true of my own knowledge so far as the same are stated upon my own knowledge, and that those matters which are stated therein on information and belief, are true according to the best of my knowledge, information and belief.

SAMUEL HEAVENRICH."

"Subscribed and sworn before me this 11th day of July, A. D., 1874. JNO. GRAVES,

United States Commissioner for Eastern District of Michigan."

The grounds of the motion to vacate and dismiss are: 1st. That the affidavit does not show any authority in Samuel Heavenrich to sign and verify the petition for the last three petitioners named, because it does not state that they do not reside in this district; and 2d. That it is not in fact made on behalf of the said petioners.

On behalf of the petitioning creditors it was contended as to the first ground of motion, that even if the provision quoted applies to this case the statement of the residence of petitioners in the introduction of the petition is sufficient to confer the authority to sign and verify the petition by agent or attorney; but it was at the same time contended that the provision in question applies only where there are five or more petitioners, and that, in a case like the present, where the number is less than five, the law as to verification remains as it was before the amendment, and that by that law a verification by one of several petitioning creditors was sufficient. And as to the second ground of motion it is contended that it is sufficient to state that the person making the oath is agent and has authority to make the petition; and that in this instance the person making the oath, being himself one of the petitioners, his statement that the contents of the petition are true of his own knowledge, so far as stated upon his own knowledge, was sufficient, because what was stated upon the knowledge of all the petitioners was necessarily upon the knowledge of each one of them. While opposing the motion, however, a motion was interposed on behalf of the petitioning creditors to amend by annexing to the petition a new verification in case the verification shall be held insufficient.

Mr. Don M. Dickinson, for petitioning creditors; *Mr. H. M. Duffield* for respondent.

LONGYEAR, J.—By the amendatory act of June 22, 1874, (sec. 12), non-residence within the district in which the petition is to be filed is made the sole ground of the right or privilege to have the petition signed and and verified by agent or attorney; and I am of opinion that, in all cases coming within the purview of the amendment, such non-residence should be stated and sworn to in the affidavit by which the petition is verified, especially where, as in this case the residence of the petitioners is stated in the petition by way of description merely, and not by way of positive averment. But it is not necessary to elaborate this point, because I am of opinion that this case does not come within the purview of the amendment, so far as the matter of the verification of the petition is concerned. The language of the provision under consideration is: "And if any of the *said first five signers* shall not reside in the district," etc. The words "said first five signers" relate back to the next preceding sentence, viz.: And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, *if so many there be.*" If there be not so many as five, then certainly the provision can have no application, because it was not made, neither was it needed, for any such case. In all such cases the law was left as it was before the amendment. In the present case the petitioners are less than five in number, and therefore it was not necessary for the person verifying the petition as agent to state the residence of his principals as a foundation of his right to act in the premises. The sufficiency of the verification, then, must be tested by the law without reference to the provision in question.

The position of petitioners' counsel is that the verification is certainly sufficient as to one of the petitioners, viz, Heavenrich Brothers, and that a verification by one of several petitioners is sufficient (the whole number being less than five), and that it has always been so treated and held in practice. Such was my first impression, but upon reflection, and a somewhat critical search for decisions of the courts upon the question, I am satisfied that the position cannot be maintained where, as in the present case, the petitioners join in separate and distinct rights, and not in one and the same right as partners or otherwise. Where several petitioners join in the petition in the same right, the practice is, I believe, well settled, to treat a verification by one as sufficient, and no good reason is apparent why it should not be so. But the case of petitioners joining in separate and distinct rights is very different. There each stands as a separate and distinct party to the litigation, so far as the right in which he prosecutes is concerned. The debt, or right to prosecute of each may be contested separately from all the others. They are allowed to join in order to make up the requisite number and amount, but when so joined, the matter stands precisely the same as if each had filed a separate petition on his own separate debt, based upon the same act or acts of bankruptcy, and then consolidated into one suit; and a verification by or on behalf of each petitioner is just as necessary in the one case as in the other.

The only remaining question upon this branch of the matter, therefore, is, was the verification sufficient as to each one of the petitioning creditors? As to Heavenrich Brothers it was no doubt sufficient, and it was so conceded. As to the others, however, I think it was insufficient. True, Samuel Heavenrich, who signed the petition on behalf of the others as their agent, swears to his agency and to his authority "to make" the petition. This no doubt sufficiently establishes his authority to sign and verify the petition on their behalf. But the difficulty is, he utterly failed to so verify. His affidavit is not in terms, nor by any implication whatever, on behalf of any of the petitioners other than Heavenrich Brothers. On the contrary it is in terms, and by necessary implication, limited to them and them alone. In the first place he swore that he was a member of the firm of Heavenrich Brothers, one of the petitioners, and that he made the affidavit on their behalf; and then when he came to the substance of the verification he swore "that the statements contained in the foregoing petition *by me subscribed*, are true

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upon my own knowledge, *so far as the same are stated upon my own knowledge;* thus clearly limiting his verification to himself and his firm, and excluding any application of it to the other petitioners. There was, therefore, no verification whatever as to the three petitioners, Morris, Dessar, Stern & Co., and Meyer & Schwab, without which the order to show cause was not authorized.

It results that the motion of respondent must be granted so far at least as to vacate the order to show cause.

The only question remaining *is that arising* upon the motion on behalf of the petitioning creditors for leave to amend by supplying a sufficient verification. The solution of this question depends upon whether jurisdiction of the suit or matter depended upon there being a sufficient verification in the first instance. In *re* McNaughton (8 N. B. R., 44), this court held that jurisdiction was obtained by the filing of the petition, and that the verification of the petitioner, and the depositions of debt and of act of bankruptcy, were necessary only to obtain jurisdiction of the person of the alleged bankrupt by the process of the court, to wit: the order to show cause. See also *In re* Raynor, 7 N. B. R., 527. On a review of the grounds of judgment in *re* McNaughton, I still adhere to the opinion there expressed. It is true that decision was made before the recent amendments, but the amendments have not changed the law so far as it bears on the question now under consideration.

The language of the act both before and after the amendments (sec. 39) prescribing the means of acquiring jurisdiction, so far as relates to the petition, is, "shall be adjudged a bankrupt on the the petition of one or more of his creditors." Nowhere in the act nor by any rule or order, is any verification of the petition expressly required. Why, then, is a verification necessary at all? By some this question is answered by saying, because the Supreme Court have so indicated by the forms prescribed by them. But, in my opinion, that would be ascribing to the Supreme Court the exercise of an unwarranted power in the absence of anything in the act itself making a verification necessary. In my opinion the answer to the question is found in the provision of section 40, prescribing upon what showing an order to show cause may be made. That provision reads as follows: "That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause," etc. That "sufficient grounds exist" can be made "to appear" only by some sort of legal evidence; and by the prescribed forms the Supreme Court have, in effect, said what that evidence shall be, viz.: First, a verification of the entire petition, and second, depositions as to the alleged debt and act or acts of bankruptcy. The verification is no part of the petition. It is necessary that it should accompany the petition only in order to predicate upon it certain prescribed action in furtherance of the jurisdiction acquired by the filing of the petition, viz., the order to show the cause. The filing of the petition is mentioned in section 40 as *authorized* by the next preceding section as an accomplished fact, and then for the first time creates a necessity for a verification; and the commencement of proceedings is made to date from such filing. (Section 38.)

Therefore, having jurisdiction of the matter, notwithstanding the insuffiiciency of the verification, the court has power to allow the amendment asked. As no good reason appears why it should not be allowed, and as it does appear that a denial of the motion to amend and a dismissal of the petition would be a denial of the right of creditors to proceed at all by a new petition, for the reason that the six months' limitation within which a petition can be filed for the act of bankruptcy alleged has expired since the filing of this petition, I think the amendment ought to be allowed, and the same is allowed accordingly. But it must be upon terms of payment by the petitioning creditors of all costs upon the order to show cause hereby vacated and the costs of these motions, to be taxed, including a solicitor's fee of ten dollars.

ORDERED ACCORDINGLY.

Summary of our Exchanges.

The Western Jurist, for August, contains an interesting article on law schools, which we hope to find space to print hereafter. Also an article on The Liability of a Master for the Wrongful Acts of his Servant, by John Proffatt, Esq., taken from the Albany Law Journal. Also the recent bankrupt act, reprinted from the American Law Times.

It also reports Black v. Burlington, etc., Railroad Company, Supreme Court of Iowa, of which the following is the syllabus:

"1. While at the point a railroad crosses a public highway, a traveler with a team and a railroad train have equal rights, and both are required to use equal care, yet a traveler approaching a railroad crossing to which a train is drawing near, is required to wait the passing of the train.

"2. It is competent, in order to show want of care in running a railroad train, that it approached a highway crossing at a high rate of speed without giving signals or alarms, and a witness may be permitted to testify to such rate of speed of the train as observed by him when it was passing a point 900 feet from the crossing in the direction from which the train was approaching."

It also publishes Davenport v. The Chicago, Rock Island, etc., Railway Co., already published in this journal, with a note (*ante*, p. 385).

It also publishes Farmer's Loan and Trust Co. v. Maquillan, published in this journal for June 25 (*ante*, p. 315).

It concludes with a digest of decisions of the Supreme Court of Iowa, mostly relating to railway taxation.

The numbers of the Daily Register received during the past week, contain several interesting decisions of the General Term of the Supreme Court of New York, each one prefixed with a carefully prepared syllabus. In Kelty v. Long (published August 18), the court rule several points as to pleading where suit is brought against a married woman under the act of that state. We presume that it has only a local interest.

In Caldwell v. Commercial Warehouse Co. (published August 19), the court rule that the provision of a charter authorizing the taking of commissions for the custody of property is not to be used as a cover for usurious interest.

In the Dutchess Mutual Ins. Co. v. Hachfield (published August 20), it is ruled that a bond made payable in blank, with the addition of the terms "his executors, administrators and assigns" following the space left for the insertion of the name of the payee or holder, is negotiable under the mercantile law of that state; and that in an action brought to recover possession of such a bond that has been feloniously stolen from its lawful owner, the law, in order to vest the title in the buyer, requires no more than that he should show that it was purchased in good faith, for value, and in the ordinary course of business, and without notice or suspicion.

The following is the syllabus of Moores v. Gunt (published August 21): "Where articles that have been purchased in this state enter into the construction of a vessel built in a foreign state, no lien, that can be enforced as such, can arise by force of our state statute when the ship arrives within this state. It was not intended, by the act of 1862, to create liens upon vessels not within this state, and there incurring debts for the purposes mentioned in the act, and it is doubtful whether a state can enact that a lien which did not already exist shall arise or attach from the act of sailing into its jurisdiction.

The following ruling (published August 22) is made with reference to contracts procured to be made by a wife through fraud of her husband: The general rule in equity is that an act done or contract made under a mistake or ignorance of a material fact, is voidable and relievable in equity, and it is a well settled principle that an assignment of property by a wife to a husband, made in consequence of untrue representations which produce false impressions, is invalid. Neither is it necessary to find that the husband knew the representations to be untrue, as the intimate relations existing between husband and wife require the utmost good faith in all transactions between them, and any misrepresentation or concealment of a material fact, or any suspicion of undue influence, will justify the interference of a court of equity. This rule applies even where the leading motive on the part of the wife in making the assignment was an improper and unlawful one.

The Western Insurance Review, for August, gives in a condensed form a large number of decisions on insurance law. It also publishes the opinion of the New York Commission of Appeals (Lott, Com.) in Hand v. Williamsburg Fire Ins. Co. We do not know what the decision is about, as we generally conclude that a dscision that is not worthy to have a syllabus is not worth reading.

The Chicago Railway Review, for August 29, contains abstracts of a large number of exceedingly interesting decisions on railway law, by the Supreme Judicial Court of Massachusetts and other courts. These embrace the following subjects: Safety of railway crossings a question of fact for jury; removal of suits to United States Courts; liability of master for injuries of servant to wife of fellow-servant; liability of railway carriers for injuring horses; validity

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of subscriptions to stock; notice of arrival of freight—reasonable time for removal; injury to lands by badly constructed embankments; remedy of landowner for damages caused by railway company in making their track conform to level of street at crossing; release of damages by person of unsound mind; vendor's lien upon railway iron; loss of goods through felony of carriers' servants—quantum of proof; agent of common carrier—when risk commences; conveyance of land for depot building—location of depot; occupation by a railroad of public roads.

The Legal Intelligencer, for August 28, contains a number of interesting articles, among which we note the following, of the Supreme Court of Pennsylvania:

In Deer v. Greenawalt, a will was witnessed by two subscribing witnesses, and a blank was left for the name of the residuary legatee; this was afterwards filled up, but as the subscribing witnesses were not able to testify as to this fact: *held*, that as to the residuary devise, the will was not duly proved.

In Nippe's Appeal, the syllabus is that the conveyance by husband to wife of his interest in land subject to the lien for unpaid purchase-money, cannot be held to be fraudulent and void, no other creditors then having claims on the husband.

In Plymouth Manufacturing Company's Appeal, A. covenanted to convey to B by a "good and sufficient deed," a certain lot, "whenever the said building as aforesaid shall be erected and the business mentioned shall be in operation." *Held*, that the covenant was not a continuing one, and that the vendee was entitled to a deed free of conditions upon its performance; which right was not lost by a subsequent change of business and conversion of the building to other purposes.

The Legal Intelligencer also publishes Wells v. Cooper, English Common Pleas, of which the following is the syllabus:

1. It is in the discretion of the court to grant a new trial in a case where a person not impannelled has served upon the jury, and the court will not grant such new trial unless substantial injustice has been done by a wrong juror having served.

2. An action came on to be tried before a common jury, and the name of Thomas Fox, being on the common pannel, was called amongst others by the associate, whereupon one Thomas Cox, who was on special jury panel, went into the box by mistake, served upon the jury, and took part in the verdict, which was given for the plaintiff. The defendant alleged afterwards that Cox was a friend of the plaintiff, and had purposely, and in the interest of the plaintiff, tendered himseif as a juror, but this was denied by Cox in a letter written in answer to enquiries by the attorney of the plaintiff. *Held*, (by Keating and Grove, JJ.), that it was in the discretion of the court to grant a new trial, and a rule for a new trial discharged.

The Albany Law Journal, for August 29, contains a leader on the extradition of fugitives from justice, in which the editor shows that the lager beer clause of Massachusetts statute, may be made to reach a culprit under the very shadow of Yuba Dam. In an article on Liability of Express Companies, it discusses the rule laid down by Judge Ballard, in the case which we publish in this number, and shows that it is an innovation upon the rule established by a number of adjudications. It otherwise contains a large amount of interesting matter.

The Chicago Legal News, for August 29, publishes the opinion of Mr. Justice Davis of the Supreme Court of the United States, in Humaston v. The American Telegraph Co., in which it was held that where a company covenanted to pay for certain property a price to be fixed by arbitration, and prevented this mode from being adopted by revoking the submission, they could not take advantage of their own wrong, and deprive the plaintiff of the opportunity of showing to the court and jury what the value of the property was. The court states the rule for estimating the damages for a failure to deliver stocks according to contract.

Also an opinion of Judge McAllister, of the Supreme Court of Illinois at Columbus, in the case of The People *ex rel.* Smith v. Brown, holding that the Illinois statute of 1874, authorizing the state's attorney, *ex officio*, to file in the county court, without any proof of probable cause, an information in a criminal case, is unconstitutional, and is also unconstitutional so far as it authorizes criminal warrants to issue upon a charge unsupported by proof of probable cause, and in so far as it provides for a procedure entirely different from that in the circuit court.

It also concludes the publication of Judge William's opinion in the Cheney ecclesiastical case; prints an opinion of the attorney-generai of Illinois on equalizing taxes, and also notes of a number of interesting decisions.

The Washington Law Reporter, for August 25, publishes Doddridge v. Gaines, relating to new trials in the Supreme Court of the District of Columbia; also Luchs v. Jones, in which the following point is ruled: In case of the sale of real property under a deed of trust, the purchaser, as a matter of law becomes vested with the title, and if the person who executed the trust-deed remains in possession of the premises without any agreement to that effect, he becomes, by operation of the landlord and tenant act, tenant by sufferance to such purchaser, and, upon being notified to quit in thirty days, is liable to be turned out by proceedings under that statute.

It also prints the recent act of Congress for the protection of settlers upon railroad lands, together with rules established by the commissioner of the land office for proceeding thereunder.

The Pacific Law Reporter, for August 18, publishes without syllabus a number of decisions of the Supreme Court of California, relating to Ejectment, Pre-emptions, Taxation, Power of Legislature, and Void Assessment.

The Legal Gazette, for August 21, reports the decision of the Supreme Court of the United States in Baring Brothers & Co. v. Dabney, Morgan & Co. *et al.*, of which the following is the syllabus:

"In 1812, the Legislature of South Carolina created a state bank. In 1821, the future *profits* of the bank were directed to be set apart for the payment of certain stock issued by the state. In 1838 an act was passed authorizing the issue, in the name of the state, of certain fire-bonds, the faith and funds of the state being pledged for the payment of the same. The profits of the bank, after the payment of the first stock, was to be set apart for the payment of the interest on the fire-loan bonds, and the final redemption thereof. In 1865, the bank became insolvent, and in the same year an act was passed directing the president and directors to collect the assets of the bank and hold the same to be appropriated. 1st. To pay the principal and interest of the fire-loan bonds payable in Europe; 2d. Of those payable in the United States; and 3d. To the redemption of the outstanding notes hitherto issued by said bank. *Held*, upon a question whether this act was constitutional, 1. That the assets of the bank having arisen from its capital and its operations, they were not profits, and could not be applied for the purpose mentioned in the act. 2d. The fire-loan stocks and bonds, even when guaranteed by the bank, were debts of the state and not debts of the bank, and the legislature could not by law appopriate the assets of the bank for the payment of the debts of the state."

The Legal Gazette also has an exceedingly interesting account of the crisis which happened last winter in the Court of Appeals at Montreal, wherein the whole bar of that city withdrew from the court and refused to practice in it for the space of four months, on account of gross incompetency and partisanship of some of the judges. The Legal Gazette concludes its article as follows:

"The whole affair was extraordinary. Lasting, as it did, for some four months, the "judicial crisis" was the theme of the newspapers, the politicians, the lawyers and the public generally. The struggle was highly interesting, and had the excellent effect of accomplishing, at least partially, the object sought for. The action of the Montreal bar was a noble one, and the wholesome example it has set may be followed with profit in case any of our courts become a burden and a reproach to the community. The fact that such a state of affairs existed in a court where the judges were all *appointed*, might also be considered with profit by those who in the midst of our republican institutions, declaim against an *elective* judiciary, and cry out for an appointive one."

The Legal Gazette also publishes two local decisions and a number of Pennsylvania statutes.

The Legal Intelligencer, for August 21, reprints from the Albany Law Journal, that learned and interesting article of John F. Baker, Esq., of New York city, on the Legal Custody of Dead Bodies. It also publishes a number of interesting decisions, among which we note the following:

In Warwick v. Wah Lee, PIERCE, J., of the Philadelphia Common Pleas, holds that a Chinese laundry in a basement, so conducted as to injure the trade of a tradesman in the next story, may be such a nuisance that equity will interfere to prevent damage therefrom.

In McFerren v. The Mont Alto Iron Company, Supreme Court of Pennsylvania, we find the following "glittering generality" given as a synopsis of one of the points ruled: "Testimony irrelevant for one purpose, may be admissable for another."

In the same case it is also ruled that a party competent, prior to the passage of the Pennsylvania act allowing parties in interest to testify, is not rendered incompetent by that act.

In Bigony v. Tyson, the same court hold that a bond in $2000, conditioned that Dr. B. shall not practice medicine in a certain locality, is not to be considered as liquidated damages.

The case of Strong v. O'Donnell, decided by DANA, J., of the Common Pleas of Luzerne County, relates to the taxation of shares of national bank stock. The following is the syllabus:

"1. Shares of national bank stock are personal property.

"2. Those belonging to non-residents are separated by the acts of Congress

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from the persons of their owners for purposes of taxation, and are to be taxed at the place where the bank is located.

"3. The states may direct the manner and place of taxing the shares of resident owners, and the legislature of Pennsylvania not having separated such shares from the person of their owner, their *situs*, like that of other personal property, is at the domicil of their owner, and they are to be taxed in the town or city where he resides, not in that where the bank is located.

"4. To avoid multiplicity of suits, the court has jurisdiction to enjoin against the collection of an illegal and unauthorized tax.

See, upon the same subject, Tappan v. Merchants' National Bank, *ante*, p. 239.

In the Commercial Bank of Cleveland v. Simmons, in the United States Circuit Court, Northern District of Ohio, it is held by Mr. District Judge WELKER, that the plaintiff, a national bank, had the right to bring suit in the U. S. circuit court of the district where the bank was located upon two notes indorsed to it by the payee, who was also a citizen of the state and resident of the district; That a national bank does not sue by virtue of any right conferred by the judiciary act, but by virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter; that having no right to sue under the judiciary act, the limitation in the 11th section, as to suits on indorsed notes and choses in action, does not apply.

We recently published (*ante*, p. 232) an opinion of Mr. District Judge HOPKINS on the local jurisdiction of the federal courts in suits *against* national banks. It might be well to compare the two cases.

The Legal Intelligencer publishes the Oregon Steam Navigation Company v. Winsor, already published by us (*ante*, p. 350).

The Nashville Commercial Reporter, for August 20, publishes the case of Alexander v. Kelso, Supreme Court of Tennessee, Knoxville, 1872, in which the court discusses at length what constitutes an executor *de son tort*. The following points are ruled:

"1. If A. deposits with B. money to be kept by him for A., and A. dies, and B. pays the money out to a creditor, or to the widow of A., then B. is an executor of his own wrong; for the money is the goods of A. But if A. lends to B. the money, and B. pays it out after the death of A., to his creditor or widow, B. is not an executor *de son tort*, for he pays out his own money and not the money of A.

"2. A party sued as executor *de son tort* is a competent witness under the act of February 24, 1870, declaring parties to the record incompetent to testify where the suit is brought by or against an executor, etc. The provisions of the act applies only to rightful executors and administrators."

The same journal publishes Hale v. Hord, decided by the same court at the same term, where the court rule the following points:

"1. Since the passage of the code, unless objection is taken to the jurisdiction, a court of chancery will try an action of ejectment.

"2. A demurrer admits the allegations of the bill to be true.

"3. Under the code, 3907, a party has option to apply to the court in which a record is lost or destroyed, to have it set up and supplied, or he may, upon a proper case made out, have the record set up and supplied in a court of equity. Citing and modifying the case of Graves v. Keaton, 3 Cold. 12.

"4. The complainants claimed title under an elder grant issued upon an entry made in the entry-taker's office of Hawkins county, but the beginning corner was about one-half mile over the line in Green county, and the defendant's conflicting grant laid entirely in Hawkin's county. *Held*, That the complainants had a valid grant as to the land in Hawkins."

Notes and Queries.

LAMAR, BARTON COUNTY, MO., July 30, 1874.

EDITORS CENTRAL LAW JOURNAL:—The act of the general assembly of Missouri, approved March 25th, 1874, entitled "An act to prevent non-residents of the state from herding or grazing their cattle on certain lands in this state," is a matter of much importance to us in this part of the state, but we fear it is unconstitutional. Can you refer us, through your columns, to any authority, pro or con? Yours, etc. R. B. R.

ANSWER.—We cannot. Perhaps some of our readers can.

RULO, NEB., August 18, 1874.

EDITORS CENTRAL LAW JOURNAL:—Please publish, in your valuable journal, a course of study for a law student reading in an office.

Yours, truly, J. M. C.

ANSWER.—Would recommend the student to give half his time to office work, copying, conveyancing, etc., and to reading, the first year, books, in the following order: Bishop's First Book of the Law; Walker's American Law; Blackstone's Commentaries; Kent's Commentaries; Starkie's Evidence, 1st volume; Stephen's Pleading; Smith on Contracts; Bispham's Equity.

Legal News and Notes.

—CHIEF JUSTICE DAILY, of the Common Pleas, of New York city, and president of the American Geographical Society, attended the recent anniversary dinner of the Royal Geographical Society in London, and was treated with marked consideration by the officers and members.

—ONE of the new rules of the post office department instructs postmasters that they must not allow postal cards to be used for abusive or obscene purposes, *but postmasters are not expected to read them all to see what is on them.* The violation of this rule renders them unmailable, but should they reach their destination through inadvertence they can only be delivered upon payment of six cents postage, the double-letter rate, deducting the one-cent stamp therefrom.

—THE Cleveland Leader considers the opposition to the new constitution of Ohio to have been: all corporate companies, on account of the restrictions proposed by it upon them in several respects; all county and little local rings holding "soft things" which the new instrument threatened to take away; the catholic voters; radical temperance people, who opposed the whole in order to make the more sure of defeating local option; "the idiotic vote cast for license and against the constitution;" the democratic dislike to an instrument framed by a convention authorized by a republican legislature. For whatever reason, the defeat of the measure is much to be regretted.

—A SPRINGFIELD special dispatch, 19th, to the St. Louis Republican, says that Judge Treat, of the United States Court, on that day issued the expected *mandamus* commanding the board of supervisors to levy a tax of 1¾ per cent. on all the taxable property in the county to pay the judgments obtained against the county for past-due interest on the bonds issued to build the court-house. It will be remembered that a previous *mandamus* from the same court was disregarded by the county board, and that the supervisors were fined $1,000 each for contempt, which they paid out of the county treasury.

—THE NEW REGULATIONS FOR THE ISSUANCE AND HOLDING OF PATENTS.—The new law relating to patents, trade-marks and copyrights, provides that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published in the title page immediately following, if it be a book; or, if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statute, statuary or model, or design intended to be perfected and completed as a work of fine art, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words: "Entered according to the act of Congress, in the year ——, by A. B., in the office of the librarian of Congress, at Washington," or, at his option, the word "copyright," together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18—, by A. B." For recording and certifying any instrument of writing for the assignment of a copyright the librarian shall receive from the person to whom the service is rendered $1, and for every copy of an assignment $1, said fee to cover in either case a certificate of the record, under seal of the librarian of Congress, and all fees so received shall be paid into the treasury of the United States. In the construction of this act the words "engraving," "cut" and "print" shall be applied only to pictorial illustrations, or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the patent office. The commissioner of patents is charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except there shall be paid for recording the title of any print or label not a trade-mark $6, which shall cover the expense of furnishing a copy of the record under the seal of the commissioner of patents to the party entering the same. This act is to take effect on and after the 1st day of August next.

THE LAWYERS OF ANCIENT ROME.—All the civil magistrates were drawn from the profession of the law. The celebrated Institutes of Justinian were addressed to the youth of his dominions who had devoted themselves to the study of Roman jurisprudence; and the sovereign condescends to animate their diligence by the assurance that their skill and ability would in time be rewarded by an adequate share in the government of the republic. The rudiments of this lucrative science were taught in all the considerable cities of the East and West; but the most famous school was that of Berytus, on the coast of Phœnicia; which flourished above three centuries from the time of Alexander Severus, the author, perhaps, of an institution so advantageous to his native country. After a regular course of education, which lasted five years, the students dispersed themselves through the provinces in search of fortune and honors; nor could they want an inexhaustible supply of business in a great empire already corrupted by the multiplicity of laws, of arts, and of vices. The court of the Prætorian præfect of the East could alone furnish employment for one hundred and fifty advocates, sixty-four of whom were distin-

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gui shed by peculiar privileges, and two were annually chosen with a salary of sixty pounds of gold, to defend the causes of the treasury. The first experiment was made of their judicial talents, by appointing them to act occasionally as assessors to the magistrates; from thence they were often raised to preside in the tribunals before which they had pleaded. They obtained the government of a province; and, by the aid of merit, of reputation or of favor, they ascended, by successive steps, to the *illustrious* dignities of the State. In the practice of the bar, these men had considered reason as the instrument of dispute; they interpreted the laws according to the dictates of private interest; and the same pernicious habits might still adhere to their characters in the public administration of the State. The honor of a liberal profession has indeed been vindicated by ancient and modern advocates, who have filled the most important stations with pure integrity and the most consummate wisdom; but in the decline of the Roman jurisprudence, the ordinary promotion of lawyers was pregnant with mischief and disgrace.

The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into the hands of freedmen and plebeians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fermenting differences, of encouraging suits, and of preparing a harvest of gain for themselves or their brethern. Others, recluse in their chambers, maintained the dignity of legal professors by furnishing a rich client with subtleties to confound the plainest truths, and with arguments to color the most unjustifiable pretensions. The splendid and popular class was composed of the advocates, who filled the forum with the sound of their turgid and loquacious rhetoric. Careless of fame and of justice, they are described for the most part as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment; from whence, after a tedious series of years, they were at length dismissed, when their patience and their fortune were almost exhausted.—[*Gibbon.*

—THE Missouri democratic state convention has nominated for judges of the supreme court, Hon. William B. Napton of St. Louis, and Warwick Hough, Esq., of Kansas City. Judge Napton is at present one of the members of the Supreme Bench of Missouri, to which position he has been called for the third time after successive retirements. He was first elected to that position in 1839, and continued a member of the court until 1851. Again in 1837 he was returned to the same position, and continued in it until 1862. He was re-appointed in 1873 to fill the vacancy occasioned by the death of Judge Ewing. His renomination at this time (which seems to have been made without opposition) is a just tribute to his unquestioned integrity, his experience, his extensive learning and solid ability as a jurist. One thing in connection with Judge Napton's renomination deserves notice. His opinion in the Clark county bond case, published in the first issue of this journal (*ante*, p. 5), was severely and unscrupulously denounced by some of the rural press; and it was thought that the granger element in his party would prevent his renomination. But the good sense of the people seems to have settled into the conclusion that he had simply reaffirmed principles established by his predecessors and by the Supreme Court of the United States, and that an honest judge could have done no less under the circumstances. Mr. Hough is about forty years of age. He was admitted to the bar in 1859 at Jefferson City. He is well spoken of by those who know him.

—THE Albany Law Journal, referring to the disgraceful conduct of the dominant party in New Hampshire, uses the following just language: "The recent judicial changes in New Hampshire, which resulted in displacing Judges Doe, Sargent and Smith from their positions in the highest court of the State, were, to say the least, of doubtful expediency and propriety. If political reasons governed in making the change, as has been stated, the act is positively disgraceful to the dominent party in New Hampshire. We have always depreciated any attempt at making political qualifications a criterion in the selection of judicial functionaries. And it is especially deplorable in our view to make political considerations alone an excuse for the removal of judges whose ability, learning and integrity are beyond question, and unsurpassed. Without disparagement, it may be said that Judge Doe is one of the most learned and indefatigable jurists who have adorned the bench of this country for many years. His opinions exhibit the utmost research and elaboration, and his work shows him to be wedded to a purely judicial life. His removal is a loss not only to the judiciary of New Hampshire, but to American jurisprudence."

—THE laws passed during the last session of Congress have been put in type, and press-work will be begun as soon as the index, now preparing at the state department, is ready, which will be in a few days. The laws are unusully long this session, and judging from the many calls for them from all parts of the country, are unusually important.—[*Albany Law Journal.*

—HON. ASHAEL PECK, judge of the Supreme Court of Vermont, has just been nominated by the republicans for governor of that state.

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

Attestation of Will—Signature of the Testator.—Sir JAMES HANNEN, in the case *re* Elizabeth Maddock (30 L. T. Rep. N. S. 696), decided a question of general interest to testators. The testatrix executed her will by making her mark at its foot, in the presence of two witnesses. Of these witness, one signed his name in due form; the other, an old man, named Samuel Birtwistle, wrote "Saml." but could not complete his signature owing to infirmity. This not being deemed sufficient another witness was sent for. He signed the will, whilst the first witness simply went over the signature he had previously written with a dry pen. The learned judge proposed two questions for decision: first, whether the second attesting was a valid attestation; secondly, whether the first attesting was a valid attestation? The first question was solved in the negative by Playne v. Scriven (Robert. 772). On the second question the judgment went more into details. The rule of law is, that "if a witness makes any mark with the intention thereby to subscribe, that is sufficient." Thus it becomes a question of intention. The learned judge expressed approval of the rule laid down in Charlton v. Hindmarsh (8 H. of L. Cas. 160), and thought it essential that the act intended as a subscription should be completed. This rule, hard as it may sometimes work, has received the approval of Lord CAMPBELL, Lord CRANWORTH, and Lord CHELMSFORD. From their lordships' remarks, it is evident that they were fully aware that such a rule might afford examples of the maxim *summum jus summa injura*, and such was the case in *re* Elizabeth Maddock; for it was held, that as the act which the witness intended to perform was not complete, the will was not duly attested.—[*Law Times.*

Will—Devise in Pursuance of Power.—Where a will is made by virture of a power in a trust deed authorizing an appointment to such person or persons as the devisor should appoint, devising real estate to A. for life, and the remainder in fee after A.'s decease, to the "heirs of A.'s body:" *Held*, that such appointment is valid, and in conformity with the terms of the power. Butler v. Huestis, 6 Chicago Legal News, 381; Supreme Court of Illinois.

———. ———. **Appointment of a Less Estate than Authorized**—Where a party has the power to appoint a fee, if there are no words of positive restriction, a less estate may be appointed. The appointment of a less estate than the donee might have created under the power is not thereby rendered void. But where an appointment is to be made of a particular estate, or in a certain manner and in no other way, the negative words must control, and the donee is not permitted to appoint a different estate, or in any other manner. Ibid.

———. ———. ———. Under a power authorizing the appointment of an estate in fee simple absolute, an appointment of a freehold estate for life to one person, and of the remainder in fee to the "heirs of the body" of that person, is valid, there being no negative words restricting such an appointment. But if the appointment to the "heirs of the body" was void, because not made to persons in being, no reason is perceived why the lesser estate may not be maintained. Ibid.

———. **Interpretation.—"Heirs of the Body."**—The words, "heirs of her body," used in this will are to be construed not to be words of limitation, but of purchase, and equivalent to children or issue, and are *descriptio personarum*. Ibid.

———. ———. ———. Prior to the statute *de donis*, the estate given in this will to the life-tenant would have been a conditional fee, to which on the birth of children, the right of alienation would attach. Since that statute, it is an estate tail, and in case of the death of the life-tenant, without "heirs of the body," it would revert to the donor, his heirs or appointee. But in Illinois, by virtue of the 6th section of the conveyance act, the rule in Shelley's case does does not apply to an estate tail; a life-estate only passes to the first taker, or life-tenant, and a fee-simple absolute vests in the second taker. Ibid

———. **Estates Tail.**—The estate devised in this suit was an estatetail, but by force of the Illinois statute the entail is saved in the first degree. So far as estates tail are concerned, the rule in Shelley's case is repealed by the Illinois statute. Ibid.

Wife's Mortgage—Foreclosure.—Where a mortgage is given by a wife to an individual member of a firm, to secure any indebtedness that might arise in the course of a commission business carried on by her husband, and where, between the partners of the firm, it is understood and agreed that the one to whom the mortgage has been given shall assume the accounts of the goods consigned to the husband, in an action to forclose, it is error on the part of a referee to refuse judgment on the ground that the goods (from the sale of which the action arose) were consigned by the firm, when the evidence showed that the consignment was made by the individual partner alone. Wood v. Lockwood, New York Supreme Court, General Term, May, 1874.—[*Daily Register, Aug. 14.*

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, THURSDAY, SEPTEMBER 10, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

OBITER DICTA.—It is often difficult to separate matter of dicta from matter of judgment. Whoever has attempted to should construct head notes to adjudged cases, which in general embrace only the points in judgment, has frequently experienced this difficulty. In Starr v. Stark, decided by the U. S. Circuit Court for Oregon, in May last, Mr. Circuit Judge SAWYER asserts the proposition that where the record fairly presents two points upon the merits of the case, upon either of which the appellate court might rest its decision, and the court actually decides both, without indicating that it is intended to rest the judgment upon one rather than on the other, the decision upon neither can be regarded as *obiter*. The same principle was asserted by Mr. Justice NAPTON of the Supreme Court of Missouri, in Kane v. McCown, *ante*, p. 114.

BANKRUPT ACT—IMPORTANT RULING BY JUDGE LONGYEAR.—In the matter of William Buchanan, an alleged bankrupt, the petition was filed in the United States District Court for the Eastern District of Michigan, on the 4th of February, 1874. No one appeared in opposition to the said petition, and the matter was adjourned from time to time, and finally came up for hearing on the 3d instant, on motion of *John J. Speed* for an adjudication of bankruptcy, he maintaining that, under the ruling of District Judge HILL, of Mississippi, the petition need not be amended to conform to the provisions of the amendment made to the bankrupt law, approved June 22, 1874, unless objection is made by the alleged bankrupt. Judge LONGYEAR denied the motion on the ground that he did not consider the court authorized to adjudicate upon a petition for adjudication of bankruptcy filed since December 1, 1873, not made in conformity with said amendment.

COVERTURE AS AN EXCUSE FOR CRIME.—The Beecher investigating committee got slightly off the track when they enunciated the following as a proposition of law: "It is a principle of the common law that a married woman cannot commit or be held to commit a crime perpetrated in the presence of her husband, and this upon the idea that the husband's presence and influence amount to duress, and that she is, therefore, not responsible." The learned counsel of the committee, who no doubt inspired this sentence, must have quoted it from memory. If he had taken the trouble to open the first volume of Bishop's Criminal Law, 5th edition, §§ 362 *et seq.*, he would have found the following propositions enunciated and supported by the citation of numerous authorities: "Whenever the wife, being in the presence of her husband, is presumed to act under coercion, the presumption is only a *prima facie* one, which may be rebutted by evidence. * * * It follows that whatever the offence may be, the wife, like any other person, may be proceeded against jointly with her husband in the same indictment, and she can rely on the coercion only when the proofs are adduced at the trial."

LIABILITY OF EXPRESS COMPANIES—JUDGE BALLARD'S RECENT DECISION.—Whilst the question of the propriety of the rule laid down by Mr. District Judge BALLARD, in Bank of Kentucky v. Adams Ex. Co., published in our last issue, as to the liability of express companies for the loss of property in railroad accidents, where the common law liability is limited by stipulations in the receipt or bill of lading, continues fresh in the minds of our readers, the following remarks of the Albany Law Jouraal, having reference to shis particular case, will no doubt be read with interest:

In Christenso v. The American Express Company, 2 Am. Rep. 122 (15 Minn. 270), the liability of express companies in case of restriction in the receipt given by them was considered. The facts of this case were these: The defendants were an express company engaged in transmitting from place to place goods for hire, having at different points local agents whose duty it was to receive goods transmitted and deliver the same to the consignee, as well as to receive goods for transmission, having no vehicles or other means of transportation except at their local offices for local purposes, but transmitting goods in charge of their messengers, by steamboats, railroads, coaches, etc., owned and controlled by other parties. Plaintiff's agent delivered to them goods for transportation, taking a receipt, in which it was stipulated that the defendants were not to be liable for any loss or damage except as forwarders only. Nor for perils of navigation and transportation. The steamboat on which the goods were being transported, in consequence of the negligence of those in charge, ran upon a snag and was sunk, thereby injuring the goods. In an action to recover the damages, held that the defendants were common carriers, not forwarders, and as such were liable for the loss, notwithstanding the terms of the receipt which could not cover loss arising from negligence. The rule that express companies, who forward, goods from place to place for hire, in conveyances owned and managed by others, are common carriers and liable for negligence (even where the receipt restricts the liability) in themselves or in the agencies which they employ to transport goods and packages, seems to be supported by the following additional cases. Hooper v. Wells, Fargo & Co., 27 Cal. 11; Lowell Wire Fence Co. v. Sargent, 8 Allen, 189; Sherman v. Wells, 28 Barb. 403; Baldwin v. American Express Company, 23 Ill. 198; 26 id. 504; Read v. Spaulding, 5 Bosw. 395; Haslam v. Adams Express Co., 6 id. 235; Sweet v. Barney, 23 N. Y. 335; Verner v. Sweitzer, 32 Penn. St. 208; Southern Express Co. v. Newby, 36 Ga. 635. In Sweet v. Barney, *supra*, it was said that "it is conceded that the liability of a carrier begins with the receipt of the goods by him, and continues until the delivery of the goods by him, subject to the general exceptions. And an express carrier is bound to deliver goods at their destined place to the consignee, or as the consignee may direct." That a carrier cannot discharge himself from liability for the consequences of his own negligence, or that of his agents, is established by the following cases: Grace v. Adams. 1 Am. Rep. 131, and note; Ashmore v. Pennsylvania Steam Towing Co., 4 Dutch. 180; Davidson v. Graham, 2 Ohio St. 131; Camden & Amboy Railroad Co. v. Baldauf, 16 Penn. St. 77; Pennsylvania Railroad Co. v. McCloskey's Administrators, 23 id. 526.

From these cases the doctrine may be deduced that an express company, even in case of a restricted liability contained in the receipt which it gives for a package, is not exempt from liability where the loss occurs in consequence of the negligence of the railroad or steamboat company which it employs to transport the package, although the package may be in charge of the messenger of the express company traveling on the cars or the steamboat, and although the express company may have no control over the railroad or steamboat company.

FORMER ADJUDICATION—ESTOPPEL—TITLE TO REAL ESTATE.—Every practising lawyer knows the perplexing questions which arise in respect to when former decrees and judgments are a bar to another suit, and has, perhaps, often invoked or combated the doctrine asserted in La Guen v. Gouverneur, 1 Johns. Cases, 492, where it is said: "The principle, however, extends farther. It is not only final as to matter *actually determined*, but as to every other matter which the parties might *litigate in the cause, and which they might have had decided.*" And this general principle is repeated in similar language in many subsequent cases.

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In the recent case of Starr v. Stark, in the Circuit Court of the United States for Oregon, Mr. Circuit Judge SAWYER examines this subject with his usual learning and ability, and reaches the conclusion that this general language must be restrained by a consideration of the facts of the cases in which it is used or adopted. The case just mentioned affords an interesting illustration of the tendency of courts in recent times to limit estoppels to cases where the exact point was in issue in the former suit, or failed to be litigated through the *negligence* of the party bringing the subsequent action. The facts were these: Starr, being in possession of certain lots in Portland, Oregon, filed a bill in chancery against Stark to determine an adverse claim of title by the latter, in which the complainant, as one ground of relief, alleged title derived to himself through a United States patent to the City of Portland, and that defendant claimed title adversely under a subsequent patent to himself. And, as another ground of relief, that the legal title was in defendant under his said subsequent patent; but, that through certain transactions set out, complainant had the equitble right, and was entitled to a conveyance of said legal title. The court, upon motion of defendant, held that the two grounds of action were inconsistent, and could not be litigated together in the same action, and required complainant to elect upon which he would proceed, and omit the other; whereupon, complainant, after excepting to the ruling and order, elected to rely on the first, and withdraw the second. A decree having been rendered in favor of complainant, on the cause of action retained, which was affirmed by the Supreme Court of Oregon, it was finally reversed by the Supreme Court of the United States, on the ground that the patent to the city was void, and the bill subsequently dismissed in pursuance of the mandate of that court. Complainant, then filed a second bill, alleging the equitable title before set up in the first, and withdrawn in obedience to said order of the court, and prayed a conveyance of the legal title. On these facts it was held, and as it seems to us properly, notwithstanding the dissent of the very learned district judge, that the proceedings and decree in the former action were not a bar to the second action.

Commenting on the case of La Guen v. Gouverneur, *supra*, SAWYER, J., says: "The principle is, that an end should be put to litigation; that parties should not litigate their rights by piece-meal; that they are bound to be diligent, and when called upon to litigate their claims they ought to present all they have to say, and that it is *negligence* to omit anything within their knowledge which might be available; and, if an omission is made, the consequences must fall upon the *negligent* party. *Negligence of the party himself is the main element of the principle upon which the rule is founded.*"

The Forum — Newspaper Credits.

We have received the following communication from the learned editor of the Forum:

In your notice of the Forum in your valuable journal, for August 20, I think you make a slight mistatement. The greatest object of the review is to publish the most recent cases of importance or interest *as soon as delivered*, and not take them from the latest published reports. With this view we have either the state reporter or some one resident at the state capital, to report them, and if you publish any of the same cases, especially from your state, it occurred from the fact that your journal being weekly and enterprising, gets the cases as soon as delivered, as we do. We will give you credit whenever we take anything from the "CENTRAL." For instance, we give the case of Lewis v. Balto. & Ohio R. R. Another law journal publishes it, and it reached us before our July number came out, but then we had the case reported long before it appeared at all in any place.

"We must also differ with you about arranging our cases by subjects instead of by states. If one desires to see what was decided in his state, without regard to subjects, he has them before him, if he is looking up a particular subject. The index in the back arranges them from all the states. In the way you propose, one in order to find out what his state decided, would have to look circumspectly over the entire abstract of 20 or 30 pages."

In our notice of the Forum, here referred to (*ante*, p. 421), we had reference to *abstracts* of decisions, and not to cases reported in full. We said: "We recognize many of these abstracts of decisions as being taken from current legal periodicals, where they are published in full. The editor of the Forum would greatly enhance the value of such by quoting the periodicals from which they are taken, since, in many instances, his readers will want to see the case in full. Besides, this would enable him to give the credit usual among journals in such cases." The above communication of the editor of the Forum renders it perhaps proper that we should particularize. On page 150 of the Forum, for July, is an abstract of the very able decision of the Supreme Court of Michigan in People *ex rel.* Sutherland v. Badgley. This abstract is the syllabus of the case written by Mr. Justice COOLEY and furnished this journal and published by us in our issue of June 18 (*ante*, p. 299). It is not unlikely that the Michigan State Reporter may have sent this case to the Forum, with the same syllabus. But the next abstract is that of the decision of Mr. District Judge WITHEY in Warren v. Ives, published in this journal for June 25 (*ante*, p. 312). This abstract is also the syllabus of the case, and was drawn by one of the editors of this journal. We recognize an abstract on the next page of the Forum, case of Viser v. Scruggs, as being the syllabus of the case as published by us in our issue for June 25 (*ante*, p. 313). This syllabus was furnished us, together with the case itself, by Mr. Justice SIMRALL of Mississippi. It is not unlikely that he may have furnished it also to the editor of the Forum. The next abstract in the Forum is that of Kellogg v. Milwaukee and Saint Paul Railroad Company. This case was reported especially for this journal, and the abstract in the Forum was written by one of the editors of this journal. The next abstract in the Forum (p. 153) is that of Taylor v. Steamboat Commonwealth. This is the syllabus of the case as published in full in the Chicago Legal News for July 11 (p. 334). It was written by the editor of that paper. Passing on to page 158 of the Forum, we find an abstract of Udderzook's case, decided by the Supreme Court of Pennsylvania. This is the syllabus of the case as published in our issue of July 16 (*ante*, p. 352). It was written by one of the editors of this journal. On the next page we find an abstract of People's Ins. Co. v. Kuhn, Supreme Court of Tennessee. This is the syllabus of the case as published in this journal for April 30 (*ante*, p. 214). It was prepared for us by Hon. J. O. PIERCE of Memphis.

These and other instances which we might give, will serve to show what was in our minds at the time we wrote the passage above quoted. We do not wish to be understood as assuming the attitude of sticklers for newspaper credits. We simply desired to throw out a friendly suggestion to the editor of the Forum, which he might turn to the advantage of his readers, and which might incidently be a benefit to us.

—THE common law may be called the severity of one remedial system; fiction is the cowardice of the law, and equity is the justice of the law.

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Bankrupt Act—Discharge—Proportion of Assets to Debts.

Mr. District Judge BLATCHFORD, in *re* Franke, has recently decided the point that in bankruptcy proceedings, commenced prior to the 31st day of December, 1873, and subsequently to the 1st day of January, 1869, and where all the debts proved against the bankrupt's estate where contracted subsequently to the 31st day of December, 1868, and where application for discharge is not made until after the passage of the act of 1874, the right of the bankrupt to his discharge is subject to the (now repealed) acts of July 27, 1868, and act of July 14, 1870, and that his estate must pay fifty per centum of the debts proved against it, unless a majority of the creditors consent to his discharge. In other words, he holds that section 9 of the act of 1874 is not retroactive, and does not control the bankrupt's right to a discharge in cases which otherwise are subject to the restrictions of the act of 1868 and the act of 1870.

The facts of the case, as stated in Judge BLATCHFORD'S opinion, are as follows: Charles J. Franke, Jr., and Charles F. Franke, were adjudged bankrupt, as co-partners by the court, on the 28th of June, 1872, on a petition filed against them. They appeared and filed a written consent to an adjudication. A warrant was issued, and the first meeting of creditors was held on the 2d of August, 1872. On that day thirty creditors proved their debts. An assignee was elected by the votes of twenty-seven of these. On the 19th of September, 1872, the bankrupts filed their sworn schedule of debts and assets. On the 23d of July, 1874, and not before, they filed a petition for discharge. By the 24th of July, 1874, forty-four creditors had proved their debts. The hearing of the petition for discharge was fixed for the 18th of August, 1874. No creditors appeared to oppose a discharge. The assignee has received moneys belonging to the estate to the amount of $9,996.22. It was not shown that the assets of the bankrupts were equal to fifty per cent. of the claims proved against their estate, upon which they were liable as principal debtors, nor was it shown that the assent in writting of a majority in number and value of their creditors, to whom they had become liable as principal debtors, and who had proved their claims, was filed at or before the time of the hearing of the application for the discharge. According to the schedule, all of the debts were contracted after the 31st of December, 1868. Notwithstanding these facts the register certified that the bankrupts had conformed to their duty under the act of Congress passed in 1867.

According to the act of 1868, no discharge could be granted to debtors whose assets were not equal to fifty per cent. of the claims proved against their estate upon which they were liable as the principal debtors, unless the assent in writing of a majority in number and value of their creditors, to whom they shall have become liable as principal debtors, and who shall have proved their claims, be filed at or before the time of hearing the application. By the first section of the act of July 14, 1870, it is declared that the provisions of the second clause of the thirty-third section of said act of 1867, as amended by the first section of the act of 1868 shall not apply to those debts from which a bankrupt seeks a discharge which were contracted prior to the 1st of of January, 1869. "The requirements of the act of 1868," said the learned judge, "apply to all proceedings in bankruptcy commenced after the 1st of January, 1869, whether the petition be one filed by or against the debtor. Under these requirements the right to discharge in this case is not shown; but the certificate of the register implies that it is supposed that because this is a case of compulsory or involuntary bankruptcy, discharges may and must under the act of June 22, 1874, be granted without a compliance with the requirements of the act of 1868."

Judge BLATCHFORD has written a lengthy and elaborate opinion on these points, holding that the provisions of the act of 1868 must be complied with before a discharge in bankruptcy can be obtained, and the decision of the register in bankruptcy is overruled.

The Administration of the Law in the South.

The Washington Chronicle, a journal whose political bias certainly would not lead it to draw too strong a picture of this question, thus discusses the manner in which justice is administered in the courts of South Carolina:

From every indication it seems evident that not only in the administration of the affairs of the state, but in the execution of laws and the trial of causes in court, South Carolina is in an unusually unfortunate condition. Serious charges are openly made against the judges and officers of court, and it is said that it is impossible to obtain a just verdict from a jury, and if one is obtaincd the court fails to execute it. The juries are largly sclected from the colored people. Many of them are honest, and desirous to do their duty conscientiously, but ignorant of the most ordinary rules of business, and without any knowledge of law whatever, or any experience in the business transactions of life. It is no uncommon thing, correspondents report, to find half the jury asleep, and in the courts the testimony and arguments are frequenly interrupted by the judge ordering the sheriff to wake up those jurymen. If the judge has not had his dinner, or if having it, it sits heavily upon his stomach and he feels gengenerally annoyed, he sometimes breaks out, after a short stock of patience is exhausted: "Mr. Sheriff, wake up them niggers!"

It is evident that where emancipated slaves are permitted to sit as jurors, a stringent jury law is needed, discriminating closely as to intelligence. We remember a case tried before the late Judge HUDSON, of the Criminal Court of Memphis, where a colored man maliciously pushed a white man off a fishing.boat, and drowned him. The body sank to rase no more, and was not afterwards recovered. This was seen by several witnesses; but a colored jury gravely acquitted the prisoner, on the ground that the *corpus delicti* had not been proven. Through the ignorance of jurors (and even of judges) in some of the Southern states, the administration of justice has become the grossest farce. The constant failure of justice has broken down the confidence of intelligent people in the judicial tribunals; mob law is hence invoked and encouraged, and the very ends of government are defeated.

There can be no excuse, however, for the failure to enfore the law in those states where the blacks are not predominant, and where the entire administration of the law is in the hands of the whites. We have had instances of mob violence in Missouri, which would be a reproach to savages, and the feeble and cowardly efforts of the authorities to punish them, have been humiliating in the last degree. We will let the Louisville Courier-Journal, which has no interest in misrepresenting its own state, tell how the law is enforced in Kentucky.

The law against the carrying of concealed weapons is a dead letter. Every coward and bully goes armed. Every case of manslaughter goes unpunished. Every case of shooting with intent to kill passes by as an amusing episode, provided there is no funeral. Even the most atrocious, cold-blooded, deliberate, malignant, dastardly assassinations have left no mark on the statute-books except the mark of acquitals purchased by money or intimidation. Red-handed murderers roam at large among respectable people. Red-handed

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murderers occupy places of responsibility and trust. * * * There are at this moment fifty cases of homicide on our criminal docket, which ought to be recorded as murder cases, where the defendant is at large on bail, with the least possible danger of an adverse result. There are five hundred cases of petty shooting, with intent to kill, which will never come to trial. * * * In a word, there is no security for life, because no law for those who take it, in Kentucky, and has not been this many a year.

Any attempt to cure this state of things will be futile, unless the causes which have produced and which perpetuate it are first ascertained. These causes are two-fold: one for which the *people* are responsible, and the other for which the *courts* are responsible. So far as the responsibility of the people is concerned, it may be summed up in the simple statement that the popular difficulty in the way of preserving the peace and preventing crime consists in the fact that the law breakers are too numerous and too bold, and the law-abiding too few and too cowardly. So far as the responsibility of the courts is concerned, we may point to the fact that as early as 1822, the Court of Appeals of Kentucky, decided in Bliss v. Commonwealth, 2 Littell, 90, that a statute prohibiting the carrying of *concealed* weapons was unconstitutional; and although this rule has, within a comparatively recent period, been changed in Kentucky, under a different constitution (Hopkins v. Com., 3 Bush, 480; Cutsinger v. Com., 7 Bush, 362), yet it existed for more than a generation, during which time the popular habit of carrying weapons had become inveterate. Since the late war the same court has, in a series of decisions, enunciated the extraordinary and startling doctrine that a man whose life has been threatened by another may kill his adversary "on sight," whenever and wherever he may chance to meet him. Phillips v. The Commonwealth, 2 Duvall, 328; Carico v. The Commonwealth, 7 Bush, 124; Bohannon v. The Commonwealth, 8 Bush, 481. There may be extraordinary occasions and conditions of society where such a principle ought to be applied, but it is our deliberate judgment that society can have no peace wherever, as a general principal of law, such a rule is suffered to prevail.

Right of Recovery where Money is Paid on a Raised Check.

ESPY v. FIRST NATIONAL BANK OF CINCINNATI.

Supreme Court of the United States, No. 195, October Term, 1873.

Right of Bank to Recover Money Paid by Mistake on Raised Check—Effect of Bank Officer Pronouncing Such Check "Good."—A check drawn by S. and M. on the bank for $26.50, in favor of H., was raised to $3,920, and the payee's name changed to E. H. & Co., and offered to the latter by a stranger in payment for bonds and gold purchased by him. E. H. & Co. sent the check for information to the bank; whose teller replied "it is good," or "it is all right." In a suit brought by the bank against E. H. & Co. a judgment was given for plaintiff. On error to this court it was held:

1. That where money is paid on a raised check by mistake, neither party being in fault, the general rule is that it may be recovered back as paid without consideration.

2. But that, if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss.

3. That where a party to whom such a check is offered sends it to the bank on which it is drawn, for information, the law presumes that the bank has knowledge of the drawer's signature and of the state of his account, and it is responsible for what may be replied on these points.

4. That unless there is something in the terms in which information is asked that points the attention of the bank officer beyond these two matters, his response that the check is good will be limited to them, and will not extend to the genuineness of the filling-in of the check as to payee or amount.

5. *Quære:* Would the endorsement of the word "good," with the officer's initials, under such circumstances, make the bank liable beyond the genuineness of the signature and the possession of funds to meet the check as certified?

6. Where a check is certified for the purpose (known to the bank) of giving it credit for negotiation or circulation, to be used as money, and it so passed into the hands of third persons, the bank would be bound, though the case might be otherwise when it was only certified to give the party presenting it assurance that it was good for his own satisfaction in taking it.

7. But it is clear that a verbal reply that a check is good, given for the information of the party about to receive it, extends only to matters of which the bank had knowledge, or is presumed to have by the law, unless he is told that more extended information is expected or asked for as to the validity of the check.

In error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. Justice MILLER delivered the opinion of the court.

Stall & Meyer, customers and depositors with the First National Bank of Cincinnati, made their check on that bank for the sum of $26.50, payable to the order of Mrs. E. Hart, and delivered it to a stranger to all the parties to the transaction out of which this controversy arose This man erased the name of the payee and the amount for which it was given and inserted the name of Espy, Heidelbach & Co., bankers and brokers, and also the sum sum of $3,920, and passed it to Espy, Heidelbach & Co., in payment of bonds and gold which he purchased from them.

The check was paid by the bank through the clearing-house, and the next day the fraud was discovered and the bank made a demand on Espy, Heidelbach & Co. for the amount, as paid through a mistake.

If this were all the case there would be no doubt of their right to recover. The principle that money so paid under a mistake of the facts of the case can be recovered back is well settled; and in the case of raised or altered checks so paid by banks on which they were drawn, there are numerous well considered cases where the right to recover has been established, when neither the party receiving nor the party paying has been in any fault or blame in the matter. Of course if there is fault on the part of the party receiving pay for such a check, it strengthens the right of recovery.

But in the case before us the rights of the parties are to be determined by what took place between themselves before the check was paid. It appears by the bill of exceptions that the man who perpetrated the fraud, having ascertained from Espy, Heidelbach & Co. the price of the bonds and gold which he proposed to buy of them, told them that he had dealings with Stall & Meyer and would get their check for the amount, and after an absence of two or three hours returned the check in question. Not wishing to take it from this stranger without further information, they sent Mr. Snarenberger, one of their clerks, to the bank, with instructions to ascertain if the check was good, and to say that it was presented by a stranger. Snarenberger presented it to Mr. Sanford, the proper officer of the bank, who, after examining the check and the state of Stall & Meyer's account, said "it is good," or "it is all right." "Send it through the clearing-house."

There is a slight disagreement between Snarenberger and Sanford as to the precise words used, but we do not deem the difference of any importance. But there is difference in another point between these two, which with the jury might have had some weight. Snarenberger testifies that he told Sanford that the check was offered to his house by a stranger, which Sanford denies; and Sanford says that he told Snarenberger that if the check was offered by a stranger, he would advise them to have nothing to do with him; that he would be careful and not pay so large at check to a stranger, no matter how good looking he was.

On the return of Snarenberger, Epsy, Heidelbach & Co. delivered the bonds and gold to the stranger and received the check in payment, and in the language of the record, the stranger went his way and was heard of no more. Espy, Heidelbach & Co. endorsed the check, and it was paid as stated already, through the clearing-house.

In the suit brought by the bank to recover the money it had a judgment, to reverse which this suit is brought.

The defendants excepted to the admission of certain testimony given by the plaintiffs on the trial for the purpose of proving that the words "all right," "it is good," when used in reference to a

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check presented at the bank on which it is drawn, had, by the custom and usages of the bankers of Cincinnati, acquired a limited and well understood meaning, namely, that it had reference exclusively to the genuineness of the drawer's signature and to the state of his account at the bank. The objections made to this evidence were that in its nature it was inadmissible; that the person testifying showed his want of knowledge on the subject, and that the expressions "all right" and "it is good" were not the precise expressions used. But we need not enquire whether the court was right in admitting this testimony, because in the subsequent progress of the trial it became immaterial. The court refused to charge the jury, as requested by the plaintiffs in their fifth and sixth prayers, that if there was such an understanding among bankers as to the use of the terms mentioned, it limited the responsibility of the bank to these two matters; and in the charge of the court of its own motion, it placed the case beyound the influence of such testimony, by instructing the jury that as matter of law such was the effect of the words supposed, when used under the circumstances suggested by the interrogations of plaintiff's counsel in regard to the understanding of them among bankers.

We are relieved also, by an attentive consideration of the instructions given by the court, from another very grave question much discussed by counsel in this court, that is, whether a verbal statement, by the proper officer to certify checks, that the one presented is good, is, or is not, the equivalent of a written certification of the check in the usual manner. For the fourth instruction asked by the defendants and granted by the court is precisely what is claimed by counsel here as to the effect of such verbal statement, as will be seen at once by its inspection. It is as follows: "A verbal certification of a check is equally valid with a written certification, and constitutes a contract obligatory on the party giving the certification, the consideration of which is the property parted with by the party receiving the certification on the faith of the certification." The plaintiff in error, against whom the jury rendered their verdict, notwithstanding the instruction thus given, must be held to have had the benefit of the principle thus asserted with the jury, whether the court was right in giving it or not.

The plaintiffs on the trial below prayed ten distinct instructions to the jury, all of which were granted except the fifth and sixth, which we have considered. The defendants prayed eight instructions, all of which were refused or modified except the fourth, to which attention has just been called. Upon all these rulings of the court as well as upon the charge of the court of its own motion, errors are assigned.

But we are of opinion that the whole case turns upon the latter charge of the court. This consisted of four distinct propositions:

1. That if defendants below sent the check to the bank for the purpose of having the latter pass upon the genuineness of the signature and the state of the account of the drawer, the statement that it was good, or all right, would estop them from denying that the signature was genuine, and there were funds to meet it.

2. If defendants sent the check for the purpose of testing the genuineness of the signature of the drawers, the state of their account, and to test its genuineness in all other respects, and plaintiff knowing the full extent of the object for which it was sent, replied "it is good," or "it is all right," plaintiff is estopped to set up that the check was raised.

3. That if the defendants had no suspicion that the check was raised, and sent it to plaintiffs for examination without specifying the particulars to which they wished the examination directed, the plaintiffs had a right to presume that it was desired in relation to such points as the law presumed them to have knowledge, namely: the genuineness of the drawer's signature and the state of his account, and if they answered in good faith and had no means other than those of defendants of knowing that the check was raised, they were not estopped from setting up that fact.

4. That if the parties were mutually ignorant and unsuspicious concerning the check being raised, the law did not impose upon plaintiffs more than the defendants, the duty of calling on the drawers for information on that subject.

The plaintiffs in error, defendants below, can have no cause to complain of the first and second proposition laid down by the court below.

If the bank officers had their attention turned to the matter of the raising of the check, or even had notice that, in applying to them for information, the parties presenting it did so for the purpose of getting information which would include that subject, they could have limited their general statement that it was good so as to exclude its application to that point, or might have declined answering altogether. If, with this notice, says the court, they gave a general statement that the check was good, or all right, these words must be held to have reference to all the matters on which they knew the other party asked or desired their opinion. Unless we are prepared to hold, to the fullest extent, the principle asserted by the plaintiffs in error, that the general statement that the check is good binds the party making it as to everything connected with its validity; this charge of the court is as favorable to them as it should have been, and is only doubtful as it militates against the bank.

We think it is equally clear on principle that there was no error in the fourth proposition of the court. Undoubtedly, where there exists a suspicion that the check has been altered in the amount, or in the name of the payee, the proper party to be enquired of is the maker of the check. He and he alone has the means of settling that question conclusively. The bank, as a general rule, can know this no better than the party to whom it is presented for negotiation. It is the latter who first parts with his money or property on the faith of the check, and he is as much bound to diligent enquiry on that question as the bank. The latter is held by law to know the drawer's signature and the state of his account. He is no more bound to know or to answer beyond these two matters than the party who presents it for information. So if there be no suspicion of the fraud in raising the check, the parties are equally innocent, and no question of the relative degree of diligence in making enquiry on that subject arises between them. This is certainly true unless the bank, if it consents to give any information at all about the validity of the check, is bound to answer as to everything which may affect its validity. As this contention is the turning point of the case and is the one which is responded to in the third of the propositions laid down by the court, we turn now to consider that.

This assumes that neither party had any suspicion that the check was raised, and that no special reference was made to that point in the enquiry of the defendants below. It is also to be considered that the bank was not asked to certify it in the usual way by endorsing it as good, and that the party who asked information was the one whose name was in the check as payee. We do not propose to decide here what would have been the legal effect in the present case if the bank officer had, under precisely these circumstances, been requested to endorse the check as good and had done so, affixing his name or his initials in the ordinary way.

The strong argument of plaintiff in error is that such an endorsement would bind the bank for the entire validity of the check, and that what was said verbally by Sandford was the legal equivalent of such an endorsement. If this latter point were conceded, no case precisely in point has been produced where this would be held to bind the bank under the circumstances of the present case. The authorities relied on are mainly acceptances of drafts or bills of exchange, and it is the same class of cases that are relied on to show that a verbal acceptance, or promise to accept, is equivalent to a written acceptance. The highest courts in this country and in England have regretted the decision which gave original sanction to this latter proposition.—Boyce v. Edwards, 4 Peters, 122; Johnson v. Collins, 1 East. 103.

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Bank checks are not bills of exchange, and though the rules applicable to each are in many respects the same, they differ in important particulars. Merchants' Bank v. State Bank, 10 Wallace, 647. Among these particulars is that a check is drawn against funds on deposit with the banker, and the endorsement that it is good implies that when the endorsement is made there were funds there to pay it. A bill of exchange is not drawn on such deposits necessarily, and its acceptance raises no implication that the drawer has such funds to meet it. It is a new promise by the acceptor to pay, funds or no funds. In both cases the bank is supposed to know the signature of its correspondent, and cannot, after endorsing it as good or accepted, dispute the signature. But as one of the main elements of utility in a bill of exchange is that it shall circulate freely, and it may thus pass through many hands on the faith of the acceptor's signature, it may possibly be that he should be responsible for the promise contained in it, as it came from his hands, for it was drawn on no special fund, and the possession of such fund by him does not affect his liability. By such acceptance he becomes primarily liable, as if he were the maker of a promissory note. How far these reasons should be applied to a certification that a check was good, seems extremely doubtful, both on principle and authority. Where the object is to use the endorsement to put the check in circulation, or raise money on it, or use it as money, and this object is known to the certifying bank, it may be argued with some force that the bank should, as in the case of an acceptance of a bill of exchange, be held responsible for the validity of the check as it came from the hands of the certifying bank. Such a rule would seem to be just when the checks are certified, as we know they often are, without reference to the presence of funds by the drawer, and when the well-known purpose is to give the drawer a credit by enabling him to use the check as money by putting it in circulation.

But such a verbal statement as was made in the present case cannot come within that principle. There was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it into circulation. Nothing was said or done by the bank officer which could be transferred with the check as part of it to an innocent taker of it from the payee. Such subsequent taker would have no right to rely on what was said by the bank officers, any further than the payee would.

We are of opinion that the court was entirely right in treating the case as one in which information was sought and obtained by Epsy, Heidelbach & Co., for their own use, and to govern their own action. For such information as the bank was willing to give, and did give, it was, no doubt, responsible, because it had reason to believe that the other party would act upon it. But only to this extent and only on this principle is it liable. It is not liable as for accepting or endorsing a draft or check with intent that it might go upon the market for general use and negotiation with the credit of its name attached to the paper just as it was placed on the market.

Under these circumstances we are of opinion that the circuit court was right in holding that in the absence of anything tending to direct his attention to other matters, the bank officer had a right to suppose that the information was desired of him only in regard to the signature of the drawers and the state of their account. These were material facts to be known, which both common sense and commercial law presumed to be within his knowledge. The answer he gave that the check was good, or was all right, must be supposed to be responsive only to these two points. The genuineness of the payee's name, and of the sum filled in the body of the check, were as well-known and as easily ascertainable by the payees themselves as by the bank officer, and unless the enquiry was so framed as to call his attention to these points, he had no reason to suppose, in the nature of the transaction, that he was expected to give information in regard to them. So the response of "good" should not on sound principle be held to extend to them. He was under no moral or legal obligation to give an opinion on these points. He had no reason to suppose that he was asked for such an opinion, and because he did give an opinion that the check was good in the only points of which he knew anything, it would be illogical to hold the bank liable on the ground that the response meant good absolutely and for all purposes.

The court told the jury very clearly that if the bank officer had any reason to believe that the defendants were seeking information in regard to the general validity of the check, or if they had been asked any question which related to the genuineness of the check as to amount or the names of the payees, his statement that it was all right would bind the bank. This was as far as the court ought to have gone in that direction, for they were not bound to answer such a question, nor, as we have already said, does the law or the nature of the business imply that they had any superior information on these points to that which the defendants had.

The case was certainly very fairly put before the jury, so far as the rights of plaintiffs in error are concerned, if the views here advanced are sound, and the judgment must be

AFFIRMED.

Remedy by Assignee in Bankruptcy Against Stockholders of Insolvent Corporations for Unpaid Stock.

NATHANIEL MYERS, ASSIGNEE OF ST. LOUIS SOAP COMPANY, v. F. A. SEELEY *et al.*

United States District Court, Eastern District of Missouri.

Before Hon. SAMUEL TREAT, District Judge.

1. **Rights of Creditors against Stockholders.**—The remedy in equity of judgment-creditors of insolvent corporations against the stockholders who have not paid in full for their stock, stated and discussed.

2. **Bill in Equity by Assignee of Bankrupt Corporation Against Stockholders.**—The assignee in bankruptcy of an insolvent corporation cannot maintain a bill in equity in the District Court against the stockholders of such corporation to collect assessments upon their unpaid stock; because such a bill would necessarily require the appointment of a receiver who could not be the plaintiff in the suit, and would hence supersede the regular bankruptcy proceedings. The proper course is for the district judge to order an assessment upon all unpaid stock to be collected by the assignee.

Bill in equity by the assignee of a bankrupt corporation against the stockholders to collect the amount alleged to be due on their respective shares of stock.

Meyers & Litton, for plaintiff; *S. M. Breckenridge, Ira C. Terry, Lee & Adams*, for defendants.

TREAT J.—The bill is by the assignee of a bankrupt corporation, against certain stockholders, to compel payment by them of the amount alleged to be due on their respective shares of stock. Many of the parties defendant have not been served, and many responsible stockholders are not made defendants.

Bills by creditors who have judgments against a corporation have been sustained against the corporation and its stockholders. Said bills being framed in the name of the judgment-creditors and of all others who may choose to come in and be made parties thereto. In such cases the decree has been for an account to be taken of the debts and assets of the corporation, for the appointment of a receiver, to whom the stockholders and officers are ordered to pay and account respectively for so much of the assets and capital stock as are necessary to pay the debts due to the creditors; the assets thus collected and received to be applied by the receiver in discharge of the debts.

The reason of that rule is, that the unpaid subscriptions are assets applicable to the payment of corporate debts which the corporate authorities may call in for corporate purposes. If there are adequate assets other than said calls, then the creditor has no legal or equitable right to insist upon such calls. Primarily, the amount due on subscriptions is a debt to the corporation which it alone can enforce. and unless the corporation is without other assets to meet

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its obligations, and fails to make the needed calls, creditors cannot interpose. When the facts justify their interposition, an account of assets and debts should be taken in order that it may be known what, if any, calls should be made. No further call should be made than what is sufficient, together with the other assets to meet all debts; for the bill by creditors cannot reach beyond the satisfaction of their demands. They have no other equity. Adler v. The Milwaukee Patent Brick Manufacturing Co., 13 Wis. 57.

If a company is insolvent, the original mode of making calls upon the stock is not to be pursued in the enforcement of such a decree; for the debt is then due on the stock without demand, and no stockholder can shelter himself behind an agreement that he might pay otherwise than in money, or money value, as other stockholders have to do.

Every share of stock subscribed represents an asset available to the corporation and its creditors. The payment of it in full, that is, actual cash payment, or payment of cash value, is enforceable. As between the corporation and its stockholders, its agreement as to paid up stock may be valid, but neither directors nor stockholders, nor both, can so act towards creditors as to debar the latter from insisting upon the actual payment by stockholders of what is really due on their stock.

The assignee of shares can be in no better condition than the assignor. The transfer is not, so far as the right to make calls is concerned, dependant upon the good faith of assignor and assignee in their dealings between themselves.

The question is simply whether the stock has been really paid in full to the corporation. The assignee may have paid for it to the assignors, and may have relied on the representations of the latter, and of officers of the company, that the shares bought were fully paid; yet creditors are not bound thereby, and if the stock was not fully paid, the holder is liable to creditors for the amount remaining unpaid.

The foregoing rules are clear enough for all ordinary cases brought by creditors; yet here as stated in the case cited from 13 Wis., and in the case of Ogilvie v. Knox Ins. Co., 22 How. 380—where the corporation is in bankruptcy, what is the proper course to be pursued? The assignee in bankruptcy has all the authority of a receiver to collect demands and pay debts; the proceedings in bankruptcy are adjusting the accounts, and the court sitting in the bankrupt case is proceeding to ascertain what calls, if any, will be necessary. If this suit in equity (and it might have been brought in the United States Circuit Court) is to result in a decree for an account, etc., shall the decree take from the court sitting in bankruptcy all further cognizance of those matters, or in other words, shall the Court of Equity draw into its jurisdiction and supersede all the powers and functions of the court in bankruptcy, specially charged by law with the collection and distribution of the assets of this insolvent corporation?

This suit is by the assignee in bankruptcy, and under the orders of the court appointing him, an assessment may be made on the unpaid shares, just as if the same had been ordered by the corporation before bankruptcy, for he represents the corporation for the collection of all its assets. He represents also the creditors who are not bound by any agreement between the corporation and its stockholders, whereby the latter were to be considered as holding full paid stock. Hence, to now order an account to be taken by a master and to appoint a receiver, etc., would be virtually to supersede the pending proceedings in bankruptcy.

The proper course seems to be to dismiss the bill without prejudice, and order an assessment on all unpaid stock to be collected by the assignee; otherwise the proceedings will be embarrassed at every stage.

As the assignee is plaintiff, the court cannot appoint him receiver; and if he is to be superseded in the administration, what is to become of his powers and duties, and also of the ordinary and regular proceedings in bankruptcy? The powers and duties devolved by the bankrupt act seem necessarily to make a distinct proceeding in equity improper—to supersede that mode of satisfying creditors' demands against an insolvent corporation which has been adjudged bankrupt.

NOTE.—To avoid any difficulty arising from the two years' limitation clause in the bankrupt law, which might prevent the bringing by the assignee of new suits against the individual stockholders, to recover payment of the unpaid stock on their respective shares, the court, instead of formally dismissing the bill, as indicated in the opinion, subsequently directed "that the bill be retained for further proceedings thereunder on the following order: That the assignee proceed to collect from all stockholders of said company the amount due and unpaid on their respective shares." As to the general right of creditors and of the assignee in bankruptcy against the delinquent stockholders of a bankrupt corporation, see Sawyer v. Hoag, *ante*, p. 43.

Taking Private Property for Railroads.

CALIFORNIA PACIFIC RAILROAD COMPANY v. ARMSTRONG.

Supreme Court of California, April Term, 1874.

Hon. WILLIAM T. WALLACE, Chief Justice.
" JOSEPH CROCKETT, } Associate
" ADDISON C. NILES, } Justices.
" AUGUSTUS L. RHODES, } Justices.
" ISAAC S. BELCHER, } Justices.

1. **Eminent Domain—Taking Property for Railroads—Damages where the Track is Laid before Condemnation.**—Although a railroad company enters upon land and lays its track thereon before having it condemned in the proper proceeding, yet, upon proceedings afterwards instituted to condemn the land, the owner will not, under the California statute, be entitled to have the track so laid considered as a part of his realty, and its value considered in estimating the "just compensation" he is to receive. In this case the railroad company entered upon the land, pending a former proceeding, to condemn the same, which was dismissed.

2. ——. ——. **"Special Benefits."**—The "special benefits" mentioned in the California statute, are not confined simply to those benefits which are special to the particular tract of land taken, but include benefits which the track receives from the construction of the road, in common with other contiguous lands which are not taken for railroad purposes.

Opinion by CROCKETT J., WALLACE, Ch. J., BELCHER and NILES, JJ., concurring. RHODES, J., in a qualified concurrence.

This is a proceeding to condemn land for railroad purposes; and it appears in the case that, in the year 1868, the plaintiffs commenced a similar proceeding for the purpose of condemning the particular tract in contest here, and other lands; and obtained an order of court allowing them to enter upon and retain the possession of said tract pending the proceedings, and duly filed a bond as required by the statute in such cases. It further appears that, before the hearing in the present proceeding, the former proceeding was dismissed as to this tract; and that "before the commencement of this proceeding" the plaintiffs had constructed upon the land a railroad track, at their own expense, of the value of $2,211 24 without the consent of the then owner of the land, from whom the present defendant purchased. It is not expressly stated that the track was built whilst the order made in the proceeding of 1868, authorizing the plaintiffs to enter upon and retain the possession, was in force; but we infer that such was the fact. Nor does it appear on what ground, or for what reason, the former proceeding was dismissed. The commissioners in the present case assessed the value of the land, at the commencement of the action, at the sum of $403 50, exclusive of the railroad track; which they estimate to be to value of $2,211 24. This being a portion of the larger tract, they estimate the damages to that portion not taken at $1,112 50, and the benefits which accrued to the part not taken, "by the enhancement of the value thereof in consequence of the construction of the railroad (there being no special benefits), at the sum of $1,112 50." The court below held that the value of the railroad track, constructed by the plaintiffs, ought not to be estimated as a part of the land taken, and excluded it from the computation; and also held that the benefits to the land not taken should be set off against the dam-

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ages thereto. These rulings constitute the grounds of error relied upon on this appeal.

The argument on behalf of the defendant on the first point is, that the plaintiffs, in constructing the railroad track, were trespassers, and that the track, being attached to the soil, became a part of the realty, and belonged to the owner of the land. Hence, he claims that its value ought to be included in the estimate of damages, in like manner as though the defendent had himself built the road. But this proposition cannot be maintained. Neither the constitution nor the statute contemplates that a person, whose land is taken in the exercise of the right of eminent domain, shall be entitled to anything beyond a "just compensation." He is to be paid the damage he actually suffers and nothing more. But to hold that, in addition to the fair value of the land taken, and such other damage as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over-technical construction of it.

On the second point, the proposition is that it appears from the report of the commissioners that there were no *special* benefits to the lands not taken, resulting from the construction of the railroad; though they also find that it will thereby be enhanced in value in the sum of $1,112 50. From this the defendant's counsel deduce the argument that, inasmuch as this land will only be benefited in common with other contigous lands, and will receive no benefit peculiar to itself, it does not come within the rule which requires benefits to be set off against damages. In other words they insist, that the benefits must be *special* and peculiar to the particular tract—something different from, and in excess, of the benefits resulting to other adjoining lands. But there is no valid reasons for this distinction. The theory of the statute is that the land-owner shall receive a fair, just compensation for the damage he suffers; and if that portion of his tract which is not taken will be enhanced in value by the construction of the railroad, his damages will be diminished to the extent of the enhancement; and hence the statute contemplates that by deducting this benefit from the damages, the sum which remains will constitute a "just compensation" in the sense of the constitution. This was the view of the question announced in the case of The San Francisco, Alameda and Stockton Railroad Company v. Caldwell, 31 Cal., 367, which is decisive of the point.

JUDGMENT AFFIRMED.

I dissent from the conclusion announced on the first proposition.

RHODES, J.

NOTE.—We published some time since (*ante*, p. 124), a note of a case, United States v. A Tract of Land, etc., where the government had forcibly taken possession of a tract of land for light-house purposes, and, after having built a light-house thereon, instituted proceedings to condemn it. The same court held that the light-house became annexed to the soil, belonged to the owner, and that its value was to be estimated in fixing the damages. This is no doubt good common law, but there is no sense in it. It is a lingering barbarism which ought to be repealed. Justice and sense in such a case would have been satisfied with giving the owner the actual value of the land, exclusive of the light-house, and also the damages he had actually suffered by reason of the trespass.

We publish the foregoing case at the request of several subscribers.

Lease—Assignment by Lessor as Secu ity—Rights of Such Assignee Against the Assignee in Bankruptcy.

DANIEL F. MEADOR *et al.* v. R. D. EVERETT, ASSIGNEE IN BANKRUPTCY OF L. H. CLARK.

United States Circuit Court, Western District of Missouri, August, 1874.

Before DILLON, Circuit Judge.

The assignment, transfer and delivery of a lease by the lessor to secure a debt, is valid as against the assignee in bankruptcy of the lessor.

In the bankruptcy proceedings against L. H. Clark in the District Court, the petitioners, Daniel F. Meador and his copartners, filed a petition in the nature of a bill in equity for the enforcement of a lien, to which the district court sustained a demurrer and dismissed petition.

The petitioners, Meador & Co., appeal from this action of the district court.

Their petition as filed in the district court, in substance states that, in July, 1870, the complainants sold to L. H. Clark, one of the bankrupts, certain furniture to be used in his hotel at Kansas City, for the sum of $6,731.90, for which said Clark executed six notes for $1,000 each, payable in 2, 3, 4, 5, 6, and 7 months from date, and one note for $731.90, payable eight months from date; that the same having been proved against the estate of said Clark, that on the 1st of May, 1870, Clark executed a lease of said hotel to one John C. Parks for five years; that Parks took possession of the property under the lease July 1, 1870; that the lease was duly recorded July 8, 1870; that on the 7th of July, 1870, said Clark, to secure the payment of said notes, assigned, transferred and delivered possession of said lease to complainants with the consent of said Parks; that on the 6th of July, 1870, said Clark gave complainants a power of attorney to receive and collect the rents accruing to said Clark under the lease, until their debt should be paid, and thereby authorized and empowered them to do and perform all in reference to said lease that said Clark himself could do; that on the 6th of July, 1870, as a further security, and a further recognition of the assignment of said lease from said Parks, said Clark drew his bill of exchange for $6,731.90 on said Parks, who accepted the same, thereby becoming liable for said debt, and agreeing to apply the rent of said building to its payment, as the same became due; that said Everett, as assignee, now has possession of said hotel; and that by reason of the premises complainants have a lien upon the rents of said hotel and pray that the assignee be required to rent said hotel for ——months, the proceeds to be applied to the payment of their debt, and for general relief.

W. B. Napton, Jr., for the petitioners (appellants); *Lay & Belch*, for the assignee in bankruptcy.

DILLON, Circuit Judge.—The bankrupt, owning a hotel, made a lease of it for five years to one Parks, reserving rent. Being indebted to the petitioners, the bankrupt, to secure them, it is alleged, "assigned, transferred and delivered possession of said lease to the petitioners, with the consent and sanction of said Parks, the lessee." At the same time it is further alleged, that "the bankrupt executed to the plaintiffs a power of attorney to receive and collect the rents accruing under the said lease, and to do and perform all acts with reference to said lease that the said lessor himself could do." And it is further alleged that the lessee accepted the lessor's bill in the plaintiffs' favor for the amount of their debt against the lessor, said bill to be paid out of the rents as they fall due. No copy of the lease or assignment, or power of attorney is in the record, but according to the averrments it must be taken that the assignment was in writing. In the absence of the written assignment and instrument I can do no more than to indicate the legal rights of the parties upon the facts set forth in the plaintiff's petition.

If the transaction between the bankrupt and the plaintiffs gave to the latter any rights or equities in respect to the rents or the demised property, the assignee in bankruptcy takes the estate subject thereto. In this respect he stands precisely in the place of the bankrupt. Assuming the allegations of the petition to be true, they show in the plaintiffs, as against the bankrupt, such rights in respect to the rents or demised property as the law will recognize and protect. It is well settled that it is competent for the lessor to separate, by contract or devise, the rent from the reversion, retaining one and disposing of the other, or disposing of the rent to one person and the reversion to another. 1 Washb. Real Prop. 338, where many cases are collected.

Whatever the contract between the bankrupt and the plaintiffs

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show the former disposed of to the latter, will be binding upon the former and his assignee in bankruptcy. In Russel v. Russel, 1 Brown Ch. R. 269, it was decided that the pledge of a lease by the lessor, by delivery merely, was in equity a mortgage of the leasehold estate as against the assignee in bankruptcy. Much more clearly would this be the case where there was an express assignment and delivery of the lease by the lessor to secure a debt. In ex parte Wells, 1 Vesey, 162, Lord Chancellor THURLOW said, "an assignment of rents and profits is an odd way of conveying, but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage."

The petition states a case which *prima facie* as to the demised estate puts the plaintiffs, so far as neccessary to secure payment of their debt against the bankrupt, in the place of the bankrupt, and therefore the demurrer of the assignee ought to have been disallowed.

The extent of the plaintiffs' rights I can not determine in the absence of the lease, the assignment and power of attorney. I only hold that the petition makes a case giving, to some extent at least, a lien which the bankruptcy court should respect. I see no reason why the rights of the plaintiffs and assignee may not be well determined upon the petition of the plaintiffs.

The order sustaining the demurrer and dismissing the petition is reversed, and the district court directed to permit the assignee to answer the petition if he shall be so advised.

ORDERED ACCORDINGLY.

Municipal Corporations—Power to Tax.

A. L. SLACK, ADMINISTRATOR, v. JAMES S. RAY, ASSESSOR AND COLLECTOR.

Supreme Court of Louisiana, July 25, 1874.

Power to Tax Construed.—The grant to a municipal corporation of the full power to tax, gives, by implication, authority to use all necessary means to effectuate the object, including the imposition of appropriate penalties, such as is used by the state in collecting other taxes.

Appeal from Parish Court, Parish of Ouachita.

A. L. Slack, for plaintiff; *W. W. Farmer*, for defendant.

The opinion of the court was delivered by WYLY, J.—The plaintiffs enjoined the tax-collector from selling certain property, belonging to the succession represented by him, for taxes due the city of Monroe for the year 1873, and also for the penalties for non-payment of said taxes. The court dissolved the injunction as to the taxes, but maintained it in relation to the penalties. From this judgment the defendant, the tax-collector, has appealed. That the state can collect taxes and impose penalties for non-payment thereof, after giving due notice, was recently decided by this court in several cases, especially in the case of Morrison v. Larkin, tax collector. Indeed the proposition is not denied by the plaintiff. It is denied, however, that this right has been conferred on the city of Monroe by the state, and therefore, the defendant has no authority to sell the property of the plaintiff.

Looking to the charter of Monroe we find section 25, which provides:

"That for the purpose of levying and collecting taxes and licenses, the mayor and city council are hereby invested with full power to pass all laws, not inconsistent with the constitution of the United States, or of this state, to compel the payment, by compulsory process, of all taxes or licenses which may be due; and they are hereby authorized to confer on the assessor and collector power sufficient to carry into effect the laws and ordinances pertaining to the levying and collecting of such licenses and taxes." Acts 1871, p. 242.

We think this section confers full authority on the city of Monroe to assess and collect taxes, and to impose penalties for non-payment of taxes. The grant of full power to tax carries with it authority to use all means necessary to accomplish the object, and the imposition of penalties after due notice for non-payment of taxes is a legitimate means of collecting revenue, and it is a means employed by the state in collecting its taxes. The state can confer this power because there is no limitation in the constitution inhibiting it.

As the state can collect, in a summary manner, its taxes and the penalties for non-payment thereof after due notice, it can confer the same power on the political corporation which it employs in administering the government.

There is no force in the objection that section 25 of the charter of the city of Monroe is not covered by the title, and therefore repugnant to article 114 of the constitution, and void.

The title of the charter is: "An act to incorporate the city of Monroe; to fix its boundaries; *to provide for the government*, and create a recorder's court for the same." The statute would fail "*to provide for the government*" of the city of Monroe if it failed to authorize the levy and collection of taxes for the support thereof.

There are other objections, but they are without weight. It is therefore ordered that the judgment appealed from be amended so as to dissolve entirely the injunction sued out by the plaintiff, and as amended that it be affirmed, appellee paying costs of both courts.

NOTE.—*Power to establish fire limits*—The same court, in The Mayor, etc., of Monroe v. Hoffman, held that the right to establish fire limits is given among the municipal powers granted to the incorporation, and that the right to prohibit the erection of wooden buildings carries with it, necessarily, the right to *remove* them when constructed in violation of the prohibition.

We are indebted for the above case to W. W. Farmer, Esq., of Monroe, La.

Admirality Pleading—Libel in Personam—Description of Vessel.

HENRY K. MORREN v. PATRICK KEEN *et al.*

United States District Court, Eastern District of Michigan, August 4, 1874.

Before Hon. JOHN LONGYEAR, District Judge.

1. **Description of Lake Vessel in Libel in Personam.**—In a libel *in personam* against the owners of a lake vessel, it is sufficient to describe the vessel as "the barge Illinois, her boats," etc., without alleging that the vessel is of twenty tons burden or upwards, or that it is enrolled and licensed for the coasting trade, or that it is employed in the business of commerce and navigation, or is capable of being so employed, or without alleging in any other manner that the vessel, her boats, etc., are of such a maritime character as to entitle the court to entertain jurisdiction in the premises.

On demurrer to libel. The libel is *in personam* against the respondents as owners of "the barge Illinois, her boats," etc., for supplies. There is no other or further description of the vessel set up in the libel than that above quoted. The grounds of the demurrer were 1. That it is not alleged in the libel that the vessel was of twenty tons burden or upwards; 2. nor that the vessel was enrolled or licensed for the coasting trade; 3, nor that the vessel was mployed in the business of commerce and navigation, or was capable of being so employed; 4, nor in any manner that the vessel, her boats, etc., were of such a maratime character to entitle the court to entertain jurisdiction in the premises.

Mr. F. H. Canfield, for the demurrer; *Mr. H. B. Brown*, opposed.

LONGYEAR, J.—The libel is in the usual form of libels *in personam* under the general maritime law. 2 Conk. Adm. 478, et seq., 482, 488; Ben. Adm. 2d ed., 554 (No, 83). The allegations, the absence of which constitute the first three grounds of demurrer, were necessary in order to confer jurisdiction under the act of Congress of February 26, 1845 (5 Stat. at Large, 726), entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same." 2 Conk. Adm. 491, and note a. But the supreme court in the case of The Eagle (8 Wall. 15), adopting the only logical conclusion from

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their earlier decision in the case the of Genessee Chief (12 How., 443), authoritively decides that general admiralty jurisdiction was not limited in this country to tide waters, but extended to the lakes and the navigable waters connecting them, and hence that the act of 1845 was insperative and ineffectual, with the exception of the clause which gives either party the right of trial by jury when requested. Since that decision, the limitations as to jurisdiction imposed by the act of 1845 have had no existence, and the necessity of inserting in the libel the allegation in question has ceased; and consequently, a libel which is sufficient under the general maritime law, is now sufficient in cases upon the lakes and their connecting waters. See the General Cass, 4 Ch. Leg. News, 89, S. C. 5 Am. L. T. 12. The first, second and third grounds of demurrer are therefore not well taken.

As to the fourth ground of demurrer, I find no adjudications or opinions of text writers upon the point; but judging from the forms adopted and universally used from an early period in admiralty jurisprudence down to the present time, it seems to have always been considered sufficient to describe a vessel in a libel, whether *in rem* or *in personam*, as the ship, barque, sloop, schooner, steamboat, steamer, barge, or as the case may be, giving her name, without further specification or qualification. See 2 Conk., Adm. 490, note a. These terms seem always to have been considered sufficient to denote the maritime character of the subject. In their ordinary meaning they signify maritime things, and, independently of the consideration of long usage, the use of those terms alone is no doubt sufficient to confer jurisdiction without further description or qualification. The rest follow by necessary implication. If the fact be different, it must be taken advantage of by way of special allegation, and cannot be by way of demurrer. The fourth ground of demurrer is, therefore, also not well taken.

The demurrer must be overruled, with costs of the demurrer to libelant, with leave to respondents to answer the libel on condition of payment of the costs of the demurrer, including a counsel fee of $10.

DEMURRER OVERRULED.

[Communicated.]

Some of the Dying Glories of the Common Law.

LITTLE ROCK, Ark., August 31, 1874.

EDITORS CENTRAL LAW JOURNAL:—On the 27th of August, under the heading "Some of the Dying Glories of the Common Law," it seems to me that you are a too severe. If we examine the reasons for the common law rules in slander, we find much good sense in them, in the light of surrounding customs. To charge a man directly with an indictable crime at common law, subjected the false accusor to an action, because it subjected the party slandered to hue and cry and consequent imprisonment, wherein *habeas corpus*, bail and speedy trial did not figure so readily as now, as well as to the obloquy which followed. The law properly implied damages, at least nominal, to prevent false clamor. Bacon Abridgement, Title, Slander, B. On the other hand, words which imply crime, as "he is forsworn," are not actionable unless spoken concerning a judicial proceeding; while to say that a man is per jured involves a direct charge of crime and is actionable.

The only doubt there would seem to be about the good sense of the common law rule, is the above exception to the general rule in all cases, that damage must accrue before there is a right of action, which makes any class or kind of slander actionable without averment and proof of actual damage. If a man set fire to his field and it burns into his neighbors field, doing no harm, he is liable to no action. If, on the contrary, the fire burns his neighbor's barn, he has a right of action against the one who started the fire. That fixes a uniform rule of consequential damage at common law, to which a limited class of verbal slanders forms an exception. It is difficult to see the difference between the fire in the field and the fire from the tongue. There were reasons for the common law exceptions in slander, which have no force in this country.

If I comprehend you rightly, you, as well Judge HUMPHRIES, who delivered the opinion in the case of Mrs. Pollard, seem to give the impression that to charge one with fornication or adultery is not actionable at any event; and you soundly berate the common law for its faults. In a practice of twenty-three years I have never failed to sustain actions for such slanders; and when the lady was of good repute, never failed to secure heavy damages. It belongs to that class of cases in which you must aver and prove special damage. And it is always possible among a lady's friends to prove that some one shunned her society on account of the slander, or that she lost an opportunity of favorable marriage. The loss of an acquaintance is sufficient to give the right of action. See precedent for it, 2 Chitty's Pleading, 641. The special damage sufficient to support an action, must be a certain actual loss (as of a particular marriage) or the *acquaintance* or *friendship* of some *specified* person. 1 Rol. Ab. 36; 1 Lev. 261; 2 Bos. and Pul. 284; 1 Saund. 243; 3 B. and P. 372-4-6: 1 Taunt. 39; Bacon Ab. Slander C.; 8 T. R. 130. See also precedent for charging a governess with fornication, 2 Chitty's Pleading, 641 b.

In Mrs. Pollard's case it seems the loss of it was more the fault of the lawyer than the law; for he surely could have proved, and must have done so, special damage, to have recovered $10,000; otherwise even in actionable (*per se*) slander, his damage must have been nominal. Why did he not aver it and save his case? If his client did not suffer damage, she ought not to have her action; if she did, let her aver it, and she has a case in which the judgment cannot be arrested.

The rule is laid down in the 1st vol. of Chitty's Pleading, page 395, as follows: "Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of; special damages are such as really took place, and are not implied by law, and are eithersuper added to general damages arising from an act injurious in itself, as when some particular loss arises from uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent, and not actionable in itself, but injurious only in consequences." At page 396, the same author says: "So, in an action for words, not actionable in themselves, but becoming so only in respect of particular damage." And again at page 397, he says: If an action be brought for words, not in themselves actionable, and the plaintiff does not prove the special damage laid in the declaration, he will be non-suited, because the special damage is in such case the gist of the action; but when the words are of themselves actionable, the jury must find for the plaintiff, though no special damage be proved." If a man is slandered in his business, he has no right of action except he aver, and prove special damage. We have now in Arkansas a statute which makes words charging any one with adultery or fornication liable to an action. Since the decision in McGough v. Rhodes, 12 Arkansas, 625, it is very doubtful whether it dispenses with averment and proof of special damage—whether it does more than re-enact the common law. Yet is it right that the law should presume anything about it? What right has any one, not damaged, to recover anything? The common law presumed damage from the use of words which charged another with crime. This presumption was conclusive. See 1 Chitty's Pleading, 407; 6 Term Rep. (Durnf. & East) 691.

It seems that if any part of the common law rules as applicable to slander, has grown absurd in the light of modern civilization, it is that which presumes damages, as a legal conclusion, and encourages vexatious suits in cases where no real real damage occurs; hence slander suits have grown into general disrepute.

SAM. W. WILLIAMS.

REMARKS.—It is possible that we did not make ourselves clearly understood in the article referred to. Perhaps we should have qualified what we wrote, so as to make it read that the law awards no punishment and affords no redress against him who imputes to a woman a want of chastity, *unless such imputation has occasioned her pecuniary loss*. By recurring to an article on "Councils of Honor," in a previous number (*ante*, p. 396), our correspondent will perhaps be able to understand more fully the nature of our criticism upon the common law rule. It is this: That the common law gives damages, not for the outraged feelings — not for the *defamation*, but only for the *pecuniary loss* which may or may not happen in consequence. In other words, as clearly and convincingly shown by Mr Townsend, in his work on Slander and Libel, § 57, "The protection is to the *property* and not to the *reputation*." "When we consider," says this learned and philosopical writer, "that falsely and maliciously to impute, in the coarsest terms and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding, civil or criminal; whereas, an action may be maintained for saying that a cobbler is unskillful in mending shoes, or that any one has held up his hand in a threatening posture to another, it would seem to need nothing more to satisfy the most skeptical that the protection is to the property and not to the reputation." Ibid.

But our correspondent fully asserts, and very clearly expounds this principle, when he calls attention to the familiar rules of the common law, with reference to *special damage* in actions resulting from a defamation of the character. The point wherein we seem to differ is this: He believes that there should be no words actionable *per se*—that pecuniary damage should be averred and proved in all cases; we believe that pecuniary loss should not constitute the gist of the action at all, but that the action should be given for the outraged feelings and impairment of the reputation, whether it entail any pecuniary damage or not. We think that the principle that the action

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is given for pecuniary loss, is a barbarous relic of the old Saxon codes —one of the "dying glories of the common law," which modern courts have relieved against by a number of ingenious devices and fictions, not the least of which is that fiction to which our correspondent calls attention, which makes the loss of a *friend* or *companion* evidence of pecuniary loss. Unable to abrogate the rule itself, without incurring the imputation of usurping the functions of the legislature, the courts have also (as we think) relieved against it liberally and beneficially, by extending from time to time the number of verbal slanders from which the law will conclusively presume pecuniary loss—in other words the slanders which are actionable *per se*. And it would really seem that the chivalrous judges of the common law might, while protecting the professional reputation of a cobbler, and making it actionable to call a man a bogus peddler (Pike v. Van Wormer, 6 How. Pr. 101), or a vagrant (Miles v. Oldfield, 4 Yeates, 423), have extended the same beneficial rule, so as to protect the reputation, and silence the defamer of woman.

But the common law has never been imbued with this spirit. If it had, we never should have had the barbarous rule that a father can only recover damages for the seduction of his infant daughter, on the ground that she is his *servant*, and that her seduction has deprived him of her service, and thereby entailed upon him pecuniary loss. We cannot avoid thinking that such principles of law are better adapted to the code of the Sandwich Islanders, than to that of an enlightened and honorable people.

Fiction is at once the courage and the cowadice of the law. For while a king brandished the sword of state over the heads of his judges, and threatened them with the Tower, they may have been excused in resorting to fictions in order to change unjust and unyielding rules of law—since artifice is the only weapon of the slave against the master, of the weak against the strong. And it may, and doubtless often did, require great courage to do even this. But it is at the same time cowardly to say one thing and mean another, and in a court of justice where the truth ought always to be spoken, this out not to be done. But if, as our correspondent seems to imply, the earlier judges of the common law have succeeded in reforming the law of slander by fictions and devices, so as to protect the reputation of woman, why should our courts of justice at the present day, adhere to those fictions and devices? Under what obligation are they to continue to say one thing and mean another? Why ought they not to do what seems more worthy of a court of justice, cast aside the fiction—the falsehood—and advance directly to the truth? Instead of reforming this ancient barbarism "indifferently," why should they not "reform it altogether?"

[From our own correspondent.]

Judge Shaw.

BOSTON, August, 1874.

EDITORS CENTRAL LAW JOURNAL:—It is not easy to estimate the value of Judge SHAW'S labors. Only those who knew him when living, and saw what and how much he did, and how admirably he did it all, and have observed and considered the influence and effect of his labors, both while he lived and since his death, are competent to form a just estimate of their value; and even the estimate of such, must in some respects at least, be inadequate. But the judgment of all such will be found to be that he was both a great and a good magistrate. For thirty years he sat in the seat of the chief justice of this commonwealth. He was appointed in 1830, and he resigned in 1860. Among all his associates during these years, learned and able as many of them were, he was indeed chief. Once or twice only, on some question, the majority of the court was against him, and then he dissented. His dissent was respectful and manly. The chance is, he was right. He tried or heard more causes in these thirty years, it is believed, than any other judge. His first opinion will be found in the 10th of Pickering, which contains also more than twenty other opinions that were written by him. Many of the questions considered in the course of this long period are new; many are quite complicated—some are of great public concern—in respect of some, the puplic mind was excited and divided; parties were hostile and clamorous; there was intense feeling; sometimes the just cause was the unpopular. Yet in all these cases he was master. The just cause, through him largely, if not chiefly, prevailed; the beneficient end was answered. Everybody felt that he got to the bottom of things; all knew that he was honest. He did not excite enthusiasm, but he commanded the general respect. He dealt only with the understanding,—which Locke calls the most elevated faculty of the soul. There was no rubbish in his mind. In investigation, he advanced step by step only. He verified as he went. In difficulties, so far as depended on him, he saved the commonwealth from reproach. He was independent. He kept his conscience and his shirt clean. His personal wants were few, and he had the means to supply them. Above all, he was courageous. He pursued the way his understanding pointed. He did not overlook the law in any vain expectation that somehow, somewhere in the empyrean, he might find a law still higher; but he took as his guide the constitution and law of the land and of the seas, as he found it, and diligently sought to find out what, in truth, these imported. And when he had decided a case, discussion stopped. With equal courage and independence, he had a finer understanding and was withal a better writer than Lord HOLT,—whom, in some respects, he resembled.

Sir EDWARD COKE was great. Neither was he wanting in courage. When the king said to to him—"So, I am under the law?"—COKE replied—"yes, you are." At another time, he declared that the king could not, by his proclamation, make that an offense which was not an offense before; "for if he may," said COKE, "then he may change the law of the land in a high point." He declared that the king had no prerogative but that which the law of the land gave to him. He carried the resolutions, which, a half a century later, were the foundation of the *habeas corpus* act. He advocated free trade. It is said he never deserted a friend; nor took a bribe; nor corrupted anybody; —and I can well believe it. He delighted in his morning bath, and in clean clothes. He was temperate. He was committed to the Tower—that nice little place on the Northern bank of the Thames, into which, in these last years of the nineteenth century, if you, a visitor in London will pay a shilling and wait until a party of twelve such is assembled, a man, dressed in a fool's uniform, with a long staff in his hand, will conduct you, and tell you all about the Traitor's Gate, and the Bloody Tower, and the Bell Tower and the Flint Tower, and divers other such nice little Towers and things, and show you where the good Sir SIMON BURLEY was beheaded in 1388; where the Duke of Clarence, brother of Edward the Fourth, was drowned in Malmsey wine; where the gay Edward sickened and died, and where his three children were murdered in the Bloody Tower,—from whence Jane Shore was released only to die in poverty; and Annie Askeed was tortured, and Jeffries ended his life in captivity, and the beautifuld Lady Jane Gray was beheaded on the Green, and the pious Annie Boleyn, after being beheaded, was thrust into an old chest and put in the vault of the chapel; and Margaret, the last of the Plantagenets, was brought to the Block, and Cranmer, Ridley and Latimer were imprisoned, and the great Sir Walter Raleigh was simply beheaded in 1618,—pointing out to you, as you go along, many other such pretty and strange and wonderful things, including all sorts of armour worn by all sorts of men and boys, except only the men of sense—and the head-blocks and thumb-screws and limb-stretchers and crown jewels,—all of which, I suppose, teaches, or is designed to teach, that in England there has been progress toward a better state of things in these centuries—and is certainly cheap at a shilling;—into this nice and instructive place, I say, Chief Justice COKE was thrust, as a prisoner, and thither went, as a brave man ought, and as in like case Judge SHAW would have done, rather than declare the law to be what he knew it was not; and there, in the few months that he was kept, he wrote the finest part of his "Commentaries on Littleton." Honor and thanks to Sir Edward Coke through this and all the succeeding centuries. But, alas! the greatest of men even sometimes make mistakes, and Sir Edward is not an exception to this rule. When he was liberated, he suffered himself to be elected sheriff for Suffolk and Buckinghamshire, and in the exemplary discharge of his duties as such, he stood, as was the custom, with a white wand in his hand, behind the puisne judges, who were not worthy or but just worthy, to shine his boots, and held the court room doors open while they strutted their brief strut in and out. All honor to the memory of Judge SHAW! Sooner than have done that, it is my belief, if there were need, he would have wheeled a barrow in any honest business of his own,—which, happily, in all that part of his life from ten to eighty, he was just able to do.

PELHAM.

Notes and Queries.

BLOOMINGTON, ILL., Sept. 2d, 1874.

EDITORS CENTRAL LAW JOURNAL:—In 1857, A. and B. bought of C. two lots in the city of B——. Five hundred dollars to be paid down, and two notes, one payable in one year, the other two years with interest, each drawn in the sum of $300, constituted the consideration.

As between themselves, A. and B. agreed, by parol, that A. should pay the five hundred dollars down, and that B. should lift the two notes as they became due. A. complied with his part of this agreement, but B. failed to take up the two notes, or either of them; whereupon, A. also paid the notes. These notes were signed by A. and B. jointly. A. has been in possession, and had control of the property ever since its purchase.

Now, the question is, has B. any interest in the lots which the law will recognize? Will not a court of equity compel B. to give to a A. a quit-claim deed? Or, in other words, what is A.'s remedy, the record showing that the property was conveyed to A. and B., and the facts showing that A. alone paid the purchase price of the same? Please answer in the next number of the JOURNAL, and much oblige yours, etc.,

C. D. M.

ANSWER.—The *title* being in A. and B. there is nothing stated which would make B. a trustee of the *title* for A. A.'s remedy is to have equity charge the $600, with interest on the lots, thus subrogating A. in the place of the vendor.

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If A.'s possession has been *adverse* to B. for the requisite length of time under the laws of Illinois, he would need no remedy, as he would have a title in this way.

SHELBINA, MO., Sept. 2d, 1874.

EDITORS CENTRAL LAW JOURNAL:—A note given, payable four years after date, with following interest clause: "Interest ten per cent., said interest to be paid annually; and if we fail to pay the interest when due, it is to bear the same rate of interest as the principal." Now, the note is secured by deed of trust, providing, that upon failure to pay any part of the principal or interest when due, the whole shall become due and payable, and that the trustee may proceed to foreclose the deed. Can the deed be foreclosed for failure to pay the interest at the end of the first year? Or, in other words, if there was no deed securing the payment of the note, could the interest be collected at the end of the year? Or is it optional with the payee whether he pay the interest at the end of the year, or pay interest on interest until such time as he does pay it? Very respectfully yours, C. M. K.

ANSWER.—The interest is due annually. The contract so states; and the purpose of the last clause is not to give the maker an option to delay payment of interest four years, or at his pleasure, but to give the holder the right to 10 per cent. interest on interest, if the annual interest be not paid.

MARYSVILLE, KANSAS, Aug. 14, 1874.

EDITORS CENTRAL LAW JOURNAL:—Have there been any decisions declaring the loans made by building associations to their stockholders usurious, and where can I find them? J. D. B.

ANSWER.—Such loans (including those of "loan fund associations") have been decided usurious in the following cases: Martin v. Nashville Building Association, 2 Coldwell, (Tenn.) 418; Philanthropic Building Association v. McKnight, 35 Penn. State, 470; Columbia Building Association v. Ballinger, 12 Richardson, (S. C.) Eq. 124; Houser v. Hermann Building Ass., 41 Penn. State, 478; Reiser v. William Tell, etc., Ass., 39 Penn. State, 137; Denny v. West Phila., etc., Ass., Ib. 154; Premium Fund Association's Appeal, Ib. 156; Melville v. American, etc., Ass., 33 Barbour, 103; Savings Bank v. Wilcox, 24 Conn. 147. See Parker v. Fulton Loan and Building Association, 46 Ga. 166; Bibb County Loan Association v. Richards, 21 Ga. 592; Silver v. Barns, 6 Bing. N. C. 180; Burbridge v. Colton, 8 Eng. L. & Eq. 62; Cutbill v. Kingdom, 1 Wellb. H. & G. 494; Delano v. Wild, 6 Allen, 1; Bowker v. Mill River Association, 7 Allen, 100; Hoboken, etc., Ass. v. Martin, 2 Beasley, 427; Shannon v. Dunn, 43 N. H. 194; Franklin, etc., Ass. v. Marsh, 5 Dutcher, 225; Merrill v. McIntire, 13 Gray, 157; West Winstead Savings Bank, etc., v. Ford, 27 Conn. 282; Citizens' Mutual Loan Ass. v. Webster, 25 Barb. 263.

BRENHAM, TEX., Sept. 1, 1874.

EDITORS CENTRAL LAW JOURNAL:—On page 85 of No. 7 of the JOURNAL for February last, you discuss the question whether or not the homestead, exempted by law from forced sale, descends to the wife in fee simple, at the death of her husband, in Missouri. In Texas, with her liberal exemption laws, the question becomes an interesting one; but, as yet, we have had no decision of it. The Vermont decisions, as it seems, turn upon the construction of the 5th sec. of the homestead act, and if it is not asking too much, we will be obliged to you if you will publish that section in an early number of your journal. Respectfully, S. & G.

ANSWER.—Section 5 of the Vermont statute, above referred to, reads as follows:

"If any such housekeeper or head of the family shall die, leaving a widow or any minor children, his homestead, to the value aforesaid, shall pass to and vest in such widow or children, or, if there shall be both, in such widow and children, without being subject to the payment of the debts of the deceased, unless legally charged thereon in his life-time; and such widow and children, respectively, shall take the same estate therein of which the deceased died seized; provided, that such children shall, by force of this chapter, only have an interest in such homestead until they shall attain their majority; and the probate court having jurisdiction of the estate of such deceased housekeeper or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the persons entitled thereto." Gen. Stats. Vt. ed. of 1863, pp. 456-7.

There are some other decisions bearing upon this point which we have not heretofore noticed, and we hope to find time hereafter to collate them. The courts of Massachusetts use the expression "the estate of homestead." The question has been passed upon in several California cases, the result being, if we remember rightly, that there are no terms known to the common law which will accurately describe the estate which descends to the widow and child un under the homestead law of that state.

MARYVILLE, TENNESSEE, August 14, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. owns a tract of land; in the summer of 1873 he harvested a crop of oats off a certain field; in the month of September, 1873, he leased the same field to B., to be sown in wheat, expressly stipulating that the field should be cultivated in wheat. B., sowed the field in wheat, but from some cause, either a *freeze out* or faulty seed, the wheat in the spring failed to put in an appearance, but in its room and stead a very fine *volunteer* oat crop grew and matured on the same land, the oats springing from the seed wasted from crop of previous year. The lessee was to receive *two-thirds* of the *wheat* grown, *he furnishing the seed wheat.* What are the legal rights of the lessee in the crop of oats?

Has he any interest in, or is he entitled to any part of the oat crop, if so, what part?

Please answer through columns of CENTRAL LAW JOURNAL.

ENQUIRER.

ANSWER.—If the lease extended beyond the harvest period for the oats, and the lessee was in possession, he would have the right to gather the oats, but would have to account for the fair or customary use of the land. A contingency happened not anticipated by the parties, and in relation to which the contract did not determine their rights: and hence the law will regulate their rights according to the principles of justice and right.

Summary of our Exchanges.

The Chicago Legal News, for September 5, publishes the opinion of Mr. Chief Justice Waite, in the United States Supreme Court, construing the laws of Congress relating to the pre-emption and entry of government lands, and stating the effect to be given to the opinions of the government officers in determining the rights of contesting claimants under such laws.

Also the decision of Mr. Chief Justice Waite in Self v. Jenkins, United States Circuit Court, Eastern District of North Carolina, holding that a court of equity has no power to restrain the treasurer of a state from paying out money in pursuance of law, on the ground that an earlier appropriation for a specific purpose had been misapplied.

Also McMarren v. Kean, published in this issue of this Journal.

Also The Heroine, a suit in Admiralty before Mr. District Judge Deady, of the District of Oregon, by seamen of the British barque Heroine, for wages. Several interesting points in admiralty law are ruled.

Also Merrick v. Davis, Supreme Court of Illinois, which was a trial of the right of property in a growing crop.

The Washington Law Reporter, for September 1, publishes Deener v. Brown, Supreme Court, District of Columbia, General Term, determining the rights and liabilities of the parties to a bank cheque where there has been delay in presenting it for payment.

Also a decision of the secretary of the Interior, of which the following is a syllabus: "For ascertaining the proper and necessary recitals of a patent in a given case, the applicant is bound by the terms and disclosures of such filings as, conformably with the law, he rests his right to enter and purchase upon; and for the further ascertainment and protection of rights, and as a duty on the part of the government, the examination of the general land office should, whether protest be filed or not, proceed beyond the papers filed by the applicant, and into those *general records* of the office, which evidence the final disposition made of the public domain; and if, upon examination, it is found tha any part of the premises applied for has been previously disposed of, express exception thereof should be inserted in the subsequent patent."

It also reprints from the Chicago Legal News, Butler v. Huestis, which we have already noticed.

The Chicago Railway Review, for September 5, republishes Randall v. Ewell, 52 N. Y. 521, and also notes of several interesting decisions in railway law.

The following is a summary of the principal contents of the American law Register for September:

Rights of Surities *Inter-Sese.*

Frost v. Plumb, Supreme Court of Errors of Connecticut.—Injury to horse for unlawful purpose—hirer liable for tortious injury to horse, notwithstanding illegality of contract—distinction between acts which are merely breaches of the illegal contract and independent torts. Odinion by Carpenter, J. Note.

Glenden Iron Co. v. Uhler, Supreme Court of Pennsylvania.—Trade-mark—geographical name—name of incorporated town cannot constitute a valid trade-mark, although adopted and used prior to the incorporation. Opinion by Mercur, J. Note.

Martin v. Robson, Supreme Court of Illinois.—Husband and wife—rule as to liability of husband for torts of the wife committed during coverture—modification in the rule is required in states where by statute the sole control of her property and earnings is given to married a woman—husband not liable in Illinois where the act is committed out of his presence, and without his partici-

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pation. Opinions by Thornton, J., and by Sheldon, J., dissenting. Note.

The Pennsylvania, United States District Court, Eastern District of Pennsylvania.—Admiralty—salvage service may, in exceptional cases, be rendered by a passenger, although he has no opportunity to leave the ship—reduction of salvage allowance, for subsequent assumption of illegal authority. Opinion by Cadwalader, J.

Pittsburgh, etc., R. R. Co. v. Andrews, Court of Appeals of Maryland.—Negligence—passenger in railroad train putting his arm out of the window is guilty of such contributory negligence as requires the court to say, as matter of law, that he cannot recover. Opinion by Miller, J.

Swasey v. Antram, Supreme Court of Ohio.—Joint action—Judgment against all the defendants after death of one, is voidable—married woman has no authority to enter a general mercantile business—business treated as the husband's. Opinion by Welch, J.

The Irish Law Times, for August 22, continues its leader on Life Insurance Law and Legislation. It also republishes from the Solicitor's Journal, a compendium of the proposed new rules of practice under the English judicature act, which takes effect in November. This will prove of much interest to those who have leisure to watch the progress of law reform in England, but any attempt to condense it would be futile.

The Albany Law Journal, for September 5, comes to us with its usual amount of excellent matter. An article on the Contracts of Married Women, appears to be a review of some of the points of a former contribution to that journal, by Mr. Proffatt, of New York City.

In discussing the ruling of Mr. Justice Hunt, in denying Miss Susan B. Anthony the verdict of a jury in the prosecution against her for illegal voting, the learned editor of the Albany Law Journal seems to have got himself into a regular hornet's nest. Mrs. Matilda Josslyn Gage "went for him" in the Syracuse Journal, and showered a perfect hail-storm of invective upon his devoted head. If every epithet had been a brick-bat there wouldn't have been a grease-spot left of him. He seems, however, to have endured it with the same philosophic placidity with which the Wandering Jew received the volley of grape-shot; and now he turns upon his persecutor with a weapon so sharp, and with a speech so caustic, that it would make a man cry "O, don't!"

The Albany Law Journal also publishes Madras Railway Co. v. The Zemindar of Carvetingarum, before the judicial committee of the privy council, which hold that the principle that if a man bring and accumulate upon his land anything which, if it escape, may cause damage to his neighbor he does so at his peril, is not applicable to the case of water stored in tanks in India, which have existed from time immemorial, and are preserved and repaired by the landowners by reason of their tenure, as essential to the welfare and existence of the people.

Also Commercial Bank of Cleveland v. Simmons, which we have heretofore noticed, in which Mr. District Judge Walker holds that the right of the national banks to sue is not controlled by the judiciary act, but by the national banking law of 1864.

The Legal Gazette, for September 4, reports Mercantile Insurance Co. v. Folsom, Supreme Court of the United States, in which it is ruled that contracts of insurance which clearly show that it was the intention to make them operate retroactively, are as valid as those intended to cover a subsequent loss, if it appears that the insured as well as the underwriter was ignorant of the loss at the time the contract was made.

And also that, where upon a submission of the facts to the court below, the finding is general, nothing is open to review but the rulings of the court *in the progress of the trial.*

It also publishes Davenport v. Dows, same court, where it is ruled that although a stockholder may bring a suit when the corporation refuses, as is settled in Dodge v. Wolsey, 18 Howard, 340, yet such a suit can only be maintained on the ground that the rights of the corporation are involved; and that where such suit is commenced the corporation must be made a party.

The Legal Gazette also publishes The Chicago City Railroad Co. v. Allenton, which it credits to the Chicago Legal News, but with a syllabus for which the editor of the Gazette claims credit. It is as follows:

1. The directors of a street railway corporation in Chicago "resolved to increase the capital stock of the company." *Held*, that their charter did not give the directors power to increase the stock, without the consent of the stockholders, and their action was therefore illegal.

2. The constitutional question involved in the case *shirked* by the supreme court.

The Legal Gazette also publishes the proposed amendments to the consfitution of Michigan, and several interesting Pennsylvania statutes.

The Financier, for September 5, comes to us with a 24-page supplement containing a statement, in tabular form, with remarks, of the funded debt of the states and principal cities and railroad corporations in the United States. It will prove of immense value to financial men and investors.

The Legal Intelligencer, for September 4, contains a number of interesting decisions of the Supreme Court of Pennsylvania. Among them we note Gallagher's appeal, in which it is decided that a bequest of the interest of a certain mortgage for life is a specific legacy, and if the specific security is lost the legatee takes nothing; and that a widow, electing to take against the will, takes nothing specifically, but under and through the executor.

The following is the almost unintelligible syllabus of Resser v. Johnson.

1. A plaintiff will not be restrained from selling an alleged interest in real estate of his judgment debtor, unless the want of such interest is clear and manifest. The determination of title will be left to an ejectment.

2. In this case the invalidity of plaintiff's lien by reason of defendant's adjudicated bankruptcy was not sufficiently clear to justify an order restraining execution.

In the case of Peterman's estate it is ruled that an assignor for benefit of creditors, reserving the benefit of the exemption act, is entitled to select out of what property he pleases. The appraisers of the assigned estate must appraise what he retains. It is not laches for him to wait until the sale of realty in which he had an undivided interest, and then claim his exemption out of its proceeds.

The following is the syllabus of Hays v. Briggs:

The Act of 1843 and 1871 relating to lateral railroads, give appeals upon the questions of *compensation* and *necessity* for land taken, but not as to *location*. Whether the petitioner is allowed too little space, is to be determined upon exceptions to the report of the viewers.

The acts give a right to take land for wharfage, but not for harborage.

A lateral railway may cross a carrying railway to reach navigation.

The owner of land on the margin of a river is protected from having it taken for the use of a lateral railway, if he, *bona fide*, intends to use it for such purpose himself, although compelled to defer present improvement.

Testimony of special instances of sale is not competent upon the question of the value of land taken.

In Torrens *et al.* v. Campbell, it appeared that A., by writing, purchased the business and assets of B., and agreed to pay his debts. In a suit on this promise by C., a creditor of B., *held:* That it was admissable to prove that at the time of the agreement, B. exhibited a list of his debts, on the strength of which the promise was made, which list did not contain C.'s debt. *Held* also, that the action could be maintained by C. in his own right and name, as A. had received assets from B., the promisee, at the time of the promise.

The Legal Intelligencer also publishes an English decision (Vice Chancellor Bacon) on Trade Marks.

The Washington Law Reporter for August 18, publishes Barnes v. The District of Columbia, in which the Supreme Court of the district expound the liability of the district under its present government, for injuries to persons falling into excavations in its streets. This is an interesting case, and we shall notice it hereafter.

The Reporter also reprints from the Chicago Legal News the case of Heffron, which we have heretofore noticed.

It also publishes a decision of the secretary of the interior, of which the following is the syllabus:

"1 Land, when once appropriated under the homestead law, is thereafter removed from pre-emption settlement and homestead entry, and can only be again subject to them by a cancellation of the homestead entry in the manner prescribed by law.

"2. Such cancellation becomes effective at the date of the receipt of the order therefor at the local office.

"3. To initiate a valid right, under the pre-emption law, to a tract of land, covered by a homestead entry, some act of settlement must be performed by the pre-emptor, *subsequently* to the cancellation of said homestead entry."

Our other exchanges, so far as received, do not appear to contain much matter of general interest.

Legal News and Notes.

—HENRY SLATER, a prominent member of the bar of Baltimore, committed suicide the other day, by cutting his throat.

—A boarding-house keeper in Trenton, N. J., has brought suit against the owner of a bee-hive to recover damages for continued invasions of her dining-room by the bees at meal-times, stinging and driving away the boarders; and, out West, a bequest of money to a priest, to be expended in masses for the soul of the testator, is contested on the ground of its being contrary to public policy.—[*Albany Law Journal.*

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—ELEVEN jurisconsults, designated by the German imperial government to prepare a civil code, have accepted the duty.

—JOSEPH H. BRADLEY, Jr., a prominent member of the Washington bar, died recently in that city.

—HON. E. M. PAXSON, Judge of the Court of Common Pleas of Philadelphia, and Warren J. Woodward, President Judge of the Court of Common Pleas of Berks, have been nominated for judges of the Supreme Court of Pennsylvania.

—ALEXANDER MCKINLEY, Esq., formerly an active member of the Philadelphia bar, but more recently flag secretary under Admirals Dupont, Thatcher and Farragut, respectively, died recently in Philadelphia.

—THE attorney-general has decided that the proviso in the army appropriation bill of the last session of Congress, to the effect that only traveling expenses shall be allowed to any person holding employment or appointment under the United States, supersedes and cuts off the allowance of mileage to United States marshals, as provided in the fee bill.

—A curious exemplification of the value of extradition laws was furnished in the courts yesterday by the arrest of a merchant charged with burglary committed at Stockholm, in July last. The man confessed his crime and will probably be sent back to Sweden to stand his trial. With the progress of enlightenment, dishonest people may probably discover that roguery does not pay.—[*New York Herald, Aug. 31st.*

—THE Legal Chronicle, speaking of the late decision of the Court of Claims in refusing to admit Mrs. Lockwood as a solicitor, says: "We do not believe that the bar at large will support the decision of Judge Nott, for much as they dislike to see a woman move into a sphere which does not seem to be her own, yet they are far too chivalric to help crush her, or deny her the right to earn her daily bread as she may best be qualified, merely *because she is a woman.*"

—WE learn that thirty-six essays, written in German, English, French and Italian, have been sent into the Social Science Association by competitors for the prize of £300 placed at the disposal of the association by his Excellency Don Arturo de Marcoartu, ex-deputy to the Cortes in Spain, and to be awarded for the best essay on the following subject: "In what way ought an international assembly to be constituted for the formation of a code of public international law, and what ought to be the leading principles on which such a code should be framed?"

—THE Illinois Wesleyan University of Bloomington, Illinois, has a law department: Ruben M. Benjamin, A. M., is dean and professor of Property, Contracts and Domestic Relations. Owen T. Reeves, A. M., is professor of Pleading, Evidence and Equity Jurisprudence. Robert E. Williams, Esq., is professor of Constitutional, International and Criminal Law. The course of instruction is two years in duration, and is by recitation and lectures. Its graduates are entitled to admission to the bar without further examination.

—THE association for the reform and codification of international law, established last year in Brussels, will hold its second annual meeting at the Hotel de Ville, Geneva, on September 7. It is expected that the conference will be attended by many eminent publicists of Europe and America. The Law Magazine and Review says: "The English bar will likewise be represented. Sir Vernon Harcourt, Mr. Hinde Palmer, Mr. Osborne Morgan, Sergeant Simon, and others have been invited to attend. Mr. Thomas Webster will read a paper on Property in Intellectual Labor; Mr. H. D. Jencken, the general secretary of the association, has argeed to bring forward in a treatise he has prepared, the very important question of 'The International Laws regulating Negotiable Securities,' including bonds and shares. Professor Amos and Professor Leone Levi will also, it is hoped, be present, and contribute their share to the valuable matters to be considered at the conference."—[*Albany Law Journal.*

—THE biography of Salmon P. Chase, by his private secretary, contains the following extract from a letter written by Mr. Chase, June 2, 1863, to Mr. Jay Cooke. It is an honor to his memory, and exhibits his character in striking contrast from that which is implied in the base suggestion that his opinion in the Legal Tender case was influenced by the motive of promoting his chances as a candidate for the presidency:

"You informed me two or three weeks ago that you had purchased 300 shares of Philadelphia and Erie railroad stock for me. At that time I was expecting means of payment from the sale of a farm in Ohio, and would have been glad to hold the stock for income. The sale, however, has not yet been effected, and I have, therefore, not been able to make payment. This morning I have yours of yesterday, notifying me that you have sold the stock at an advance which gives a profit of $4,200 on the transaction, and you inclose me a check for that amount. As I had not paid for the stock, and did not contemplate purchasing with any view to resale, I cannot regard the profits as mine, and therefore return the check for $4,200. It is herewith enclosed. I am much obliged to you for your willingness to regard the money paid for the stock as a temporary loan from you to me. But I cannot accept the favor. When Congress, at the last session, saw fit to clothe me with very large powers over currency and financial movements, I determined to avoid every act which could give occasion to any suspicion that I would use the powers conferred on me to effect markets unnecessarily, or at all, with reference to the private advantage of anybody. To carry out this determination faithfully, I must decline to receive any advantage from purchases or sales made with views to profits expected from the rise or fall of market prices. For these reasons I must decline to receive the check. For, in order to be able to render the most efficient service to our country, it is essential for me to *be* right as well as to *seem* right, and *seem* right as well as to *be* right."

—THE CRIMINAL QUÆSTION OF THE ROMAN JURISPRUDENCE.—The deceitful and dangerous experiment of the criminal *quæstion*, as it is emphatically styled, was admitted rather than approved in the jurisprudence of the Romans. They applied this sanguinary mode of examination only to servile bodies, whose sufferings were seldom weighed by those haughty republicans in the scales of justice or humanity; but they would never consent to violate the sacred person of a citizen, till they possessed the clearest evidence of guilt. The annals of tyranny from the reign of Tiberius to that of Domitian, circumstantially relate the execution of many innocent victims; but, as long as the faintest remembrance was left alive of the national freedom and honor, the last hours of a Roman were secure from ignominious torture. The conduct of the provincial magistrates was not, however, regulated by the practice of the city, or the strict maxims of the civilians. They found the use of torture established, not only among the slaves of oriental despotism, but among the Macedonians, who obeyed a limited monarch; among the Rhodians, who flourished by the liberty of commerce; and even among the sage Athenians, who had asserted and adorned the dignity of human kind. The acquiesence of the provincials encouraged their governors to acquire, or perhaps to usurp, a discretionary power of employing the rack to extort from vagrants or plebeian criminals a confession of their guilt, till they insensibly proceeded to confound the distinction of rank, and to disregard the privileges of Roman citizens. The apprehensions of the subjects urged them to solicit, and the interest of the sovereign engaged him to grant, a variety of special exemptions, which tacity allowed, and even authorized, the general use of torture. They protected all persons of illustrious and honorable rank, bishops and their presbyters, professors of the liberal arts, soldiers and their families, municipal officers, and their prosterity to the third generation, and all children under the age of puberty. But a fatal maxim was introduced into the new jurisprudence of the empire, that in the case of treason, which included every offence that the subtlety of lawyers could derive from an *hostile intention* towards the prince or republic, all privileges were suspended, and all conditions were reduced to the same ignominious level. As the safety of the emperor was avowedly preferred to every consideration of justice and humanity, the dignity of age and the tenderness of youth were alike exposed to the most cruel tortures; and the terrors of a malicious information, which might select them as the accomplices, or even as the witnesses, perhaps, of an imaginary crime, perpetually hung over the heads of the principal citizens of the Roman world.—[*Gibbon.*

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

A novel question was presented in Williams v. Firemen's Fund Insurance Co., 54 N. Y. 569. The action was on a fire policy, containing a prohibition against storing petroleum, etc., on the premises. The defendant claimed an infraction of this provision. It seemed that the plaintiff, who had been in the army during the late war, had received a gun-shot wound resulting in a cutaneous disorder, which he treated by an application of crude petroleum oil to the surface of his body, and for that purpose he kept crude petroleum in a jug on a shelf in his room, and had some quarts of it in the building at the time of the fire, It was not pretended that the fire proceeded from or was aided by this material. The court held that this was not a "storing" within the meaning of the policy. Commissioner Reynolds suggested that even if the plaintiff had taken a quantity of the oil internally it would not have amounted to a "storing" on the premises. We are very glad this is so settled. Any other decision would have been an ungenerous requital for the sufferings of the plaintiff in the cause of his country, and would operate to retard enlistments in the event of another unholy rebellion. Let it once be adjudged that a man must not only bleed but itch for his country, unallayed by emollients of an inflamable nature, or run the risk of having his property destroyed by fire, without the power of enforcing his insurance, and our liberties are no longer secure.—[*Albany Law Journal.*

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Partnership—Substitution of New Members for Old without Changing Firm Name—Rights of Creditors Against Retiring Partner.—The case of Speer v. Bishop, published in the American Law Record for August, was a decision of the Supreme Court, Cincinnati, in general term, before Judges O'CONNOR, TILDEN and YAPLE. It presents a highly interesting and oft-recurring question in the law of partnerships. The decision is not final, the case having been appealed to the Supreme Court.

H. S. & Co., composed of H. S. and one of his sons, were copartners under that firm name, doing business for a number of years in the city of C., when they removed to the city of B., and carried on business there as partners, under the same firm name, H. S. always being the monied man of the firm, and having a good reputation and credit as a business man; and while in B. they also kept an office in the firm name of the city of C. They dissolved their copartnership, H. S. retiring from the firm, and another of his sons entering it with the other, the first partner. Neither bore the name of H. S., the name of the father. By agreement, the new firm took the claims and assumed the debts of the old firm, and the new firm was to and did continue business under the old firm name of H. S. & Co. H. S. recommended the new firm under the former to the old customers. Notice of this change, etc., was duly published in the newspapers printed in the cities of C. and B., and advisory letters were sent to all who had formerly dealt with the old firm. B. & Co., merchants of the city of C., were strangers to the old and new firms, and had no personal acquaintance with any of the members thereof; but they knew H. S. by reputation, and that his reputation was good, and they took daily the newspapers in which the notice of dissolution, etc., was published, but never saw or had knowledge thereof. One of the new firm called upon them and purchased goods. He represented himself as one of the firm of H. S. & Co. B. & Co. did not enquire of him who composed the firm, nor did they know; but they enquired on 'change concerning the standing of H. S. & Co., and learned it was good. After the first purchase, H. S. & Co. purchased by orders, written upon paper with letter-heading, printed H. S. & Co. After these purchases, and in ten months after its formation, the new firm of H. S. & Co. failed, with liabilities amounting to some $60,000, and with assets not exeeeding $6000 in value. In an action of B. & Co. against H. S. & Co., including H. S. individually by name, for the price of the goods so sold and delivered to the new firm: *Held*, that the firm name H. S. & Co., was more than a mere designation of a house, or association of persons of any names indifferently, but was a declaration that H. S. personally was a member of the firm, and strangers not knowing the facts were justified in dealing with the firm on the faith of such representation, without inquiring further; that as H. S. voluntarily and actively caused and assented to the use of his name as a partner in that connection, he was, as against B. & Co., estopped from denying that he was a partner in the firm, and that they could sue and recover against him as such, for the goods so sold and delivered by them.

The fact that one of the new firm, in the absence of all the members of the firm of B. & Co., may have handed their porter or other employee a card with the names of the two members printed in the upper left and right corners, and H. S. & Co. in the center, was not notice to B. & Co. of the fact that H. S. was not a partner, such card never having heen handed to B. & Co.

Husband and Wife—Married Woman a Partner.—A married woman has not capacity to enter into a general mercantile partnership not connected with or relating to her separate property, and where she assumes to do so with the consent of her husband, and is by him assisted in managing and carrying on the business, the husband, and not the wife, is to be regarded in law as the partner. Swasey v. Antram, 24 Ohio State, 87.

———. ———. The *feme covert* having obtained a "permit" to trade within the lines of the army, with the knowledge and consent of her husband, entered into a partnership with other persons, for the purpose of buying and selling goods and merchandise under said "permit," and herself, with the assistance of her husband, managed and conducted the business. The firm was subsequently dissolved, and its property transferred by the other partners to her, she agreeing to pay all the partnership debts. She then sold the property to S., who had notice of all the facts, and who in like manner agreed to pay the partnership debts. This was all done with the knowledge and concurrence of the husband, who joined her in executing the bill of sale to S. In an action by a creditor of the firm against the *husband* and the other members of the firm, not including the wife: *Held*, that the goods in the hands of S., or the price agreed by him to be paid therefor, and not yet paid, are liable to atatchment in the action. Ibid.

Bank Deposits—Right of Arrest.—Where money is deposited from time to time in the course of ordinary banking business, subject to check at sight, the relation between the parties is that of debtor and creditor, and not that of trustee and *cestui que* trust. In such case the credit is given to the pecuniary responsibility of the banker, and not to his personal integrity, and the deposit becomes the propertyof the recipient, to be paid on demand as a debt due and payable. Therefore, in an action to recover the money so deposited, no right of arrest exists under the New York Code. Buchanan Farm Oil Co. v. Woodman, June court.—[*Daily Register, Aug. 15.*

Bankruptcy—Railroad Corporation—Act of Bankruptcy—Mortgage.—It is not an act of bankruptcy for a railroad corporation to convey its property in trust to secure bonds to be issued and sold, and the proceeds to be applied to pay all its unsecured debts, the same being done *bona fide* with a view to enable the company to continue its legitimate business, though it may be technically insolvent, or likely soon to be so. In *re* Union Pacific Railroad Company, U. S. District Court, District of Massachusetts, (LOWELL, J.) 31 Legal Intelligencer, 261.

Same.—Such a mortgage is not made invalid by the circumstance that the unsecured creditors are offered the right to take the new bonds, or the proceeds of sale thereof, at their election. Ibid.

Same.—*It seems* that a mortgage for money to pay debts ratably would not be an act of bankruptcy even in a trader. Ibid.

Same.—Some distinctions between traders and railroad corporations, in respect to mortgaging their property, pointed out. Ibid.

Property in Membership of Board of Stock Brokers—Assets.—Where, under the articles of association of a board of stock brokers, a member cannot transfer his seat to a party not elected and approved by the board; and where upon the insolvency of a member, his rights as such are forfeited, and the board is authorized to dispose of his seat, and apply the proceeds to the payment of his indebtedness to other members of the board to the exclusion of all others, only the residue of the proceeds of the sale, after paying all the liabilities provided for in said articles of association, is assets of such insolvent member. Hyde v. Woods, U. S. Circuit Court, District of California, SAWYER, J., 1 Am. Law Times Reports, N. S. 354.

Same—Case in Judgment.—Under such articles, F., a member, failed to meet his engagements in the board, August 24, 1872, and being indebted in a large amount to sundry members, on that day assigned his seat in the board to W., with authority to sell and pay the proceeds to his various creditors in the board. With the assent of the board, W. sold the seat to T., who was elected by the board, for ten thousand dollars, and, with the approval of the board, paid the entire proceeds pro-ratably to F.'s creditors, who were co-members. October 1st, 1872, F. was adjudged a bankrupt on petition of a general creditor, filed September 18th, 1872. After said sale and payment, an assignee having been appointed, he brought suit against W. to recover said sum of ten thousand dollars. *Held*, That the assignee was only entitled to the residue after payment of F.'s liabilities to the co-members provided for in the articles of association, and there being no surplus, he was not entitled to recover. Ibid.

Principles which Govern in Interpreting Wills.—If wills are to be interpreted in the light of precedents, the court will follow those which are most in harmony with the genius and laws of this country, and customs of its people. It will be guided by those that effectually do justice, and not by such as would give an arbitrary and technical meaning to words never understood or contemplated by the testator, and that may defeat all the objects of his beneficence, as manifested in his will. Ibid.

Priority of Attachment over Deed of Assignment.—In Wilson . Eiffler, Supreme Court of Tennessee, Knoxville, 1872 (Nashville Commercial Reporter, for Aug. 10), the point is ruled that a deed received in a register's office, and the time of its reception endorsed on it by a party not authorized by law to make the endorsement, will not hold the property as against creditors attaching the property before the deed was registered.

Section 454 of code of Tennessee requires the register of deeds to keep a book in which he shall note the day and the hour at which instruments are left with him for registration, and the entering of an instrument which is left to be registered in this note book, has the same effect as though the instrument had been actually registered at the time.

It appeared that the assignment in question was left with M. L. Hall, on the day the attachment was levied; that Hall was clerk of the Circuit and District Courts of the United States, and kept his office in the rear of the court-house, and that H. M. Aiken, the deputy register of Knox county, kept the register's books in his (Hall's) office, Hall says, on the 18th of August, 1866, Aiken was absent, and the deed of assignment was brought into his (Hall's) office, and he made the following endorsement on said deed: "Rec'd, Aug. 18, 1866, 10 o'clock A. M." Hall states that he was neither register nor deputy register at the time, but made the memorandum to enable Mr. Aiken to know the time the deed was brought to the office for registration; that he made no entry in the note-book in the register's office. Aiken, the deputy register, shows that the deed was not, in fact, registered for several days after it was left at the office, and was not entered on the note-book until after the levy of the attach-

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ment, although the counsel of complainants had notice of its execution before the levy of the attachment. It was *held* that the deed was not noted for registration within the requirements of the statute, and that the rights of attaching creditors were not affected by the endorsement made on the deed.

Marine Insurance—Creditor—Evidence—Declarations—Insolvency.—A shipmaster and owner procured a marine insurance policy upon his one-quarter of his vessel "on account of whom it may concern;" los payable to himself. The vessel was lost during the voyage, covered by the policy, with the master and all on board. The plaintiff, a creditor of the deceased master, brought this action upon the policy, claiming that it was obtained for his benefit. He introduced testimony of the declarations of the deceased that if the plaintiff would make him a loan he would secure him a policy on this vessel; and subsequent declarations that the loan had been made to him by the plaintiff, and that he had secured the plaintiff by procuring a policy for his benefit. *Held*, that the testimony was inadmissible without proof that the deceased was acting as plaintiff's agent in effecting the insurance, and that the declarations themselves were not competent for this purpose. Evidence was introduced to prove the insolvency of the deceased. *Held*, that it was improperly admitted. Sleeper v. Union Ins. Co., Supreme Judicial Court of Maine; Western Ins. Review, July, 1874.

Removal of Causes from State Court to Federal Court—"Final Hearing or Trial."—In Burts v. Beard, Nashville Commercial Reporter, August 20, the Supreme Court of Tennessee had occasion to consider the oft-recurring question of the construction of the act of Congress of 1867, with reference to the removal of causes from the state courts to the federal courts. The case was in chancery, and on the coming in of the master's report, a petition was presented asking that the cause be transferred to the federal court. This the chancellor refused, and the supreme court, in passing upon this ruling, say: "We assume that the petition is based on act of Congress of March, 1867. That act provides that in the cases specified, the removal may be had on petition filed at any time before the final hearing or trial of the suit. This act as we think, simply means before a trial or hearing settling the rights of the parties. The object was to give the parties a trial in the federal court, where it was assumed the questions might be more fairly investigated, freed from local prejudices. After the trial it is too late to transfer the cause. This would be to give revisory power to the federal circuit court and not an original trial, as was contemplated by the statute. Such is the ruling of the Supreme Court of Ohio, in a well considered case, 4 Ohio, 642, and which we think clearly correct, and adopt. The chancellor was correct in refusing the transfer as asked."

Liability of Municipal Corporation for Injuries Caused by Failing to Keep Sidewalks Cleared of Snow.—In Grenier v. La Corporation de Montreal, 5 La Revue Legale, 195, a lady sued the city for $500 damages, suffered through the default of the corporation neglecting to keep the pavement of a street in order, whereby she slipped on the ice and fractered her arm. The corporation denied that they were compelled to keep the streets clear of snow, but that, under a by-law, citizens were bound to keep their winter pavements in order, and it was the duty of persons to notify the corporation of any refusal or neglect to obey this by-law. The judge declared that in the climate of Montreal "slippery walking in winter is the nominal condition of things," and decided that the corporation in this case was not at fault.—[*Legal Gazette.*

Liability of the District of Columbia, under its Present Government, for Injuries to persons Falling into Unguarded Excavations in its Streets.—In the opinion of the Supreme Court of the District of Columbia, General Term, delivered by OLIN, J., in the case of Barnes v. The District of Columbia, it is *held*, that the powers and privileges of the Baltimore & Potomac Railroad Company, under the various acts of of Congress authorizing the extension, construction, and use of a lateral branch of said road in the district, were granted free from the interference of the then municipal government of the city of Washington, and were in no way subject to its control; that under the act of Congress, of February 21, 1871, providing a government for the District of Columbia, the "entire control" of the streets and avenues of the city of Washington was given to the board of public works; that no powers were given, and no duty or obligation imposed upon the *government* created by said act, to repair them or keep in order; that said board, although created by the same act, was no constituent part of said government, and that any interference with the streets, etc., on the part of its officers, servants or agents, against the will or consent of said board would have been as much a trespass as an interference with the prescribed duty of any other *agents* of the United States, and that, consequently, where the railroad company, in constructing its road, opened a deep excavation for the track by the side of a traveled street, and so negligently omitted to put up barriers, safeguards and lights, that a citizen, in the exercise of ordinary care and prudence, fell into such excavation and was seriously injured, the district was not liable for the negligence of the railroad corporation created as aforesaid by the act of Congress, nor for the negligence of the board of public works created in the same way.

The learned judge, while admitting the liability, on grounds of public policy, of the tax-paying population of a municipal corporation which elects or appoints its own officers, agents, and servants, for their misfeasance or malfeasance, thinks that, in the present case it would be running the doctrine of "imputed sin" into the ground, to hold that they are responsible where a government is imposing on them in respect to which they have little or no voice at all, and in respect to the streets, etc., absoluteiy none.

The case is published in the Washington Law Reporter, for August 18, from which we take the foregoing synopsis.

Measure of Damages for Conversion—"Rule of Intermediate Higher Value."—In N. Y. Guaranty and Indemnity Co. v. Flynn, the New York Court of Appeals recently held that in an action to recover possession of personal property, in case a return cannot be had, the prevailing party is entitled to the value of the property at the time of the trial, and not at any intermediate time between the taking and the trial. This decision may be regarded as settling the vexed question in New York, which has been agitated ever since Cortelyou v. Lansing, 2 Caines' Cas. 200, as to what is the true measure of damages in case of a conversion. In Baker v. Drake, 8 A. L. J. 340, the New York Court of Appeals decided that in an action to recover damages for a wrongful conversion of stocks, the measure of damages was not the highest market value which the stocks had reached between the time of the conversion and the trial. The court in that case gave a very elaborate examination of the authorities, and overruled all cases in New York state holding a contrary doctrine; but the decision was a negative one, and did not state what the measure of damages actually was. In New York Guaranty and Indemnity Co. v. Flynn, *supra*, the measure of damages was positively decided. Whether the rule finally adopted by this court is the most reasonable or logical one, may be open to consideration. And it seems to us that a better rule would be the value which the owner of the property converted might have (probably) realized at any time between the conversion and the trial, had no conversion taken place. This, of course, would not necessarily be the highest value, for the owner might not avail himself of the highest price. But the value would be such as the owner might reasonably be expected to have realized had the property remained in his possession at any time before trial. This would be for the jury to determine. There may be some difficulties in the application of this rule, but we think it not impracticable.

There are some recent cases in other states that hold the measure of damages to be the value at the time of conversion, with interest to the time of trial. See Sturges v. Keith, 11 Am. Rep. 28; 57 Ill. 451; Boylan v. Huguet, 8 Nev. 345. For an able and exhaustive discussion of this subject, see Sedgwick on Damages, 6th ed., 590, 609, note, entitled "Rule of intermediate higher value."—[*Albany Law Journal.*

Negligence, when a Question for Jury.—We have heretofore alluded to the difficulties in the way of determining in what cases the question of negligence or no negligence is one to be determined by the court, or to be resolved by the jury (*ante*, p. 374.) In Ohio, the question seems controlled to some extent, by statute; and we note the following interesting ruling upon the subject, by the supreme court of that state, in 24 Ohio State Reports, 83: The case was an action brought by plaintiff in error to recover for injuries alleged to have been caused by the negligence of the defendant, a railroad company, in the management of one of its trains. After the introduction of the plaintiff's evidence, the defendant moved the court to arrest the testimony from the jury and nonsuit the plaintiff. The court, being of the opinion that the testimony adduced was not sufficient in law to sustain the action, granted the motion, as the record states, "upon the merits of said action," and rendered judgment that the defendant go hence without day and recover of the plaintiff its costs.

The court ruled the following propositions:

1. Section 4 of the act of April 12, 1858, to relieve the district courts, etc. (S. & C. 1155), which gives the right to either party to except to the opinion of the court on a motion to direct a nonsuit and to arrest the testimony from the jury, does not, by implication, repeal or modify the provision in section 372 of the code, which declares that, upon the trial of the action, in all cases except such as are therein specified, the decision must be upon the merits.

2. Under the act of April 12, 1858, the court is authorized, in a proper case, to arrest the testimony from the jury, and render judgment for the defendant. The judgment in such case, however, has not the effect of a nonsuit at common law, but is, under the provision of the code above referred to, a decision of the action upon the merits.

3. If the evidence *tends* to prove all the facts which it is incumbent on the plaintiff to establish in order to maintain his action, he has a right to have weight and sufficiency of the evidence passed upon by the jury, and it is error for the court to grant the motion, and render judgment against him.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor. } ST. LOUIS, THURSDAY, SEPTEMBER 17, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.

THE useful article in this number on Passenger Carriers, giving a view of some of the leading decisions in this country and Great Britain, as to the liability of the carrier to the passenger (other considerations applying as to servants) for latent and undiscernable defects in the machinery and apparatus of the carrier, is from the pen of Hon. FRANCIS HILLIARD, author of the Law of Torts, etc.

WE desire to call attention to an interesting decision of the Supreme Court of Tennessee, which we publish in another place, in which several points in the law of fire insurance are ruled. The careful and discriminating note which follows this case, was prepared at the request of ourselves and others, by MELVILLE M. BIGELOW, Esq., of the Boston bar, author of the Law of Estoppel, etc. We hope to be able to favor our readers with other articles from the pen of this able and judicious writer.

JUDGE HOPKINS' RECENT DECISION IN HAMLIN V. PETTIBONE.—We publish in another place a second paper by Hon. ASA IGLEHART, of Evansville, Indiana, in which he criticises the position taken by Mr. District Judge HOPKINS in Hamlin v. Pettibone (*ante*, p. 404), that the recent amendments to §§ 35 and 39 of the bankrupt act, with regard to fraudulent conveyances by the debtor, are not retroactive. Judge IGLEHART, argues the other side of the question clearly and forcibly; but it is understood that, while desiring to promote discussion of novel questions of this character, we do not necessarily adopt the views of correspondents.

AMMENDED BANKRUPT ACT—NUMBER AND AMOUNT OF PETITIONING CREDITORS.—Mr. District Judge BLATCHFORD has rendered another important decision, in *re* Hymes, with reference to the number and amount of creditors who must join in a petition against an alleged bankrupt, under the amendatory act of 1874. The point ruled will perhaps be understood from the concluding portion of his opinion, which is as follows:

Still the point to be determined is what number of creditors must join in the petition, and such number must be determined by making a computation according to the rules laid down in the section. Those rules are, that the number of creditors joining in the petition must be, by personal enumeration, at least one-fourth of the entire number of creditors, and must have provable debts amounting to at least one-third of all the provable debts, with the further rule that, in computing the number who must join—in determining how many must join, whether 'one or more"—creditors whose respective debts do not exceed $250, are not to be reckoned. Everything that is to be done is to compute the number of creditors, "as aforesaid," who must join. In doing that the creditors whose respective debts do not exceed $250 are not to be reckoned. Those creditors are to be excluded. If they are excluded, it follows necessarily that if only the creditors whose respective debts exceed $250 are included and reckoned, the proper number to join will be assertained by computing one-fourth of such creditors and such additional number of them that the aggregate of the debts of those computed will amount to one-third of the debt of the creditors so included and reckoned—that is, one-third of the debts of the creditors whose respective debts exceed $250. This view is supported by the concluding sentence of the 9th section of the act of 1874, which provides that if there are no creditors whose debts exceed the sum of $250, or if the requisite number of creditors holding debts exceeding $250 fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid. This shows that where creditors having debts exceeding $250 are to be exclusively reckoned, they are to be reckoned for all the purposes mentioned in the section—that is, for the purpose of arriving at the proper number of creditors, which is to be a number having a certain aggregate of debts.

THE CANADA ELECTION CASES.—The Canada Law Journal, for August and September, devotes considerable space to election cases. Indeed, cases arising under election laws seem to have become a prolific source of litigation in England and Ireland, as well as in Canada. These cases appear to involve exclusively the construction of election laws which, we presume, have no counterpart on the statue books of any of the United States. They are therefore without interest to lawyers in this country, unless they have leisure to observe the workings of other political systems. These statutes appear to be framed with the view of promoting the purity of elections in two ways: 1. By punishing the bribery of voters. 2. By preventing the election and voting of persons who have not a requisite property qualification. With reference to to the construction of "Corrupt Practices Act" of Canada, of 1860, in regard to bribery, we notice that the court (consisting of the Chief Justice, the Chancellor, and the Chief Justice of the Common Pleas of Ontario), in Cameron v. McLennan, 10 Canada Law Journal, N. S., 217, decline, in the present state of the law, to exclude enquiry as to the payment of *traveling expenses* of persons going to and returning from the polls, inasmuch as the same *might* amount to bribery. On this point, Mr. Chief Justice RICHARDS said:

By the Corrupt Practices Act of Canada of 1860, sec. 3, paying the expenses of voters is an illegal act, and any elector who shall hire his horse to any candidate or agent for the purpose of conveying electors to and from the polling places, shall be disqualified from voting at such election. Section 71 of the Ontario Act., 32 Vict., Cap. 21, is similar in effect, and a penalty of $100 is imposed, but the latter part provides that any elector who shall hire a horse, etc., *for* any candidate, or *for* any agent of any candidate, for the purpose of conveying any electors to and from the polling place, shall be disqualified from voting at such election, and under a penalty of $100. Cooper v. Slade, 5 H. L. 772, seems to be to the effect that merely paying the expenses of an elector, as the law stood in England, was not a violation of the statute, but promising to pay might be held to be bribery. In the present state of the law we do not think we can properly exclude enquiring in these matters.

In the subsequent case of Woodhouse v. O'Donohoe, 10 Canada Law Journal, N. S., 248, the same court hold that the hiring of teams, etc., is not a "corrupt practice" within the meaning of sec. 3 of "Controverted Election Act," of 1873, unless the hiring amounts to bribery. Upon this point, the same learned judge said:

We think the hiring of cabs and vehicles is not a "corrupt practice" within the meaning of those words in section 3 of the "Controverted Election Act," 1873. The "Act of the Parliament of Canada" there mentioned, refers to an "Act of the Dominion of Canada." But the clause will not be struck out, as the hiring might amount to bribery, and the petitioner should have the right to give evidence under it for that purpose.

These quotations serve to convey an idea of the questions which seem now to be engaging a large share of the attention of the courts of Ontario.

—JUDGE BRAZEL HARRISON, the original of one of the characters in Cooper's novel, "The Bee-Hunter," died in Kalamazoo, Mich., a few days ago, aged 104 years. His descendants number 203. He was a native of Frederick county, Md. He was not a lawyer, but this did not disqualify for judge in the wilderness, when judges were not required to know any law.

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The Purpose of a Law Review.

The learned editor of the Forum has also written a letter to Mrs. Bradwell, of the Chicago Legal News, which, with Mrs. Bradwell's comments thereon, is as follows:

BALTIMORE, Aug. 27, 1874.

DEAR MADAM:—In the isssue of your valuable paper of August 15th, which I have just seen, you fall into a slight inaccuarcy in regard to the "Forum," and thereby do some little injustice. The great feature of the *Review*, designed by its projector, was to publish abstracts of the most recent decisions of importance, up to date, *and not take the cases from the latest volumes of published reports*. Of course, no one could expect us to give over a hundred cases in full (the number in July No.), which would make a volume of two thousand pages, and being issued four times a year, would be an undertaking better suited to Chicago than here. You state that two objects are necessary to a great law review — one to give carefully prepared articles on leading subjects, the other to publish reports of cases for the three preceding months. This, you say, we do, but "fail to tell where the opinions may be found." Now, we certainly did give the title of the case, and the state and court where decided. We could refer to no report, because *our cases* are in some states one year, and in others eighteen months, in others two years, in advance of the published reports, and we do not know what number of the reports will contain them. Of course, if, as you say, we publish cases decided from one day to three months beforehand, it will, therefore, be impossible to give any reference but what we have given, as no report then in existence will contain them.

In Maryland the 38th Vol. is out a few months; the cases we give will soon appear in 39th, and some not until 40th. Copies of all the cases we give can be obtained in full by sending to the clerks of the respective states, and we do not know what more we could do. The cases found in other periodicals in this country, are from the latest volumes of reports.

As to the question of articles, such writers as we have published articles from, as Hons. Isaac Redfield, Wm, Lawrence, Prof. Holmes, etc., will answer any objections completely on that score.

Very respectfully,

ATKINSON SCHAUMBURG.

[MRS. BRADWELL'S COMMENTS.]

We will assure our brother of the "Forum" that we did not fall into a "slight inaccuracy in regard to the 'Forum.'" We said one of the purposes for which a quarterly law review is now useful, is to give the points decided in cases involving new and important questions for the three months preceding its issue, and where the full opinions may be found. We were led to this remark by the fact that the "Forum" republished, on page 138, the syllabus to Dempster *et al.* v. West, which we prepared at a cost of considerable labor, without stating from whence it came, or where the opinion could be found. We cannot better illustrate than by saying, had the "Forum" added that the opinion could be found in 6 Chicago Legal News, 335, it would have enabled its readers interested in the important questions involved, to have obtained access to the full opinion. This is one of many cases, of which we can give the volume and page. We shall notice the next number of the "Forum," and should it give references when it abstracts opinions from law periodicals, we shall be glad to note the fact.

We think Mrs. Bradwell has slightly the advantage in this argument. In short, her criticism of the Forum was the same as ours, and no doubt, like our own, was simply intended as a friendly suggestion; and the instance which she cites of Dempster v. West, may be supplemented by the large number of similar instances cited by us (*ante*, p. 447). The September number of the Canada Law Journal contains a notice of the Forum, in which a more conspicuous failure to give the proper credit is thus pointed out:

In the last number there is a paper on the valid voluntary settlement of a chose in action, which, we think, we remember to have seen first in the Solicitors' Journal, and it is perhaps an oversight that no credit is given in The Forum for the article in question.

No doubt Mr. Schaumburg has, in the hurry of his practice, entrusted the preparation of his abstracts of decisions and other selected, matter too largely to his clerks, which accounts for his misapprehension as to the sources from whence much of this matter was compiled.

The advantage of these hints to Mr. Schaumburg consists in the fact that if his readers know that an opinion is published in the Chicago Legal News or CENTRAL LAW JOURNAL, they can procure a copy of the journal which contains it for ten cents. Otherwise, they will be obliged to procure a transcript from the clerk, at a cost generally of several dollars.

Passenger Carriers.

In a late English case, Readhead v. the Midland, etc., L. R. 2 Q. B., 413, the court were divided in opinion upon the question whether passenger carriers are liable for injury caused by an unavoidable and latent defect in the carriage; a majority of the judges holding the negative. In this case, an action against a railroad company, the accident was caused by the giving away of a wheel, the tire having broken into three pieces in consequence of a flaw in the wadding, caused by an air-bubble. It was proved that such a defect would some times occur in spite of the greatest care on the part of the manufacturer; that it could not be discovered in the process of manufacture nor afterwards, either by the eye or from the ringing of the metal. The carriage, which belonged to another company, by mutual arrangement had been examined at the usual places, among others at Trent, the last stopping place prior to the accident; and the wheel, on hammering, then rang true. The tire was of considerably more than the minimum thickness, to which it is found in practice safe to wear tires.

The weight of authority seems now to be, that the law requires from common carriers of passengers the highest degree of care and diligence which a reasonable and cautious man would use. Taylor v. Grand, 48 N. H. 304; Simmons v. New, 97 Mass. 361; Maverick v. Eighth, 36 N. Y. 378; Johnson v. Winona, 11 Minn. 296. With reference to vehicles drawn by horses, the responsibility is said to apply to the team, the load and the state of the road; the carriage must be road-worthy, the horses broken and steady, the harness in good condition, the driver skillful, cautious and sober, acquainted with the road, watchful and competent, and willing properly to meet any emergency or difficulty. Derwort v. Loomer, 21 Conn. 245; Taylor Lay, 16 Minn. 566; Fuller v. Naugatuck, 21 Conn. 557. The proprietors of a stage are liable if the coach was upset by the running of the horses, and if they ran, not from accidental fright, but because the blocks were out of the brake, causing the stage to run upon them; and if the running might have been prevented, had the horses been properly harnessed, or the utmost care and diligence of a cautious person used to secure the blocks in the brake. So, if a stage is upset in consequence of baggage on the top. Farish v. Reigle, 11 Gratt. 697; Boyce v. California, 25 Cal. 467; Fairchild v. California, 13 Ib. 599; Alden v. N. Y., 26 N. Y., 102; Burns v. Cork, 13 Irish C. L. 543. Or if the superintendent allows a person other than the regular driver to drive the stage. Tuller v. Talbot, 23 Ill. 357. So, although the accident occur through the recklessness of the driver of another stage, who with his employers may be also liable; if the driver of the stage to which the accident occurred, was wanting in skill or prudence. Peck v. Neil, 3 Mc. L. 22. Proof that the plaintiff was a passenger of the accident and the injury, makes a *prima facie* case. Galena v. Yarwood, 17 Ill. 509; Dawson v. Manchester, 5 Law T. (N. S.) 182. See Yonge v. Kinney, 28 Geo. 111. And, contrary to the decision in Readhead v. the Midland, etc., it has been held that a railroad

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is responsible for injury caused by a crack in the iron axle of a car, though not discoverable by any practicable mode of examination. Alden v. N. Y., 26 N. Y. 102. And in general, that a carrier of passengers is liable for any accident occurring through defective construction of the vehicle, although the defect were out of sight, and not discoverable upon ordinary examination. Sharp v. Grey, 9 Bing. 457.

In other cases the railroad is held liable if the defect in an axle could have been discovered in the process of manufacture by any known test. Hegeman v. Western, 13 N. Y. 9. So, in case of an imperfection in a driving wheel, which had not been tested after long use, though in the usual course, hammered all round when new. Manser v. Eastern, 6 H. & N. 899. So, for the breaking of an axle from frost, if there was the slightest negligence in not preventing it. Frink v. Potter, 17 Ill. 406. And a railroad, though purchasing its stock from competent manufacturers, in the due course of business, is held responsible for their negligence. Burns v. Cork, 13 Ir. C. L. 543.

But a somewhat less rigid rule may seem to have been adopted in recent decisions, prior to Redhead v. The Midland, etc. See Anderson v. Pyper, Hay, [?] 23. Thus in Ingalls v. Bills, 9 Met. 1, specially referred to in the opinion of the court in that case, it is held that the passenger carrier is responsible, if an accident happens from a defect in the coach which might have been discovered by the most careful examination; but not where it arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by a sound judgment and the most vigilant oversight.

A coach was overturned in consequence of the removal, since the coach had last passed, of one of two cottages, whereby the driver was deceived as to the course of the road, in a moon-light night. In an action against the coach proprietor for an injury thereby sustained, the jury were instructed, that, as the road was of sufficient width, and there was no obstruction or want of light, the coachman ought to have kept within its limits. But a verdict for the plaintiff was set aside, upon the ground that the question of the driver's negligence should have been left to the jury. Crofts v. Waterhouse, 11 Moo. 133. And, with reference to railroads, it is held in recent cases, that a railroad is bound to use the best precautions in known practical use, but not every possible precaution, which the highest scientific skill, according to speculative evidence, might have suggested. Ford v. London, 2 F. & F. 730. It is bound to adopt any new and useful improvement, which would have prevented the accident. Smith v. N. Y., 19 N. Y. 127. F. H.

Homicide — Circumstantial Evidence — Force and Direction of Gun-Shot Wounds.

The case of Saunders v. State, 37 Tex. 710, furnishes an interesting discussion of this question. Saunders was indicted for the murder of James Huffhines. He was convicted of murder in the first degree, and sentenced to be hanged. The principal evidence for the state was that furnished by the statements of the prisoner himself, which made the killing of Huffhines purely accidental.

It appeared that Saunders was hired to the deceased; that he was accustomed to work with, and take care of, horses; that he had, whilst working for Huffhines, and also whilst working for another person, been in the habit of getting up in the night and going out to look after the horses in his care, under some real or imaginary alarm of a disturbance of the horses by persons intending to steal them. On the night of the killing, he called the deceased to go out with him to look after the horses, pretending to have seen some person on the premises. They went out together, the defendant having a pistol. Whilst out a short distance from the house, the deceased was shot by the discharge of the pistol in the hands of the defendant, and died from the wound.

The defendant's account of the shooting was, that the deceased was walking before him; that they were returning to the house; that he (defendant) had cocked his pistol, and was attempting to let the hammer down, holding the pistol in his hands, at a angle supposed to be about 45°, from his manner of illustrating the position of the weapon in his hands; that the hammer slipped from under his thumb, causing an accidental discharge of the pistol, the ball, as he supposed, entering the deceased in the back. But instead of this, the ball, in fact, entered the head of the deceased, about the base of the occipital bone, penetrating about two inches in a downward range towards the chin. The conviction was supported by the testimony of experts, showing that from the direction which the ball took on entering the head of the deceased, that the statement of the prisoner could not be true.

Mr. Justice WALKER said:

The state has adopted a theory, favored by the evidence of professional witnesses, inconsistent with the statements of the appellant, which appears to be predicated [on the supposition] that the direction of the ball, after it entered the head of the deceased, must necessarily have followed the prolongation of a straight line from the point at which it was discharged from the pistol. This theory, if true, to account for the depression in the line of direction pursued by the ball, after entering the man's head, would establish the fact that the ball must have been fired from a point higher than the head of the deceased, which might, perhaps, involve the case in speculation, if not in absurdity. At all events, it is inconsistent with the idea that the pistol was held in the ordinary position in which such weapons are held when aimed at an object, if the theory of the state be correct.

But, after having examined some authorities of very high standing on gun-shot wounds, and particularly the reports of surgeons employed in the field and base hospitals during the late war in the United States, we are perfectly satisfied that to whatever degree of perfection the noble science of surgery may have been brought, no rules have ever been laid down or attempted to establish the geometrical direction of war missiles after entering the human body. Where bodies of equal density, and of spherical form (as in case of the ivory balls used in the game of billiards) are brought in contact, they will seperate on the geometrical principle that the angle of incidence is equal to the angle of reflection. This, however, depends upon the condition that the cue, by which the moving ball is forced, shall strike precisely upon its center — the skillful player well understanding how to produce or avoid this result. Many illustrations might be given of this principle on the billiard table.

But when bodies of unequal density and different in form are brought in contact by equal or unequal forces, the principle by which they will be deflected depends upon so many conditions as to have so far utterly baffled any law which science has established. There are plenty of living men who could, upon their own bodies illustrate the eratic and utterly uncertain direction of gun-shot wounds, by a simple reference to the wound of entrance and the wound of exit. A ball passing through the atmosphere under a diminishing force will be deflected more easily than one flying with the full velocity of its exit from the muzzle of the piece from which it is discharged. Many instances are found where partially spent balls, entering merely the muscular parts of the human body, have traversed a line varying many degrees from the line upon which they entered the body. The most remarkable and singular results are often witnessed where leaden balls come in contact with the tough sinewous cartilages or ossified parts of the human body. Nevertheless it is true that the conical balls used in modern warfare, when passing through a line of any direction with great velocity, and brought in contact with substances of less den-

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sity, will pass forward on a straight line for a short distance, unless the form of the object be such as to exert an unequal resistance on the striking surfaces. We feel sure we are authorized in these remarks by the experience and scientific observation of every author who has treated the subject, and especially those who have written from personal observation. We do not feel authorized in a legal opinion to enter at length into mere scientific speculations. But we think in this case we are called on to deduce from science as far as it goes, and from known facts and principles, whatever can be so legitimately deduced in favor of innocence and human life.

The state offered in evidence the testimony which the appellant furnished against himself, and then, taking everything for granted which could fix the guilt of the appellant, those parts of his statement which would imply his innocence are attacked by the evidence of surgeons, whose statements, we believe, have been allowed an undue force by the jury. No member of the profession, whose experience has extended to this class of cases, need be admonished of the danger of relying too much on the opinion of experts. * * * We have twice very carefully examined this record, and the case has been argued, with great ability to the court, and we feel that we should be doing great wrong in taking away the life of a human being upon doubtful and uncertain evidence, were we to affirm this judgment. We regard it as one of those cases where the law has been violated in not giving the accused the benefit of those grave doubts which must rest upon every well informed mind that has attended to all the evidence in the case. We therefore reverse the judgment of the district court and remand the case."

The above opinion, notwithstanding some slight inaccuracy in the use of terms, presents what appears to be a just and correct view of the question discussed. Thus, it is hardly proper to call the rule that the angle of incidence is equal to the angle of reflection, a *geometrical* principle. It is rather a *physical* principle a law of motion, which we discover, not by any geometrical demonstration, but by observation of the action of one physical body upon another. Again, it is scarcely proper to speak of "any law which science has *established*." Science does not establish laws, but simply discovers those which are already in existence. In this sense it may be said, however, that science *establishes* the *existence* of certain laws of nature, and this is doubtless what the learned judge meant. Passing over these slight inaccuracies — which might well be excused in a lawyer, as a surgeon would certainly be excused in like inaccuracies in the use of legal terms — the view taken by the learned judge appears, as he states, to embody the views of the best writers on the subject. Thus, Dr. WHARTON, in his work on Medical Jurisprudence, Vol. 2, part 2, § 712, says:

A ball after entering the skin is deflected from a straight course by very slight causes. Many examples of this fact are given by all authors on military surgery. The following is a singular illustration of it: In a duel with pistols between two students at Strasburg, one fell apparently mortally wounded in the neck, but almost immediately got up, without feeling any inconvenience from his wound. It was found that the bullet had struck the larynx obliquely, and glancing from the cartilage, had gone completely around the neck and stopped on the opposite side of the larynx from where it was discovered. It was taken out by making simply an incision over it. Other examples might be cited in which balls have made a circuit around the cavities of the body, without entering them. In a wound of the head, thorax or abdomen, the ball may make a half circuit of the body and lodge or emerge at a point opposite that at which it entered, thus leading one to suppose that it must have passed directly through. In the battle of Suddozam, a soldier was struck by a bullet just above the right haunch bone. The ball passed around the trunk, entered the abdomidal parietes on the *left* side, then passed downward through the sciatic notch, and "at length contented itself with remaining in the left nates."

—A DARING attempt was made on the night of the 5th instant to burn the records of the office of the attorney-general of Louisiana. During the night the offices of that officer, in the St. Louis Hotel, now used as a state house, were broken open, all the records therein piled in a heap in the centre of the main office, and, together with part of the furniture, saturated with coal-oil and set on fire. Fortunately the flame went out, and only one or two of the papers were charred, though all are rendered nearly illegible by oil. The incendiaries appear to have been frightened off before completing their work.

Fire Insurance—Warranty—Concealment—Waiver of Defences.

GEO. W. CHEEK, AND OTHERS, v. COLUMBIA FIRE INS. CO.—SAME v. NORTH AMERICAN FIRE INS. CO.—SAME v. PHŒNIX FIRE INS. CO.

Supreme Court of Tennessee, April Term, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY, }
" ROBERT MCFARLAND, }
" JAMES W. DEADERICK, } Judges.
" THOS. J. FREEMAN, }
" JOHN L. T. SNEED, }

1. **Void Tax Title.**—In answer to a question whether the applicant for an insurance against fire owns the property upon which insurance is to be effected, and whether any other person is interested in it, he need not disclose the existence of a void tax title to the same.

2. **Lease of Premises.**—The application in thiscase, which was made part of the policy, contained the following question and answer:—"Is the mill leased or rented? If so, to whom, and how long?" Ans.—"No." *Held*, that the question was designed to ascertain whether the applicants had made a lease of the premises, not whether they were holding as lessees.

3. **Concealment.**—The non-disclosure of the fact that the title to the insured premises was in litigation, *held*, in the absence of any interrogatory upon the subject, not to avoid the policy.

4. **Application filled out by Company's Agent.**—If all the facts inquired of are truly stated to the company's agent, and he fills out the application, any failure by him to state therein facts made known to him, is to be attributable to the company, and will not avoid the policy. The evidence on this point considered.

5. **Waiver of Defence.**—Where the insurance company rest their defence upon the ground of a misrepresentation of title: *held*, that they must be confined to this point, and cannot allege other grounds of defence.

The only material fact not stated in the opinion of the court is the existence of the following condition in the policy of the Columbia Company: "If the property to be insured be held in trust or on commission, or be a *leasehold*, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance as to such property shall be void." Similar provisions were contained in the other policies.

Pierce & Dix, for Columbia and North American Companies; *E. S. Hammond & E. L. Belcher*, for Phœnix Company.

MCFARLAND, J., delivered the opinion of the court.

These causes have been argued and considered together in this court. They are bills filed to recover the amount of three fire policies underwritten severally by the defendants, who are insurance companies, organized and having their principal offices in other states, but at the time doing business in this state, and represented by the same agent.

The policies were issued upon the application of Geo. W. Cheek & Co., and are each for five thousand dollars, "on machinery fixed and movable," in a certain cotton mill, described in the policy and application. The loss by fire within the time covered by the contract, is shown, and in fact not denied. The defence in each case is placed upon substantially the same ground.

In the application, which is made part of the contract, occur the following questions and answers, substantially the same in each, to-wit:

"Are the building and machinery both owned by applicants?" Ans., "Yes." "Is any other person interested in the property? If so, state the interest particularly." Ans., "No." "Is the mill leased or rented? If so, to whom and how long?" Ans., "No."

The applicants in said written application, agree that it contains a just and true statement of all facts and circumstances in regard to the condition, situation and value of the property, known to them, and material to the risk, and make this a condition of the insurance.

The defendants in their answers admit the contracts, but deny "that said Geo. W. Cheek & Co. were the owners of the property described in said policy, or had any insurable interest therein at the time said policy issued, except as tenants," but charge that "in

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truth and in fact the property at the time belonged to W. J. Smith and Fielding Hurst, who had purchased the same at the United States direct tax sale in June, 1864."

This defence proceeds upon the ground that the assured had no insurable interest in the property, and also upon the ground that, in this respect, which was material to the risk, the statements of fact in the application were untrue, and by the terms of the contract it was thereby avoided.

This necessarily presents the question whether or not Geo. W. Cheek & Co. were the owners of the property. They are admitted to have been the owners up to the time of the tax sale referred to. This tax sale is the adverse title set up by the defence. While of course we can make no adjudication binding upon Smith and Hurst, who claim this tax title, still the question is presented, and its discussion is essential to the determination of the present case.

It is not denied that such tax sale was made, and that Smith & Hurst were the purchasers of the property; but it is argued that this sale was absolutely void for several reasons, only one of which we notice. It is clearly shown by the proof that the amount of the direct tax assessed under the act of Congress, together with the penalty and costs, was duly tendered to the commissioners by the owners before the sale, but the tender was refused. Upon this proof we must hold, upon the authority of Bennett v. Hunter, 9 Wallace, 338, that Smith & Hurst acquired no title under their purchase.

This being the only objection taken to the title, it results that Geo. W. Cheek & Co., not only had an insurable interest, but were the absolute owners of the property, and their statements to that effect in their application were strictly true.

It is next argued that, however the foregoing question may be, Cheek & Co. did fraudulently conceal from the defendants or their agent, other facts material to the risk. In two of the cases cross-bills were filed to avoid the policies upon this ground. In the other case the defence was made by answer. The other facts charged to have been concealed, or falsely represented in the application, are as follows: Smith & Hurst, under their tax purchase, and by aid of the military authorities, took forcible possession of the property, and held it for a short time, until the said Geo. W. Cheek & Co. had instituted legal proceedings to regain possession. Under a decree of the United States Court at Memphis, R. C. Brinckley, who had sold the property to Geo. W. Cheek & Co., and who had a lien upon it for unpaid purchase-money, was appointed receiver, with directions that he might rent it to said Geo. W. Cheek & Co., for the sum of one thousand dollars per month, which he did. In this mode and under this contract with Brinkley, Geo. W. Cheek & Co. had regained possession a short time before these policies were issued, and this was the character of their possession at the time. It is not shown what became of the proceedings in the United States Court.

The first question is, are these facts inconsistent with the truth of the statements made in the application for the policy, as shown in the three questions and answers which we have set forth?

It is clear these facts do not contravene the truth of the first two questions and answers, to the effect that the applicants were the owners of the buildings and machinery, and that no other person was interested in the property; for we should understand the interest of other persons, enquired after in this question, to be an actual interest, and not a mere pretended claim without any real foundation. The third question and answer are to the effect that the mill was not leased or rented to any one. This was doubtless intended to mean, that Geo. W. Cheek & Co., who were the owners, were themselves in possession, and so expected to remain; that they had not rented or leased to any third person, who might take possession. On the other hand it is true that the applicants, although the owners, were themselves in possession as renters under the receiver Brinkley.

The statement contained in this last question and answer, when literally construed, is contradicted by the facts we have stated in regard to the manner in which Geo. W. Cheek & Co. then held possession; but when understood in the sense in which the parties most probably understood it, it is not contradicted by the facts stated.

But the application purports to contain a true statement of all facts material to the risk, and it might be argued that an omission to state some material fact known to the applicant, though not specially enquired about, would be in effect the same as to make an untrue statement in the application. We do not concede this proposition in an unqualified sense to be sound. For if the underwriters choose to insure without special enquiry as to certain facts, the applicant is not bound to know that these facts would be regarded as material, and a failure to disclose them would not necessarily avoid the policy. See 2d vol. Bennett's Ins. Cases, p. 279, from 5 Hill N. Y. 188.

If the facts not disclosed were unusual, and such as the applicant must know to be material, the case would be different. Fland. on Ins. 334–5.

At all events we should say that where the defence is predicated upon a mere failure to disclose some facts within the applicant's knowledge, not enquired about, the fact not disclosed must be material to the risk in order to avoid the policy. Fland. on Ins. 293.

We have not found in the numerous cases referred to on this question, satisfactory authority for holding that the facts, which it is alleged were not disclosed, were so material to the risk as to avoid the policy. For, as indicated, in fire policies there is a distinction between statements made upon direct enquries, and a mere omission to state facts not enquired about. In the latter cases, more latitude is allowed in showing that the facts were not material. Fland. on Ins. p. 328, and authorities there cited.

The cases referred to in Flanders Insurance, p. 293 and notes, are cases where the facts are stated in the application, and by the terms of the contract are made material.

Treating of concealments, Mr. Flanders says, p. 339: "A pending litigation respecting the subject of the insurance, not voluntarily disclosed, will not avoid the risk. And the underwriters are not competent witnesses in such a case to prove that the fact concealed was material. It is not a question of science or skill, with respect to which they might be experts." For this he refers to Hill v. Lafayette Ins. Co. 2 Mich. 476. Our own court has held that the existence of a mortgage not disclosed was not material. 8 Hum. 684; although there are authorities to the contrary.

The facts which it is alleged were not disclosed, are:

1st. The existence of the pending litigation in the United States Court. This litigation, as we have seen, involved only the claim of Smith & Hurst, which, in our opinion, was a claim without legal foundation. The applicants, notwithstanding this litigation, assume to state in their application that they were the absolute owners, and we hold their statement to be true.

2d. It is said they failed to state that Smith & Hurst had had possession. We do not see how this could be material.

3d. It is said they failed to disclose that, under the pending litigation, they had rented under the receiver. Assuming, as we do, that Cheek & Co. were the owners, that the claim of Smith & Hurst was illegal, the practical legal effect simply was that Cheek & Co. would be subject to the order of the court pending the litigation.

All these facts might, within the range of possibility, affect the risk. Parties engaged in an angry litigation about property might be tempted to destroy it, rather than have their adversary succeed. But this is rather a remote danger. Geo. W. Cheek & Co. were in possession claiming to be owners, and were in fact owners. We do not see that their care and prudence in regard to it would b affected by circumstances stated.

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We are not satisfied that a failure to disclose these facts would have avoided the policy. Although the agent says in his opinion the facts might have been regarded as material, it is not a question to be decided by his opinion.

But aside from all this, how are the facts in regard to the alleged concealment? For the complainants it is maintained that these facts were fully disclosed to the agent, but he not regarding them as material, did not insert them in the written application, which was made out by him. Upon this we have the testimony of Cheek & Page, the two members of the firm, the former very positive and decided, the latter not so full, but to the same purport. They have no direct interest, as they have assigned the policies without recourse on them. On the other hand, the agent says these facts were not disclosed to him. We do not see that he has a legal interest, but his feelings would naturally incline him not to admit any failure of duty in the matter towards his principals.

The facts are to some extent of a public nature. If we regard the onus upon the defendants to make out the concealment, in this they have clearly failed.

And even if the written application be construed to contain statements inconsistent with the facts, still, in cases where the application is made out by the agent of the underwriters, and the facts are fully disclosed to him, and he fails to insert them, this will not avoid the policy.

Upon this question the defendants' counsel have referred us to a large number of cases, and it is maintained that this is in conflict with the rule which rejects parol evidence to contradict a written contract, and is only allowed in exceptional cases, where the facts untruly stated, are of a public and notorious character, or where there is fraud, accident or mistake. We cannot review or undertake to reconcile these authorities. We can only give the rule, which is sustained by one class of authorities, and which we think is sound.

1st. The agent who fills up the blanks or makes out the written application, is still in this the agent of the insurers, and not of the insured. He is in the employ of the insurers; it is his duty to represent them, and protect their interest, and he cannot rightfully divest himself of this character, although the application is in form the act of the insured. Bearing this in mind, and regarding the acts of the agent as the act of the company, then if we assume that the facts were fully disclosed to him, and he fails to state them truly in the application, it would be manifestly against all sound principle to allow any false statement thus inserted in the application to avoid the policy. It would be to allow the defendants to take advantage of their own wrong. It would put it in the power of an agent to destroy the effect of the policy, without fault upon the part of the applicant. Of course, if actual collusion be shown between the agent and insured, the case would be different. This may be placed either upon the ground of fraud or estoppel. We refer to the cases of the Insurance Co. v. Wilkinson, 13 Wallace, 222, and the Planters' Insurance Co. v. Sorrells, by this court, at Nashville, Mss., recently decided, as authorities for this holding. In the former case, it was said, this does not come in conflict with the rule rejecting parol evidence to vary a written contract, but proceeds upon the ground that the application in such case is not the statement of the applicant.

The proof clearly shows that the application was made out by the agent of the defendants, and the weight of proof is that the facts were fully disclosed to him.

A question of this character must be determined like any other question of fact, by the weight of evidence. We do not see that any different rule should be adopted as to the amount of evidence required, from the ordinary rule where any other question of fact is involved in a civil case.

Other objections are made, 1st. That the complainants have averred that they used all proper precaution to prevent the fire, that this was not admitted, and there is no proof. 2d. There is no sufficient proof of the amount of the loss.

We think it manifest, from the record, that the only defences set up are those we have considered, In fact, the real cause of resisting the payment was upon the ground that Smith & Hurst were the owners of the property. This was the real defence, and is the only real defence set up or put in issue.

It appears that proofs of losses were furnished in due time, and no objections were taken to them, and in the first named case the agent at Memphis had been instructed to draw on the secretary of the company for the amount of the policy, and the evidence indicates that the other two defendants were acting in concert on this subject. It appears that Geo. W. Cheek & Co. owed Brinkley balance for purchase-money, a note of $20,000. They (after the fire) offered him in payment four policies of $5,000 each (not the ones in controversy in this case), as they had $75,000 in insurance, but others. He was advised by the agent of the defendant not to take them, but to take the three policies involved in this case, and one other, all of which were in companies represented by him, and this upon the ground that these policies would be paid. Before the time, however, the instructions of the agent to draw for the amount, were withdrawn by telegraph and afterwards by letter, and from this letter it is clear that the defence then contemplated was upon the ground that Smith & Hurst were the owners of the property; and the defendants had determined to pay the losses, but afterwards determined to resist upon this ground. We think, therefore, the questions argued are not raised by the record.

The decrees will be affirmed with costs.

Petition for rehearing denied.

NOTE.—This case has raised in a new form the consideration of several old and well established principles of the law of insurance, if any of the rules of *fire* insurance can be said to be old and well established, and presents a fair illustration of the fact that the plainest doctrines of the law are often very difficult of application. This difficulty was, perhaps, in the mind of Lord ELDEN when he made, somewhere, the well known remark that his decisions must not be regarded as laying down any general principles; the rule of law in each case was to be considered just as broad as the facts of the case, and no broader — an injunction conspicuous in its breach.

Upon some of the points in the principal case, we cannot agree with the court of Tennessee. We shall not insist strongly that there may be doubt of the correctness of the first point; and yet we cannot pass it by without one suggestion. The court hold that, inasmuch as the tax title of Smith & Hurst was void, there was no misrepresentation in the statement that no one except the applicants and Brinkley were interested in the property. The court are doubtless correct in saying that this meant that no one else had a valid interest and that it was not falsified by the pretended title of Smith & Hurst. But suppose those gentlemen had called for a return of the sum bid for the property, and had received it, on the ground that the sale was void, as Cheek & Co. claimed, would not the government then assert the continued existence of its lien for taxes? If the sale was void, the lien had not been destroyed, and only awaited an assertion. Is not a lien upon real estate an interest in it? The payment by Smtih & Hurst of the purchase-price was not a payment of the taxes on behalf of the owner within the act of Congress. The sum paid may have been a great deal more, through the competition of bidders, than the amount due for taxes; it was a purchase of the property, against the interest of the delinquent.

However, the improbability of an assertion of such lien by the government makes this criticism, perhaps, appear rather technical. And yet there was a warranty of the truth of all the statements made; and a false statement, however immaterial, avoids a warranty.

As to the alleged misrepresentation concerning the character of the plaintiff's possession, the conclusion of the court would perhaps be correct if the question and answer given in the opinion were the only facts upon which such a misrepresentation could be based. Had the question, indeed, been merely "is the mill leased or rented?" we should be disposed to think that, without going farther, the court were wrong in saying that this question was intended to ascertain whether the applicants had leased the property. For, Cheek & Co. were in possession, as they had before stated in their application; and as the lessee is always in possession in the case of an actual lease, and not the lessor, it would follow that the companies must have meant by their question to ascertain whether the applicants were lessees or not. But the above quoted words were but half the question; the rest of it was, "if so, to whom, and how long?" Now it would seem from this that the companies desired to know whether the applicants had

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made a lease of the property; else why should they ask "to whom?" when if the question was designed to disclose whether Cheek & Co. were lessees, they must have known that they were, if there was a subsisting lease, from the fact of their possession. The fact seems to be that the apparent discordance between the two parts of the question arose from the previous statement of Cheek & Co., that they were in possession; and had not this statement been made, it would have been clear that the company desired to know whether the applicants had rented the property. And this view is strengthened by the preceding question and answer as to the character of the ownership. For, the applicants having stated that they owned the property in fee, what sense would there be in asking them if they were lessees? But probably the questions were printed ones, and not raised and put at the time, by reasons of answers given to previous questions.

If this were all, we should think, as we have said, that the court were possibly right. But the court seem to have overlooked one of the conditions of the policy having a direct bearing upon the character of the possession of the insured. The condition was, "if the property to be insured be held in trust or on commission, or be a *leasehold*, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance, as to such property, shall be void." Now it is to be observed that the language of this clause is, "if the *property* to be insured * * * be a leasehold, not if the *interest* to be insured be a leasehold. If the latter had been the language, Cheek & Co. might indeed say that the insurance was not upon their leasehold interest, but upon their absolute interest, and therefore the condition was not broken. Nor can the term "property" in this connection be synonymous with "interest" in the sense named. It would be absurd to say that there must be a disclosure of a leasehold interest in the case of an insurance upon a lease. The fact that the insurance was upon a lease, would of course show that the interest held was a leasehold; and a lease could only be insured *Eo nomine.*

If this view be correct, it follows that there was a breach of the condition quoted, unless Cheek & Co. claim that not only the tax title was void, but also all the proceedings of the United States court, by which Brinkley was made receiver, and they given possession as lessees under him. Surely they would not care to knock out such a prop from underneath them. This would be in effect to deny their own statement that they were in possession, which was true; but this possession was under the lease from Brinkley; and they could not say that they were wrongfully in possession under him, under a void lease, because they had themselves instituted the proceedings in which they had thus obtained possession, and for the express purpose of regaining possession under the authority of the United States court. They must therefore uphold the lease; and upholding it, there is a plain breach of one of the conditions of the policies.

The point next considered by the court, the non-disclosure of the judicial proceedings concerning the tax title, is perhaps the most difficult one in the case; but we are strongly inclined to support the position of the court on this question.

There are two things in respect of the statements upon which a policy is issued which go to defeat the contract; these are misrepresentations and concealments. Now these terms are sometimes in effect synonymous, and sometimes distinct — a fact too often overlooked. For example, if I am asked if there are any incumbrances upon the property proposed to be insured, and I answer, there is one, or there is none, when in fact there are several; this may be called a misrepresentation or a concealment, according to the point from which it is viewed. But if, without any enquiry being made, I should fail to disclose the fact that there had been repeated efforts to burn the property within the past few days, or that a great fire was raging at the time of my application, in the immediate vicinity of the property to be insured, this would be called a concealment, and nothing else. Now, concealments of the first class named have the same effect, and are governed by the same rules of law, as misrepresentations; and it would prevent obscurity and difficulty if they were always called misrepresentations, and the term concealment restricted in its meaning to the second class. Calling then, the first class "misrepresentations," and the second "concealments," we shall see that, while there is an obvious distinction between them, in the way in which they arise, there is a perfect equivalent in effect.

Misrepresentations (as thus understood) are false answers to enquiries; which enquiries are made to ascertain the nature and extent of the risk. And these avoid the contract, either because they are material, or because they are warranties, though the answers be honestly made and believed to be true. But fraud vitiates contracts of insurance as well as other contracts; and fraud may arise in other ways than in making knowingly false answers to enquiries; and one of these ways is by *concealment* as understood above. Concealment, thus understood, is a fraud in insurance law, and avoids the policy on this ground. If the non-disclosure of a fact not enquired of, be not fraudulent (that is, known to be false), as well as material, or at least if the fact be not of an unusual and extraordinary character, it will not avoid the contract The term concealment implies this fraudulent notion; and the maxim in contracts and sales well conveys the idea—*aliud est tacere, aliud celare.* Indeed, though we have put in a saving clause, we seriously doubt if the non-disclosure of any extraordinary fact, not known to the applicant, or anything less than express fraud in a material point, will vitiate an insurance policy, in the absence of an enquiry, which would naturally tend to the disclosure of the fact.

This, upon careful examination, will be found to be the line of distinction upon which all the authoritative cases in insurance are decided; and this brings the law of insurance into approximate accord with general priciples. Contracts and sales are avoided for material misrepresentations (in the broad sense) and for fraud; but to keep silence merely as to a material fact has no effect. There must be something more than silence; the party complaining must have been put off his guard in some way by the other; there must be fraud. The law of insurance is not so rigid; and silence amounting to concealment in the above sense, without the something more than silence, is fatal to the contract.

We have given so much time to this point because of its importance and its bearing upon the question in the principal case. Now, conceding as we have reluctantly done, that the questions concerning the title to the property in controversy, and the character of the possession, were correctly construed by the court, particularly the question whether the property was leased—there appears to have been no enquiry which would naturally have led to the disclosure of the litigation in the United States Court. The first question, at most, should have only stated the government lien for taxes; and the second only called for information as to whether Cheek & Co. had leased the property. The supposed concealment must therefore fall under the second head; avoiding the policy only because it was fraudulent and material, or at least because it was concerning a fact of an extraordinary character.

Now, if the former view be taken, that the fact was material and fraudulently withheld, it is clear that the party alleging these facts must prove them. Such a non-dsclosure does not appear to have come within the terms of the warranty so as to have imposed the burden of proving its non-existence upon the assured. Warranties are strictly construed, and their terms are not extended, though sometimes they arises by implication. To have established this defence, then, the defendants must have proved that the fact of the litigation was material (a question of fact for the jury), and that it was fraudulently withheld; which does not appear to have been done.

If the view be taken that this non-disclosed fact was merely extraordinary; we answer that if such a case without fraud *can* be a defence, it must be because the risk is very greatly affected. An unusual fact, not increasing the hazard, would be of no importance, and clearly could not affect the policy; but if the fact be extraordinary by reason of its relation to the risk, we do not see how the defence in this particular could be made out. At best, it would be for the defendants to establish the point as a fact before the jury; no court would undertake to say that the pendency of such a litigation greatly enhanced the risk of burning.

In the discussion of this point it will be observed that it has passed for conceded that if there be a fraudulent non-disclosure where no enquiry is made, it is sufficient that the fact be merely material; but some of the authorities seem to indicate that the fact should be something stronger than this—that it should be a fact of extraordinary hazard. See Bufe v. Turner, 1 Ben. Ins. Cas. 92; Boyd v. Dubois, Ib. 94: Protection Ins. Co. v. Harmer, 2 Ohio, St. 473. We are confident it should be such where the fraud was not an active one, and something more than mere silence; otherwise all distinction between non-disclosure upon enquiry and concealment, as we use the term, is confounded. The result would be that enquiries would be useless, since the applicant would be required to disclose everything at all events.

It must be understood that what we have said upon this point is said of stock fire companies. The law as to mutual companies, by reason of the lien given them, may be different; the law as to marine risks certainly is different. From the peculiar and hazardous nature of these risks, and the fact that the property is often on the high seas when insurance is effected, it has from early times been held that failures to disclose facts, not the subject of enquiry, stand upon the same footing as false answers to questions; and the natural resort of the courts in cases of fire insurance to the older principles of marine insurance, has led to much of the confusion upon the point under consideration. There is an obvious distinction between the two risks. In cases of insurance of land risks the property is at hand, and may be, and usually is, inspected by the agent of the insurer; and the risk, in connection with the statements of the application, is plain and definite. In these cases, and this is the important point in the matter, the insurer puts a long list of questions, to ascertain as fully as he desires, the character of the hazard to be assumed; *and, upon satisfactory answers, he agrees to insure the property.* He is safe, in the average run of fires, on this basis; and he therefore takes the risk of the effect of other

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facts of exposure which may not come under our head of concealment. There is thus a plain distinction between answers to enquiries and non-disclosure, where no questions are asked.

There are several other points in this important case which we had intended to examine; but the length of our note precludes our doing so at present. The subject may be resumed at another time.

It is proper to say that to have made an examination of particular cases in this note, would have extended it beyond proper limits. The writer has carefully studied the cases on this subject, and it is believed that, while the foregoing views are in conflict with some of the cases, they present a just result of the best authorities. Most of the cases are readily found in Mr. Bennett's Collection of Fire Insurance Cases, a third volume of which will soon be published. M. M. B.

BOSTON, Sept. 1, 1874.

Liability of Banks for Cashiers' Endorsements.

NATHAN MATTHEWS v. THE MASSACHUSETTS NATIONAL BANK.

Circuit Court of the United States, District of Massachusetts.

Hon. GEORGE F. SHEPLEY, Circuit Judge.

A bank loaned a sum of money to A., and innocently took as security therefor an instrument which purported to be a certificate of 200 shares of the stock of a railway company, issued by said company to the bank as collateral, but which was in fact a forgery, of which A. was the author. A., having made payment to the bank, the said instrument was re-delivered to him, with the signature of the cashier of the bank attached to the printed transfer on the back. Subsequently, A. obtained a loan of a sum of money from B., by using the same instrument as collateral. The forgery having been discovered, and A. having been convicted of obtaining money under false pretences, and having been indicted for the forgery, and adjudged a bankrupt, it was *held*, that B. was entitled to recover against the bank the damages he had sustained in lending money on an instrument which had thus received credit by being endorsed by the cashier of the bank.

SHEPLEY, J.—The defendants, the Massachusetts National Bank, loaned to one James A. Coe, $22,000, payable on call, with interest, taking from him his memorandum of indebtedness for that amount, with, as collateral security therefor, what purported to be a certificate of 200 shares of the capital stock of the Boston and Albany Railroad Company, issued to said Massachusetts National Bank as collateral. This instrument was originally a genuine certificate for two shares of the capital stock of the Boston and Albany Railroad Company, issued to H. E. Coe, but by false and forged erasures and interlineations had been so altered as to purport to be a certificate of 200 shares of its stock, issued by said railroad corporation to the Massachusettts National Bank as collateral.

The bank received the said certificate in good faith, and without any suspicion of its fradulent character, and in supposed fulfilment of the promise by James A. Coe to give, as security for the loan aforesaid, 200 shares of the capital stock of said railroad corporation. Subsequently, upon payment by said Coe to the bank, he received back his memorandum of indebtedness, and the cashier of the bank, for the purpose and with the intention of restoring the collateral to Coe, returned to him the fraudulent certificate, with the usual printed form of transfer on the back thereof, signed by H. K. Frothingham, cashier of said bank, in blank.

About two weeks after the surrender by the bank of this certificate to Coe, with the transfer in blank of the cashier on the back of it, the plaintiff, Matthews, pursuant to his agreement to loan Coe $25,000 on call, with interest, received from Coe, in good faith, the said fraudulent certificate, with the blank assignment on the back thereof, supposing the same to be a genuine certificate for 200 shares of said stock issued by the corporation, and duly transferred and assigned so as to enable him to obtain a new certificate therefor in his own name, and on receipt thereof loaned the sum of $25,000. The signature of the cashier was well known to Matthews, who correctly supposed the signature on the blank assignment to be genuine. Coe was tried and convicted for obtaining money on false pretences, and indictments for forgery are now pending against him, and he has been declared bankrupt. The next day, or very soon after the day when the money was loaned by Matthews, the fact first became known to plaintiff and defendants of the fraudulent alteration of the certificate before it came into possession of the defendants, and plaintiff thereupon notified the bank that he should hold it responsible for any loss sustained by him by reason of the premises. This action is brought for the recovery of the damages thus sustained.

The real question presented in the case is, whether the bank, by signing the blank transfer, has so far warranted the genuineness of the certificate that it is estopped from setting up the forgery as a defence to this action.

Defendants deny that the cashier had authority or right to bind the bank by the contract declared on.

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business conducted by the bank. Their acts, within the scope of such usage, practice and course of business, will, in general, bind the bank in favor of those persons possessing no other knowledge. Merchants' Bank v. State Bank, 10 Wallace, 604. One of the ordinary and well known duties of the cashier of a bank is the surrender of notes and securities upon payment, and his signature to the necessary transfers of securities or collaterals when in the form of bills of exchange, choses in action, stock certificates or similar securities for loans, which are personal property, is an act within the scope of the general usage, practice and course of business in which cashiers of a bank are held out to the public as having authority to act.

The signature of the cashier is, therefore, to be considered the signature of the bank, and the question returns whether such blank assignment on the back of the certificate by the bank is so far a warranty of the genuineness of the certificate that the bank is estopped from setting up the forgery as a defence. In the case of forged negotiable instruments it is well settled that the indorser warrants that the instrument itself and the antecedent signatures thereon are genuine. The indorser's liability in other cases is properly placed upon the ground of estoppel, and the reasoning which supports this rule of law would seem to apply with equal force and pertinency to the case of a transfer of a certificate of stock by indorsement in blank. Stock certificates are sold in open market like other securities, and form the basis of commercial transactions. The common practice of passing the title to stock by delivery of the certificate with blank assignment and power, has been repeatedly proved and sanctioned in cases which have come before the courts in New York.

The certificate in this case, as it came from the bank, contained on the same piece of paper, and on the back of the certificate, a blank assignment, which was all that was necessary to transfer the title of the stock as between the parties. The defendants must therefore be held to have intended and agreed that, whoever should present the certificate as issued from the bank, with the assignment executed in blank, should be entitled to fill up the blanks with his own name and to have a transfer of the stock made to himself on the books of the company. The certificate, accompanied with the transfer, executed in blank, was a species of negotiating of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential, in the usage and necessities of modern commerce, to make such certificates available in commercial transactions. The signature is given for the purpose of transferring title, and whenever a blank is filled a contract of sale is established between the party who has signed the blank assignment and the person whose name is rightfully filled in as assignee.

The certificate purports to be a certificate that the bank held the shares as collateral, but does not show that they were collateral for a debt of Coe's to the bank. Such a certificate might, in the ordinary course and usage of dealing in stocks, pass through the hands of many successive purchasers. The possession of the

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certificate would afford no indication that the holder of it was the person who had originally transferred it to the bank as collateral. The mere words "as collateral" in the instrument, do not tend to put the purchaser on enquiry, except so far as it relates to the authority of the bank to dispose of the collateral as between the bank and its debtor. If this enquiry had been made, it would only have resulted in the information that the assignment was made in its actual form by the joint act and consent of the bank and the debtor. The name of the pledger was not stated in the certificate as required by the Massachusetts statute.

Nor can the bank contend, with any show of reason, that Matthews was negligent in not enquiring at the office of the railway corporation. If the duty of making such enquiry was incumbent upon any one, it was surely incumbent upon the bank to ascertain the genuineness of the instrument before they gave currency to it, and lulled suspicion and doubt by the responsibility of their own signature. The answer to all the positions taken by the defendant as to notice to Matthews from the words "as collateral" in the instrument, is, that there is nothing to connect Coe with these words—there is nothing on the face of the paper, and there was nothing in the fact of the possession of the instrument by Coe to show that he was the person for whose debt the stock was held as collateral.

The negligent act which specially imposes upon the defendants a liability in this case, is that they delivered the forged instrument to Coe, authenticated by their signature in blank to a transfer, thus giving to it a currency and respectability which it would not have possessed had they made the transfer directly to Coe. Thus the bank put it in the power of Coe to commit the fraud on Matthews, on which this suit is founded. The bank substituted their trust in the honesty of Coe for the control which the bank should have exercised itself over the transfer of the instrument, and should suffer the loss consequent upon his betrayal of the trust, rather than to suffer it to fall upon an innocent stranger.

One or two innocent parties must suffer in this case by the fraud of Coe. Under similar circumstances, courts have repeatedly held that the party must suffer who has exhibited the greatest degree of negligence. The bank is precluded from setting up the fact of the forgery of the instrument, because it would be a wrong on its own part and an injury to others whose conduct has been influenced by the acts and omissions of the bank. An estoppel is a salutary rule which prevents a man from proving that to be false which he has once represented to be true, when others have acted on the faith of his representation.

The fact that Matthews has also a right of action against Coe, who is a convict and a bankrupt, does not preclude him from a remedy against the bank.

Upon the facts as agreed in this case, the plaintiff is entitled to judgment, and, according to the agreement of parties, the case is to be referred to an auditor to assess the damages.

JUDGMENT FOR PLAINTIFF.

Bankrupt Act—"Commencement of Proceedings."

In re DARIAS ROGERS.

United States District Court, Eastern District of Kansas.

Hon. C. G. FOSTER, District Judge.

1. **Bankrupt Act—"Commencement of Proceedings."**—Section 38 of the bankrupt act, concerning the commencement of proceedings in bankruptcy, construed to mean the filing of a petition sustained by proofs of the act of bankruptcy, and of the claim of the petitioning creditor.

2. ———. ———. **No Order to Show Cause** can legally issue against the debtor until such proofs sustaining the petition are filed and a *prima facie* case made.

3. ———. ———. **An Order to Show Cause**, issued without such proofs, is illegal and void, and does not constitute a commencement of proceedings in bankruptcy within the meaning of the act.

This is an application by H. B. Stoddard, a judgment-creditor of the bankrupt, for an order that the assignee sell certain real estate of the bankrupt and apply the proceeds to the payment of the petitioner's judgment, which was recovered on the 20th day of December, A. D. 1873, in the District Court of Neosho county. The petitioner claims that his judgment was recovered before proceedings in bankruptcy were commenced, and is therefore a prior lien upon the real estate of the bankrupt. On the other hand, the assignee contends that the bankruptcy proeeedings were commenced prior to the said judgment, and that the judgment is invalid and no lien on the real estate. There is no controversy as to the material facts in the case.

On the 10th day of December, A. D., 1873, Wm. M. Fortescue filed a verified petition in bankruptcy against said Darias Rogers, and thereon the register in bankruptcy issued an order to show cause against said Darias Rogers, returnable on the ——— day of December, A. D., 1873. There were no depositions sustaining the alleged act of bankruptcy, or proof of the creditors claim, offered or filed by the petitioning creditor. The deputy marshal received the order and petition to make service on the debtor, and instead of serving copies, he left the original order at the place of residence of said Rogers, and made no return of service, nor did he serve the debtor with the petition or a copy thereof, and also failed to return the original petition. On the return-day of the order, there being no papers in court and no return of service, nothing further was done; and so the matter rested until the 7th day of January, 1874, when Fortescue filed another petition, and had an order to show cause issued and served on Rogers, with a copy of the petition, and on Januray 15th, that being the return-day, said Rogers was adjudged a bankrupt.

John Hutchings, for petitioner; *Z. E. Britton*, for the assignee.

FOSTER, J.—The question to be determined in this case is: When were the bankruptcy proceedings commenced within the meaning of the law? The petitioner claims that the proceedings were not commenced until January 7th; and the assignee contends that they were commenced on December 10th. He insists that the depositions, or proofs to the act of bankruptcy, and to the petitioning creditor's claim, need not be filed with the petition, or previous to the issuing of the order to show cause, and that filing the petition and issuing the order of December 10th, was a commencement of bankruptcy proceedings. I do not think that this position can be maintained.

Sec. 38 of the bankrupt act provides: "That the filing of a petition for adjudication in bankruptcy * * * by any creditor against a debtor upon which an order may be issued by the court, * * * shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act." It is not the filing of every petition that is deemed a commencement of proceedings, but the filing of a petition upon which an order of adjudication may be made by the court. Can it, in reason, be claimed that a bare petition, unsupported by any proof of the act of bankruptcy, or of the creditor's claim, would be sufficient to base an adjudication of bankruptcy upon? I cannot see that sec. 38 sustains the claim of the respondent, but on the contrary, a fair construction of that section would require the petition to be supported by such proof as would authorize the court to issue an order of bankruptcy, if no appearance was made by the debtor.

Section 10 requires the justices of the supreme court to frame general orders, among other things, "for regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders and other proceedings to be used in said court in all matters under this act." The forms prescribed by the supreme court, then, under this section, become an essential part of the law and tend to throw some light upon this question. The order to show cause reads as follows: "Upon filing proofs sustaining the allegations of the petition aforesaid, it is *ordered* that the said ——— do appear at this court," etc. By this order

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which is served on him, have been sustained by proofs filed, and he is ordered to appear and show cause why he should not be adjudged a bankrupt.

Again, at the head of forms fifty-five and fifty-six, appear these words: "To be filed with creditor's petition." Upon the return of the order, and on the hearing of the case, it seems from section 41, that the burden of proof rests on the respondent to show that the facts set forth in the petition are not true. This is rather a novel manner of trying an issue at law, and the debtor certainly should have an opportunity to know the case he is called on to meet and the proofs offered in support thereof, and this he is entitled to know without delay, so that he may be prepared with his evidence. In other words, a *prima facie* case should be made by the proper proofs, before the debtor can legally be required to appear and show cause. *In re* Leonard, 4 N. B. R., 182. TREAT, J., says: "If there is not proof sufficient to make it appear that the acts of bankruptcy charged have been committed, no order on the defendant to show cause can be granted and the petition falls."

In re Price & Miller, 8 N. B. R., 514, LONGYEAR, J., says: "It must be *proved* by legal evidence that such grounds existed — in other words, that the facts set forth in the petition are true, before a debtor can be brought into court to show cause against the same, or be in any manner disturbed in his affairs by reason of the filing of the petition." It might be remarked in this connection that there is no record or evidence in this case showing that the court (Judge DELAHAY) authorized the order of December 10th to be issued.

In my opinion these objections go to the jurisdiction of the court, and the proceedings of the 10th of December were illegal, and the order to show cause was void and of no effect, and no bankruptcy proceedings within the meaning of the law were pending prior to January 7th, A. D., 1874. It results that this judgment is a prior lien on the real estate set forth in the petition, and the order of sale must be made as prayed for.

ORDERED ACCORDINGLY.

[Communicated — Second Paper.]

Amendments to the Bankrupt Act — Judge Hopkins' Opinion in Hamlin v. Pettibone — Construction of the Amendments to the 35th and 39th Sections.

In my former article (*ante*, p. 428) I discussed the decision of Judge HOPKINS in this case, upon the effect of the insertion of the words "*knew*" and "*knowing*" in the 35th and 39th sections of the law, instead of "reasonable cause to believe" in the original act, endeavoring to show that the change in the language, by the amendment, wrought a change in the legal effect, and that the opinion upon that point is erroneous. I now propose to examine another question passed upon in this opinion. The point is perhaps best presented by the enquiry, when does the amendment to the 35th section take effect, and upon what cases does it operate?

Judge HOPKINS gives two answers to this enquiry. The first, which I have endeavored to answer, is that it has no operation whatever, being a change of phraseology without any change of sense. The second is, that conceding that the opinion is wrong on the first proposition, still, whatever its operation may be, the amendment can only take effect as to transfers made after the passage, of the amending act. In other words, the act takes effect immediately as to future transactions, but does not operate upon any transfer made prior to the passage of the act. I will endeavor to examine the position of the learned judge upon this point.

The amending act simply provides, in terms, that the 35th section shall be amended by inserting the word "knowing" in the two places designated, and the repealing section provides "that all acts and parts of acts inconsistent with this act (the amending act) are hereby repealed." This amending act, then, took effect and went into operation June 22, 1874, the day of its passage Sedgwick, 83. Hence, it would strike one, at first blush, that from that date the old section 35 gave place to the amended section 35. How could Congress be more explicit? The express language is, "the 35th section be and the same is hereby amended." And then the purport of the repealing clause is, "that part of the 35th section, which is inconsistent with the amended section 35, is repealed, stricken out, and annulled, just as though it never had any existence." If this view be correct then there is no law in existence whereby an assignee can recover in an action founded upon the 35th section, unless the case fall within the 35th section as amended; because there *is* no original 35th section. It is superseded by the amended section, and it matters not when the transfer took place, when the right of action accrued, or whether the action was brought before or after the passage of the amendment.

But, in order to avoid the force of that which seems to lie upon the face of this amended section, it is sought by construction to make it appear as Interpret the opinion, that the amendment takes effect, as to future cases, immediately; but, as to pending cases, and those arising upon transactions occurring before the passage of the act, the original section is in force, notwithstanding the amendment and the repealing clause: but as to those portions of the act, however, that do not affect existing rights, the same are in force as to all cases, even those pending. But why should we resort to all this artificial complication, and go to the law books for precedents to get a meaning out of plain English, contrary to the one apparent upon the face of it? The answer given is, that the substantial rights of parties may not be changed. But what substantial right is in jeopardy here? The answer is, the right of an assignee to recover back from a party who has received a transfer of property, not *dishonestly*, but in violation of certain *arbitrary* provisions of the original act, found in practice to work injustice, and now abandoned for provisions more in consonance with justice and public policy.

Now I submit that the act amended and the amendment under consideration do not belong to the class of statutes in which courts resort to every possible intendment and rule of construction to prevent repeals or amendments from working injury to parties by the destruction or impairing of their rights; but that the original act belongs to the class which being in their nature, in a certain sense penal, mitigating changes by amendments or repeals are not only tolerated, but rather encouraged than discouraged.

The theory adopted by Judge HOPKINS is, 1. That the amendment does not take effect as to pending cases. 2. That the repealing clause follows the amendment, and does not operate except as to those portions to which the latter applies, and therefore does not prevent a prospective construction of the amendment as to such cases. The reasons given for assuming the first proposition are, that any other construction would affect substantial rights, and make that lawful which would otherwise be unlawful. I have already partially answered this part of the argument, and will only add that it is not unusual, by the ordinary plain import of language, for legislators to make that lawful, which was otherwise unlawful, even as to pending cases, and that although substantial rights are affected; and the courts have encouraged such legislation. I need not give a citation of authorities in detail. I cite a few only: Curtis v. Leavitt, 15 N. Y. 9, is a leading case upon this point. See also Danville v. Pace, 10 Albany Law Journal, 54, and authorities cited at page 56, embracing text writers and reports from half the states in the Union. It is true the learned judge, in the case under consideration, does not deny this latter proposition, but simply says, the "*language must be very clear.*" But the language here could scarcely be clearer. It is not necessary, where the legislature amend an act by language in the present tense, and then repeal all laws inconsistent with it, to say, "this amendment shall apply to all transfers, whether made before or after the passage of this act." This would be a simple absurdity, because it is the natural, logical, legal effect of what it has already said. But the learned judge argues further, that because the times at which several other of the provisions of the act are to take effect are fixed, some at a period anterior to the passage, and some in advance, therefore Congress did not intend to give the amendment under consideration a retroactive effect. But it is suggested that the fact that such careful attention was paid to other sections and portions of this section, and special provisions made as to the time of their taking effect, is a cogent argument in support of the construction of this amendment and the repealing clause, both without equal qualification, according to their obvious meaning and natural import, in accordance with the well known maxim, "*Inclusio unius exclusio alterius.*"

The principal argument of the learned judge, however, is the well settled rule of law, which forbids a retroactive construction when the act is susceptible of any other. I have already intimated that the rule is not applied to this class of cases with the same rigor as in those cases where the right involved is more meritorius. But while the books are full of cases supporting the general proposition, yet this case comes within an exception to which none of the cases cited by the learned judge apply, and I cannot better illustrate my view here than to quote from the opinion of Mr. Justice COWEN, in Butler v. Palmer, 1 Hill, 327, cited and quoted in Curtis v. Leavitt, 15 N. Y. 152: "A number of cases have been cited by the counsel for the defendant, and some very strong ones, to show that any enactment of the legislature, annulling contracts or creating new exceptions and defences, shall be so construed as not to affect the rights of action existing at the time of the enactment. Cases were

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also cited to show that a statute in any way modifying the remedy of a party by action, shall never be so construed as to affect actions before the statute. But these are all cases relating to positive enactments; none of them arose upon a repealing clause. The amount of the whole comes to this, that a repealing statute is such an express enactment as necessarily divests all inchoate rights which have arisen under the statute, which it destroys. These rights are but incident to the statute, and fall with it unless saved by express words in the repealing clause." To the same effect is People v. Livingston, 6 Wend. 526. See also Smith's Constitutional Construction, p. 880, sec. 759, p. 881, sec. 761. I might cite any number of authorities to the same effect, but I refer especially to Butler v. Palmer, Leavitt v. Curtis, and Danville v. Pace, *supra*, for a citation of authorities, and a discussion of the application of the principle of construction of this class of statutes as well as the citation of a great number of authorities.

But it is sought to avoid the effect of this position by first assuming that the amendment does not apply to pending cases, and then insisting that the repealing section only takes effect "when" and "where" the amendment does. But I have endeavored to show that there is no foundation for the *major* proposition, and if I am right in this, then the minor, which is dependent upon it, must fall with it.

But in addition to this, I submit that if the operation of the amendment upon pending causes were otherwise doubtful, the unconditional repealing section, without a saving clause, is, under the authorities, conclusive of the question, and the result is, either pending cases are governed by the amended section, or there is no law upon which these actions can rest.

For a repeal is not subject to any of the rules of construction laid down in case of positive statutes, but is necessarily retroactive and sweeping, unless a saving clause is introduced. Smith on Constitutional Construction, 887, sec. 765, citing the English cases, and Dwarris on Stats. 676. It is conceded that repeals by implication are not favored, but not by any means that a general repealing section amounts to the same thing. But if both propositions be admitted, how does this affect the question?

The enquiry is not as to what *part* of the act is repealed, but as to *when* the repeal *takes effect*. This being the case, whether such repeals meet with favor or disfavor with the courts, is wholly immaterial. The enactment, including the repealing section, being, as already intimated, in the present tense, without qualification, without saving or reservation, operating simply upon the remedy, or at most upon *inchoate* rights, and simply mitigating a penal provision of law, must be taken, under all the rules of construction, to have operated *eo instanti* the passage of the act, and upon all cases arising under the section, whether pending or otherwise.

But first assuming, for reasons already considered, and as I think answered, that the amendment was not intended to operate upon pending cases. Judge HOPKINS cites, Spaulding v. Alford, 1 Pick. 33, and Davis v. Fairbank, 3 How. 363, to the point that the repealing section operates only prospectively. Spaulding v. Alford was an action upon a physician's bill. The statute of 1818 forbade the collection of such a bill unless the physician had obtained a certain certificate. In 1819 another similar act was passed, changing some of the provisions of the act of 1818, as to persons practising medicine after July 1, 1818, and containing a repealing clause of such parts of the former act as were inconsistent, etc. The cause of action was a claim for services rendered after the passage, and before the taking effect of the act of 1819, without the license required by either act; and it was contended that he could recover, but the court held otherwise, deciding that the latter law was not in conflict with the former till the time at which the new provision went into operation. But it is not perceived wherein the position of the learned judge is strengthened by that case. There, the taking effect of the act was expressly postponed till a further day; while here it is not denied that the amendment takes effect, *ex vi termini*, from its passage. There, if it should have been held that the repealing act took effect instanter, there would have been no law in force upon the subject between the passage of the act and its taking effect; while here it is quite different, the effect of the repeal being only to change the extent of proof required in the given case, and yet it is sought, by mere implication and construction, to suspend the taking effect of the act indefinitely as to certain cases, while as to others it takes effect immediately, notwithstanding the terms of the amendment; and then, by a like construction, to suspend the taking effect of the repealing section, simply to prevent a slight change in the remedy by the amendment made for the express purpose of mitigating an odious provision of law. Nor is there anything in Davis v. Fairbank at all in point; the case simply consisting of a comparison of the provisions of two recording acts, and a decision that the latter act is not in the particular which is the subject of controversy so repugnant to the former, as to repeal it by implication.

It is impossible to close an examination of the books upon the question of interpretation and construction, without feeling that while there is to be found in the utterance of judges and text writers, much of sound wisdom and good sense, here is at the same time much useless refinement, not to say absurdity and nonsense. When a statute is free from constitutional objections, does not infringe inalienable rights, and is free from ambiguity, the only safe rule of construction is the same which applies to all other instruments. The statute should be read and expounded, according to the manifest intention of the legislature, as ascertained by the plain and obvious meaning of the language. This is in accord with the maxims of the sages of the law, which have not been shaken by the experience of ages. Potter's Dwarris on Statutes, 126, citing Vattel's maxims; 17 Johns. 447; 9 Barb. 170; 13 N. Y. R. 80; Potter's Dwaris, 143, et seq., and notes; 16 How. U. S. 251. All efforts, in violation of this rule, to give an artificial construction in such a case by resorting to rules growing out of any consideration of the effect of any given construction, are not only hazardous but uniformly lead to uncertainty and confusion. The only safe way of arriving at a correct construction of the statute in all such cases, is to seek for it by a straight, forward, natural reading of the language, and to apply it to its subject-matter, just as is done with the simplest instrument. Tested by this method of construction, the question under discussion here is simple and easy.

A. I.

Book Notices.

NEW YORK SUPREME COURT REPORTS.—We have received the second and third volumes of the above named reports, and shall notice them at an early day.

THE LAW STUDENT'S REVIEW BOOK. BY DUNLAP & BLIEKENSDERFER. —Address M. E. Dunlap, Erie, Pa. Price $2 50. For sale by Soule, Thomas & Wentworth, St. Louis.

This little book must certainly be a hit, at least in a commercial point of view. The reason why we think so, is that some one carried it off, before we found time to write a notice of it. We had, however, examined it with considerable care, and are satisfied that is a good book — that it contains a considerable amount of law condensed in a very small compass, and that properly used, it will prove of much value to law students. We say properly used; for if the student expects to enable himself to pass a creditable examination by studying books of this sort to the exclusion of the elementary treatises of the law, he will probably learn, when it is too late, that although there is a good deal of law in the book, yet there is a good deal more outside of it. But if he will keep it closed until he thinks he is ready, through the study of Blackstone, Kent, Story, Bishop and Greenleaf, to pass an examination, and will then open it for the purpose of reviewing his knowledge and finding out *what he don't know*, he will put it to profitable use.

EXAMINATION FOR ADMISSION TO THE BAR.—Report of the examination of Law Students for Admission to the bar, in the Supreme Court of Illinois, at the June term, 1874, containing all the questions propounded by the Examiners; the Answers of the Students; Remarks of the Judges; the Final Determination of the Court; together with Rules of Court relating to the Admission of Attorneys. Vol. II. By MYRA BRADWELL. Chicago Legal News Company, 1874.

The first thing that arrests the attention upon opening this book, is the beauty of its typographical execution. With the exception of one or two slight errors of the proof reader, we do not think it can be excelled by the book-making art.

This appears to be the second volume of a series. The first volume contained a report of the examination of the classes of 1873. We are glad Mrs. Bradwell has taken it into her head to publish reports of these examinations. Such publications cannot fail to do much good. They will enable students preparing for such examinations to form some notion of the field of study they are expected to go over. They will also serve to convince them that the examination they must pass is no easy gauntlet to run. This consideration, together with the further fact that their answers, good or bad, will be taken down *verbatim* and published, will serve to stimulate their diligence, and deter them from presenting themselves before the judges without due preparation. Another effect which the publication of these examinations will have, will be that it will work a benefit to the law schools of Illinois. For, by a rule of the Supreme Court of Illinois, the graduates of any law school organized under the laws of Illinois, whose regular course of law studies is two years, and who require an actual attendance by the student of at least thirty-six weeks in each of such years, is entitled to admission without an examination by the judges. It cannot be doubted, then, that many students will seek admission through the law schools rather than endure the severity of such an examination, and then have their answers, good, bad and indifferent — smart and foolish, "thus set down" in a book.

Another thing which arrests the attention upon opening this book, is that candidates for admittance to the bar of Illinois, other than graduates of law schools, as above stated, and attorneys from other states, under certain restric-

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such power appears to be lodged with the judges of the inferior courts. This is as it should be. Experience proves that to vest such jurisdiction in the circuit judges is almost equivalent to throwing down all barriers which it is the policy of the law to preserve, in order to protect the bar from the intrusion of ignorant and incompetent persons. It is well-known that candidates who have feared to submit themselves to the strict examination enforced by the circuit judges of Saint Louis county, have gone out to the country circuits and there got admitted, and have then returned and hung out their shingles in Saint Louis. No discretion is left the Saint Louis judges in such cases, but to enroll the candidate on motion. A stringent law is needed in Missouri, and in some other states, charging the supreme court with the exclusive duty of admitting candidates to the bar; prescribing in general terms the qualifications which should be required of such candidates, and requiring the judges of such court to examine them in open court, but empowering them to call to their aid for this purpose assessors from the qualified members of the bar.

Another thing which will be noticed on running through the pages of this book, is that neither of the classes was examined on admiralty, bankruptcy, or the jurisdiction and practice of the federal courts. Of course there would have been no propriety in judges of a state court examining candidates for admittance to their bar on questions foreign to their jurisdiction. But the lesson deducible from this fact is, that candidates who have passed only an examination of this kind, ought to be again examined before being admitted to practice in the federal courts.

The examination was conducted, in the presence of the court, by attorneys selected for that purpose. It was elementary in its character, but sufficiently horough to satisfy the judges of the qualifications of the candidates. We cannot avoid thinking that too much time was consumed in examining the candidates upon questions exclusively of English law, and which have no application, or very slight application, in this country. For instance, Mr. Denslow consumed considerable time in examining the second class, in asking questions about the jurisdiction of the English courts—a matter which not one American lawyer in fifty understands, and which is of little practical value in this country, and the entire learning in reference to which will become obsolete in England, on the second of November next. We think that more time should have been spent in examining the candidates on the constitution of the United States, and of the state of Illinois. There was too much Blackstone and too little Kent in it; and but one or two questions appear to have been asked touching matters peculiar to the laws of Illinois.

THE MONTHLY WESTERN JURIST. August, 1874. Volume 1, No. 4. Editor and Publisher: THOMAS F. TIPTON, Bloomington, Illinois. Terms, $4 per annum, in advance. Single numbers, 50 cents.

This is a small octavo of 48 pages. It consists chiefly of cases reported in full, many of them with short notes by the editor. The September number contains what appears to be an exhaustive article, on Life Insurance—Insanity —Intemperance—Suicide. We think the name choosen is an unfortunate one. The Western Jurist, published at Des Moines, Iowa, is also a monthly, and we see no reason why Mr. Tipton should have appropriated the name of that publication. The word "Monthly," prefixed to the name of his journal does not constitute a sufficient distinction between the two publications, and much confusion will be the result of it.

Notes and Queries.

SHERMAN, TEXAS, September 4, 1874.

EDITORS CENTRAL LAW JOURNAL:—I submit the following: The legislature creates counties and declares them municipal corporations, authorizes them to hold lands, points out the mode in which they may be disposed of as follows:

"The county court may, by an order to be endorsed upon the minutes of said court, appoint a commissioner to sell and dispose of any real estate of the county at public auction." This is the only statute in relation to mode.

The county court meet, and in payment of a debt due a creditor of the county, trade him a lot belonging to the county, and direct the commissioner to make him a deed, which is done. The creditor institutes suit against the party in possession, for the land, in an action which authorizes recovery upon either a legal or equitable title. The above facts appear in the petition; defendant demurs.

1. Is the statutory mode mandatory, and do the purchasers take anything under an order of court departing from such mode?

2. Can the order be attacked by defendant in this suit?

3. Can the fact of payment of purchase-money (an antecedent debt) create such an equity as will take the case out of the statute? B.

ANSWER.—If the mode of disposition by public sale is the only mode authorized (which we could not determine without an examination of the entire statute) then it would be mandatory, and in the case put, the purchaser would acquire no title, legal or equitable.

Summary of our Exchanges.

The Albany Law Journal, for September 12, has a leader on the Legal Aspects of the Beecher Scandal; a valuable article on the English Law of Negligence in Railroad Companies; a selection from the Law Times on Bazaine and the Franco-English Law of Extradition; its usual abstract of decisions of the New York Court of Appeals, and its usual amount of other interesting notes of decisions, matters of news, etc.

The Canada Law Journal, for September, (Toronto, Willing & Williamson) has an article on a new Digest of Ontario Reports; a curious article on Tenures and Costoms; selects from this journal (*ante*, p. 304) a review of Mr. Justice Cowen's opinion in the case of the Caroline; adds another handful of pebbles to the pile Criticisms on Text-Writers, Reports and other Legal Authorities; has a selection from the Irish Law Times on Judicial Errors, and another on a Disqiusition on Names, which it curiously credits to the Pittsburg Legal Journal. It also reprints from an early number of this journal, Hooker v. Miller, on the defence of property by Springguns, with a note. See the case and note, *ante*, p. 55. It also contains a digest of English Law Reports, and other interesting matter.

The American Law Record, for September, continue the article by Dr. Zimmerman in its July number, on The Public Prosecutor System in Germany. It aiso publishes Thorne v. Megrue, Superior Court of Cincinnati, holding that the undertaking of *new* securities of a trustee, relates back to, and is concurent with, the assumption of the trust. It also publishes (but without a syllabus) Judge Ballard's recent decision in Bank of Kentucky v. Adams Ex. Co., (*ante*, p. 436).

It also republishes from the Daily Register, People v. Chalmers, Supreme Court of New York (Daniels, J.) the syllabus of which is as follows: "Sureties on a bond given by an assignee under a voluntary assignment, pursuant to chapter 348 of the laws of 1860, are not liable on such bond to judgment creditors of the assignors who have obtained decrees setting aside such assignment as fraudulent; and proof that such decrees were obtained, that the assignee accounted under such decrees, that he was found chargeable in favor of the judgment creditors, with a balance of money representing the value of the assigned property, that he refused or neglected to pay such balance to the judgment creditors, and that the court in wnich the decrees were rendered thereupon ordered his bond to be put in suit, will not sustain a verdict or judgment against the sureties in an action in the name of the people on the bond."

It also republishes from the American Law Times Reports, Heaton v. Fryberger, Supreme Court of Iowa, holding that where the name of a married woman is omitted in the body of a deed, equity cannot supply the omission, even if the execution and acknowledgement are legally sufficient.

It also republishes from the Chicago Legal News, Vallette v. Bennett, and Lewis v. D'Arcy, which we have already noticed.

The Legal Gazette, for September 11, reports City of Nashville v. Ray, Supreme Court of the United States, opinion by Mr. Justice Bradley. Subject, power of municipal corporation to borrow money.

Also Merchants Mutual Ins. Co. v. Baring Brothers & Co., in which the following points are ruled:

1. The court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principal or rule of law.

2. Advances made on the credit of a ship for necessary repairs or supplies in a foreign port, create a maritime lien upon the ship, which lien may be enforced by a process *in rem*,

Also a number of Pennsylvania statutes.

The Chicago Legal News, for September 12, comes to us with eight pages of advertisements, most of it set in solid agate. This is a sign of well-deserved prosperity, which we are glad to see. It publishes an opinion of he Supreme Court of the United States, in Weber v. Board of Harbor Commissioners, on riparian rights, and the authority of a state over the soil under the navigable waters of its harbors.

Also an opinion of Mr. District Judge Longyear, in the Tug Clements, a case where a tug parted from its tow in a storm, expounding the liability of the owner of the tug in such cases.

Also a decision of the Second District Court of Dakota Territory, in Preslo v. Alexander, Shannon, Ch. J. Subject, usury.

Also a decision of the United States Circuit Court, Northern District of Ohio, in Booth v. Parks, Welker, J. Subject, infringement of patent.

Also an opinion of the Supreme Court of Illinois (Thornton, J.), in Alvis v. Morrison — a case where the record of an instrument had been destroyed by fire. The court states the effect to be given to such recording and the certificate of record on the original instrument.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.
ST. LOUIS, THURSDAY, SEPTEMBER 24, 1874.
SUBSCRIPTION: $8 PER ANNUM, in Advance.

In the case of Darias Rogers, published in our last issue, the case was entitled as of the "Eastern District of Kansas." It should have been simply "District of Kansas." The state of Kansas constitutes but one federal district.

INSANITY AS AN EXCUSE FOR CRIME.—The Daily Register, in reviewing the 7th Edition Dr. Wharton's work on Criminal Law, makes the following observations:

To our non-professional readers, the most interesting and profitable portion of the work will doubtless be the volume devoted to "Principles;" and in this connection the well known advice which Blackstone, in his "Commentaries," gives to the gentlemen of England, would well be applicable here. To the "lay gents"—such being the recognized law term in use for hundreds of years to signify the uninitiated—that part of the volume treating of the question of insanity, and the consequent testimony of "experts," will address itself. When we read in trial after trial, no matter what the offense, no matter what the defense, insanity is in some way thrust in, followed by testimony—always conflicting—of experts, we are often tempted to wonder if, after all, "the law is the perfection of reason." Yet it may be said of this, as in so many other instances where law seems one thing and justice another, that the difficulty is not with the law, but in its application. The course now followed in mixing up the issue of insanity with the other questions in the case to be passed upon by the same jury, at the same time by the same verdict, though sanctioned by time honored custom, is attacked from all quarters with loud complaints. Many schemes have been proposed. The Albany Law Journal, an able and leading law periodical, always alive to the issues of the day, in recent numbers has suggestions that a portion of the jury be composed of medical men, that one or two doctors sit at a trial as *quasi* judges, who shall charge the jury on questions of insanity in like manner as the judge charges them upon questions of law; that the question of insanity shall be left wholly to a few doctors, whose decision shall be final.

In the Ohio Legislature a bill was recently pending, if it has not already been disposed of, which provides that in cases where the defendant expects to plead insanity, he must give notice thereof beforehand; an issue upon that point alone is then to be made up, and the fact of insane or not to be tried and decided by a special jury in advance of his trial upon the indictment. Whether or not any of these schemes would materially advance the interests of justice, time only would prove; but that some change is needed is evident. We might add that perhaps the root of the evil lays deeper than the mere application of the law. Is it certain that insanity should be a defense against punishment for acts which are admitted would be criminal in a sane person? If the laws of society stand only upon the foundation of mutual protection — and with the immorality of crime human laws have nothing to do — should not society be protected? This question, however, opens up a discussion much too important for the limited space of a book notice. Dr. Wharton's work treats of the law as it is, not of changes which might be introduced.

Judicial Dignity.

Some of our foreign legal exchanges seem to have enjoyed very much a picture of a criminal trial in one of the courts of common pleas of Ohio, drawn by a correspondent of our excellent contemporary, the Canada Law Journal. We confess that this correspondent holds the mirror up to nature so closely that we cannot doubt that his statements are, in the main, truthful; but our knowledge of the people of Ohio, of their wealth and culture, induces the suspicion that his lively imagination, may have drawn him unconsciously into the fault of adding a few extra touches, just to enhance the *tout ensemble*, you know. However this may be, since the Tichborne trial, we feel reconciled to almost anything our Canadian and British brethren may say of our courts and judges. The gowns and the wigs may have given that great trial an appearance of dignity, but it was at many times the shadow without the substance. Let him who is fond of comparisons imagine (if he can) the Chief Justice of the United States, with one of his associates on either hand, bandying words with an advocate, as the Lord Chief Justice of England bandied words with Dr. KENEALY. When we consider how our Canadian and British friends must have enjoyed themselves in reading this pen-picture of the Ohio court, we derive additional consolation from the thought that the entire bar of Montreal felt obliged during four months of the past winter to withdraw from practice before the highest court of that province. We also derive a few crumbs of comfort from the following picture, which we find in the Irish Law Times, of the dignified behavior of an English county judge, whose jurisdiction appears to resemble, in some respects, that of the judges of the common pleas of Ohio:

County court judges in England sometimes curiously forget their position, as will appear by the following extraordinary scene which occurred at the petty sessions lately held at Rhyl, and arose out of a charge of assault, prefered by a hackney car-driver named Powell, against Mr. Robert Vaughan Williams, who holds the appointment of county court judge of the district, which includes Chester and most of the towns of North Wales. It appeared that on Friday last the complainant was driving a vehicle which came into collison with the defendant's carriage in one of the streets of Rhyl. Defendant then struck Powell with his whip, and this was the assault complained of. When the case was called on, the defendant rose, and delivered an angry address, which he concluded by ordering the plaintiff into custody for a period of seven days. This seemed rather too much for the magistrate who presided, and the chairman (Mr. Dixon) said the case must be taken in the ordinary way. In the meantime, a solicitor made an observation which still further aggravated the county court judge, who forthwith threatened him with seven days' incarceration. Nevertheless, the case was proceeded with, and the upshot was that the bench ordered the judge to pay a fine of £5, which his honor indignantly declined to do, whereupon the bench gave him the alternative of fourteen days' imprisonment. This terrible punishment was, however, averted by the kind offices of a friend, who paid the fine.

But to return to the letter of the Canada correspondent. After describing the court-room and the jurors, he says:

This case (it was the trial of a citizen for burglary) had been going on all day before; counsel had already "made augument" three different times; the prisoner's counsel was just winding up an address, the magnitude of which was obvious from the pile of manuscript in which it was transcribed, and to which constant reference was made, and it was stated that the state prosecutor and judge would follow at proportionate length. The long suffering of the jurors was, however, made intelligible when we were told they were professionals—in other words, that they made a business of serving on juries, and thereby earned a competent livelihood. It was also darkly hinted that a suitor had facilities for retaining a jury, as well as a counsel—and a judge. There was a judicial bench in the court of common pleas, but at present it was unoccupied. An elderly gentleman was sitting on a cane-bottomed chair, facing the wrong way, and warming his back at the open fire. His chin was resting on the chair-back, and he was meditating profoundly. He occasionally rose, traversed the room, his hands in his pockets, and expectorated thoughtfully. This was the judge. The prisoner sat by his counsel at a small table in front of the jury. We looked in vain for a dock. They have more delicacy about those matters in the states. There was another gentleman at this counsel's table, who attracted observation. His chair was tilted back against a pillar; his feet rested on the back of another chair before him. He was so placed that the judge was seated directly opposite him, and was forced to contemplate the soles of his boots. This gentleman was dressed in the seediest apparel; he picked his teeth with a pen-knife; he expectorated continuously; he was lean and sallow.

We thought he might be a crier of the court, or a personal friend of the burglar. What was our surprise when, on the defendant's counsel drawing his tedious oration to a close, he lowered his feet from their elevation, brought his chair to the horizontal, and rose with the obvious intention of haranguing the

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jury. He was, in truth, the state prosecutor. He first took from the table a dirk, which, with other murderous articles, had been found upon the prisoner. He examined it deliberately, felt its edge, held it up for the jury to observe, and commenced his address with the calmness and self-possession of the practical speaker. The opening of his speech was almost word for word as follows:—"You have heard tell, gentlemen of the jury, of the Gordian knot. Alexander, gentlemen, Alexander the Great, wanted to untie that Gordian knot, but he could not do it, nohow. So what did he do? He just whipped out his sword and cut that knot right square through. Now, gentlemen, we have a Gordian knot to untie, and a tough one, too. But I won't trouble you to untie it. I'll just slither it right clean through with this dagger. You have likely seen instruments of this sort before. They are only found on two classes of men—Texan Rangers and Italians; and when you find one of these on a man, you know he's a *rascal and a scoundrel, like this fellow here.*"

At this juncture, the learned correspondent was seized with a disposition to mirth, which, he says, attracted the attention of the usher of the court, who was "eating an apple with a pocket-knife, which had evidently cut a good deal of tobacco," and he thought it well to retire before he had compromised his character by laughing in the face of justice.

The Emperor JULIAN, was, we must allow (although we cannot agree with him in his religious views), a judge of no mean pretentions. He frequently presided in the Forum of Constantinople, clad in his imperial garments; and his clear and penetrating intellect constantly detected and exposed the shams and the subtleties of the advocates. But his indignation against the pettifogger frequently overcame his dignity, and for this fault, he often suffered himself to be reproved by his ministers. But, great as he was as a judge, as a warrior, as a statesman, and as the supreme pontiff of the Immortal Gods, to say nothing of his skill as an orator and his wisdom as a philosopher, we are pained to say that he was not ashamed to boast that his hands were never washed, and that his beard was unkempt and *populous*. We have judges of high courts in the United States who expectorate tobacco juice from the judgment seat, and who write two-bottle and three-bottle opinions that would not have disgraced my Lord ELDON. We sincerely wish, for the sake of history, that Judge JULIAN could have been induced to wash his hands and comb his beard; and we sincerely wish that all American judges would refrain from the use of tobacco while on the bench, and from the use of ardent spirits at all times. We also hope that all judges will digest their dinner and "sleep well o' nights," to the end that they may be able to treat the members of the bar, and particularly the younger members thereof, with that indulgence which is due to the dignity of the court and to the infirmity of the advocate. In short, we desire to record our vote in favor of judicial dignity.

The Louisiana Question.

Since going to press with our last issue, the acting government of the state of Louisiana has been overthrown by an armed insurrection, and re-instated by the President of the United States. With the exception of the Arkansas case, this is the first time in our history when it has been sought to overturn a *de facto* state government on the Spanish-American plan. So anamolous is the case, and so strong are the political feelings entering into it, that in attempting to discuss it, men are apt to lose their heads. On the one hand the spectacle of an established state government being overthrown in a few hours by an insurrection rising up in the streets of the state capital, is calculated to produce a profound feeling of alarm in the breast of every friend of republican institutions. On the other hand, it is not for Americans to deny a prniciple which is incorporated into many of our state constitutions, that the doctrine of non-resistance to arbitrary power is a slavish doctrine, unworthy of a free people, and that, whatever the form of government or condition of society, the right of revolution always remains, subject to be called into exercise by grievances which have become intolerable and which can be redressed in no other mode.

It is not our purpose to discuss any political question involved in the Louisiana troubles. The province of a law journal is to eschew politics and to address itself to legal questions alone. We therefore remain silent on what may be termed the *merits* of the case. We neither condemn nor defend the recent insurrection in the streets of New Orleans; but we propose to direct attention to the simple point of the *legality* of the President's action in the premises.

The constitution of the United States (Art. 4, § 4) provides that "the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened) *against domestic violence.*" The act of February 28, 1795, §1 (1 Stat. 424) provides that "*in case of an insurrection in any state against the government thereof*, it shall be lawful for the President of the United states, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection." There may be other acts of Congress of a similar import, but a consideration of the above (which dates back to an early period in the history of the republic) makes it clear that it is the duty of rhe President when applied to by the duly consituted governor of a state (when the legislature cannot be convened) to protect such state government against insurrectionary overthrow. It must be also obvious that the President is the final judge whether the exigency contemplated by the statute has arisen. See Martin v. Mott, 12 Wheat. 19.

If, therefore, the state government of Missouri or of Illinois, or any other state government concerning the lawful existence of which there is no dispute, were attacked by a domestic insurrection, no doubt could arise as to the President's duty in the premises. But the difficulty in the Arkansas and Louisiana cases arose from the fact that in each case there were *two* governments, each claiming to be the duly elected and legally constituted government of the state. Between these two contending parties, the duty laid upon the president by the constitution and laws, obliged him finally to decide. But whilst this obligation rested upon him, he was not a judicial officer, and obviously had no jurisdiction to hear and determine a case of a contested election for the office of governor of a state; nor had he any superintending jurisdiction which would enable him to revise the judgment of the state tribunal whose jurisdiction it was to hear and determine the question. His duty was obviously limited to supporting that party who had been declared elected by the tribunal having jurisdiction to make such declaration. In the Arkansas case, when the President became satisfied that the legislature was the tribunal having exclusive and final jurisdiction over the question, and that it had decided the question in favor of Baxter, who had been duly declared elected and installed in the office accord-

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ing to the forms of law, it became his imperative duty to support Baxter against insurrectionary overthrow, although he may have believed, as most well informed persons did believe, that Brooks had been elected by a clear majority. He could not constitute himself or any of his legal advisers a judge for the purpose of investigating the merits of the case; he could not go behind the decision of the tribunal which had authority to count the votes and declare the result, but to the decision of that tribunal he was obliged to give full faith and credit.

We suggest, therefore, that it is by this standard that the legality of the President's action in the Louisiana case must be judged. If the Kellogg government was declared elected by the state tribunal having jurisdiction to count the votes and declare the result (for no one pretends that Judge DURELL'S celebrated order was anything more than a mere nullity) it was the duty of the President to protect his government against insurrectionary overthrow. But on the other hand, if Kellogg was not declared elected by this tribunal, or by the duly constituted tribunal having jurisdiction finally to hear and determine the contest, then he was a mere usurper; and any movement, insurrectionary or otherwise, which resulted in establishing the duly elected state government in power, called for no interference on the part of the general government. We are not sufficiently acquainted with the history of the Louisiana case to express any opinion on these questions.

The Railway Question in Wisconsin—The Potter Law—Injunction to Compel Observance.

The *constitution* of Wisconsin (Art. 11, sec. 1) provides that corporations may be created by general laws or special acts, and then declares: "All general laws or special acts enacted under the provisions of this section may be *altered or repealed* by the legislature at any time after their passage." Under these provisions the Circuit Court of the United States for the Western District of Wisconsin (present Mr. Justice DAVIS of the United States Supreme Court and DRUMMOND, Circuit Judge), some weeks since, sustained the validity of what is known as the Potter law, regulating railway tariffs in that state (*ante*, p. 348). Soon after that decision was pronounced, the attorney-general of the state of Wisconsin, *ex officio*, filed an information in the nature of an injunction bill in equity, originally in the supreme court of the state, the object of which was to compel the Milwaukee & St. Paul Railway corporation to conform to the Potter law, and to that end a preliminary injunction was moved by the attorney-general before the full bench. The motion was resisted by the the company, upon two main grounds: 1st. Because the supreme court of the state had no *original jurisdiction* to issue the writ of injunction. 2d. On the merits, because the Potter law is unconstitutional. On the 15th instant, the supreme court announced its decision overruling these objections, and awarding the writ as asked by the attorney-general.

The following is the provision of the state constitution in relation to the issue of writs by the supreme court, and which it was held did not preclude the remedy sought by the attorney-general on behalf of the state: "The supreme court shall have power to issue writs of *habeas corpus*, mandamus, injunction, *quo warranto*, *certiorari* and other original and remedial writs, and to hear and determine the same." Art. 7, sec. 3. The same section provides that "the supreme court, except as otherwise provided in this constitution, shall have *appellate jurisdiction* only."

The subjoined abstract of the decision of the supreme court granting the temporary injunction, is said to have been prepared by Chief Justice RYAN, of the Supreme Court of Wisconsin, and it bears upon its face such evidence of substantial correctness that we feel justified in presenting it to our readers:

This court has no original jurisdiction of proceedings by injunction at the suit of private persons, or to enforce private remedies, but has jurisdiction of the writ, in matters public, upon information of the attorney-general, in the nature of an injunction bill, to restrain excess where mandamus would not go to remedy the defect. The writ given to this court in a group of prerogative writs is given as a *quasi* prerogative writ for prerogative purposes. Considered and approved independently of secs. 13 and 14, chap. 148, Revised Statutes, courts of equity have jurisdiction, upon information of the attorney-general, *ex-officio*, to restrain corporations from excess or abuse of corporate franchises, or other violation of public law under color of franchise to the public injury. These sections confer no jurisdiction on this court. Whether they operate to limit the jurisdiction of the circuit courts is not here considered. It is for the court to determine, on such an information, whether the acts charged work a public injury. This jurisdiction was an established equitable jurisdiction at the time of the adoption of the state constitution, and sec. 5, art. 1, of the constitution, in relation to trial by jury, has no application to it. Were this otherwise, the questions raised by these informations are questions of law, and the jurisdiction of them in equity deprives the defendants of no right of trial by jury. Chap. 273, of 1874, is not repealed by chaps. 292 or 341 of the same session. All the chapters can and will stand together. The court finds no difficulty in holding that the Chicago, Milwaukee & St. Paul Railroad Company is the corporation designated as the Milwaukee & St. Paul Railroad Company in chap. 273. The corporation is sufficiently indicated by the name used in the statute, although it had a month before added the prefix of "Chicago" to its name. The constitutional amendment of 1871 prohibiting special acts of the legislature for granting corporate power or privileges except to cities is prospective only, and has no relation to existing corporate charters by special acts before the amendment. These may be amended or repealed by special act, as before. The rule established in the Dartmouth College case, is considered and disapproved as far as it is extended to *quasi* private corporations instrusted by charter with public interests so as to constitute them *quasi* public corporations. The rule is followed, nevertheless, by the court, because it is the rule of the Supreme Court of the United States of the construction of a clause in the federal constitution; but the reserved power in the state constitution to alter or repeal corporate charters, was designed to take, and does take, all corporations created under it out of the rule in the Dartmouth College case, and the legislature has the same power over such corporations as if the rule in that case had never existed. *The reserved power to alter or repeal has no other limit in law than is implied in the words used; the power to alter or a power to amend a charter without entirely changing its purpose or character.* The exercise of the power should be under the guidance of extreme moderation and discretion, and should not be oppressive and unreasonable. But all this rests in the legislative discretion. So far as corporate franchises are concerned, the legislature is under a moral obligation not to reduce the tolls of railroads below a fair and adequate amount, but their power over the franchise is absolute. But the power to alter or repeal cannot affect the property of corporations other than the franchise. Such right of property is inviolable.

It is not material here whether the defendants had elected to accept or reject the alteration of their charters. By chap. 273 they were bound to obey the statute, or to discontinue their operations as corporate bodies. In either case, they had no right to conduct their operations in defiance of public law. Chap. 273, of 1874, so far as its provisions are before the court in the cases, is a valid amendment of special charters of the defendants, granted by the state. Whether it would be a valid amendment of the general railroad act of 1872 is not here considered. The territorial charter of 1847 of the Milwaukee & Waukesha Railroad Company, extended by the territorial act of 1848, is the subsisting charter of the railway built under it from Milwaukee to Prairie du Chien. It does not appear in this case whether the charter was accepted and the corporation organized under it before the adoption of the state constitution. There is a presumption in the circumstances that they were. Such being the case, the charter is not subject to the reserved power to alter or repeal; and, as chap. 273 of 1874 would impair the obligation of a franchise of that charter within the rule in the Dartmouth College case, chap. 273 of 1874 cannot be held to apply to the railroad built and existing under that charter if accepted before the adoption of the state constitution.

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An information in equity by the attorney-general, *ex-officio*, has the same effect as to answer and injunction as a bill in chancery verified on information and belief. Now, the question is unimportant, because the violation of chap. 273 charged is apparent from the affidavits on both sides. There is a judicial discretion to withhold an injunction and mandamus in aid of private remedies, but there is no such discretion at the suit of the state in matters of public injuries. In such cases writs go peremptorily, *ex debito justiciæ*. The court has discretion to withhold either of the writs in cases of positive public injury. The motions of the attorney-general must be granted, and the writs issue as to all the roads of the Chicago & Northwestern Railway Company, and all of the roads of the Chicago, Milwaukee & St. Paul Railroad Company except the railroad from Milwaukee to Prarie du Chien, built under the territorial charter of 1847 and 1848; but before the writs issue the attorney-general must file in these causes his official stipulation not to prosecute the defendants for forfeiture of their charters for any violations of chap. 273, charged in these informations, before the 1st day of October next, that time being allowed by the court to the defendants to arrange their rates of toll under chap. 273.

This decision fortifies the presumption of the correctness of the judgment of the United States Circuit Court, that under the constitution of Wisconsin, the legislature has quite unlimited control over the railroads of the state. Mr. Senator CARPENTER, one of the ablest lawyers of the country, made an elaborate and forcible argument at Ripon, Wisconsin, on the 16th instant, asserting the same doctrine, to which we shall refer more at length hereafter.

A *mandatory injunction* to compel compliance with a public law is a feature in the case that will not fail to attract the attention of the profession.

Mr. Justice Curtis.

A great man is but a nine days' wonder. When the telegraph announced, in the midst of ths excitement occasioned by the Louisiana troubles, that a great jurist had died quietly in his bed, very few took notice of it, and some of those who did, no doubt asked themselves, "who is Judge CURTIS?".

BENJAMIN ROBBINS CURTIS, was born at Watertown, Mass., November 4, 1809. He graduated at Harvard College, in 1829, was admitted to the bar in 1832, and commenced the practice of law at Northfield, Mass. Soon after he removed to Boston, whose bar numbered in its lists the great names of WEBSTER and CHOATE, MASON and DEXTER. Here his commanding talents brought him into such high repute that in September, 1851, at the early age of forty-one, he succeeded, in obedience to the general desire of the whig party of Massachusetts, to the seat on the Supreme Bench of the United States, made vacant by the death of Mr. Justice WOODBURY.

It is a singular coincidence, that on the happening of Mr. Justice WOODBURY's death, Mr. WEBSTER being in Boston and President FILLMORE at the national capital, each without understanding the other's wishes, singled out Mr. CURTIS as the appropriate recipient of this high honor. On the 10th of September, 1851, Mr. WEBSTER wrote to Mr. FILLMORE, as follows:

A very important vacancy is created by Judge WOODBURY'S death. The general, perhaps I may say, the almost universal sentiment here is, that the place should be filled by the appointment of Mr. B. R. CURTIS. Mr. CHOATE is perhaps Mr. CURTIS' leader, and is more extensively known, as he has been quite distinguished in public life. But it is supposed he would not accept the place. He must be conferred with, and I should have seen him to-day, but he is out of town. I shall see him as soon as possible. Every thing being put at rest in that quarter, as I presume it will be the moment I see Mr. CHOATE, I recommend the immediate appointment of Mr. CURTIS. There will be an advantage in disposing of the matter as soon as may be. Judge SPRAGUE is now on his way home from Europe. His friends, no doubt, will urge his pretensions. Judge PITMAN, too, of the District of Rhode Island, is a learned lawyer, an able judge and an excellent man. If an appointment were to be made by promotion from the bench of a district court, it would be very difficult to overlook Judge PITMAN, who has been on the bench more years, by a good many, than Judge SPRAGUE, and working at a much smaller sallary. But in my judgment it is decidedly better to appoint a man much younger than either of these judges. Mr. B. R. CURTIS is of a very suitable age, forty-one; he has good health excellent habits, sufficient industry and love of labor, and, I need hardly add, is in point of legal attainment and general character, in every way fit for the place.

On the same day Mr. FILLMORE wrote to Mr. WEBSTER, with reference to this subject, as follows:

"I believe that Judge MCLEAN is the only whig upon the bench, and he received his appointment from General JACKSON. I am therefore desirous of obtaining as long a lease, and as much moral and political support as possible, from this appointment. I would, therefore, like to combine a vigorous constitution with high moral and intellectual qualifications — a good judicial mind and such age as gives a prospect of long service. Several distinguished names have occurred to me, but I do not consider myself so intimately acquainted with the New England bar as to be able to form a correct opinion. I have, however, formed a very high opinion of Mr. B. R. CURTIS. What do you say of him? * * Does he fill the measure of my wishes?

Two days later, Mr. FILLMORE wrote to Mr. WEBSTER in reply to the letter first above quoted, "I am happy to see that we both concur in opinion as to Mr. B. R. CURTIS. I will wait till you can see Mr. CHOATE, and if all is satisfactory, I will issue the commission at once." Soon after, Mr. FILLMORE having learned that Mr. CHOATE concurred in the general desire that Mr. CURTIS should receive the appointment, issued the commission to him.

The "moral and judicial power," as Mr. FILLMORE expressed it, of the two whig members of the bench, Mr. Justice MCLEAN and Mr. Justice CURTIS was shown in their dissenting opinions in the memorable Dred Scott case, 19 Howard, 529–633. Mr. Justice CURTIS' opinion alone covered ninety pages of closely printed matter. His disagreement with the majority of the court on the great questions involved in that case, is supposed to have been one of the causes which induced his resignation, which took place a year latter, in the fall of 1857. On retiring from the bench, he returned to Boston and resumed an extensive practice at the bar, in which he continued, until the sickness which resulted in his death. During this period he served two years in the legislature of his state. Notwithstanding what might be inferred from his dissenting opinion in the Dred Scott case, he was, during the latter years of his life, a democrat in politics, and his name was frequently mentioned as the possible candidate of that party for the presidency. On the death of Mr. SUMNER, he was the candidate of his party for the seat in the United States senate thus made vacant; and during the whole of that protracted contest, their vote was cast solidly for him.

The published works of Mr. Justice CURTIS would have given his name a place in the memory of the legal profession, if he had never acquired any fame as a jurist. While on the bench he found time to edit two volumes of circuit court reports, the former of which was published in 1854, the latter in 1857. These volumes comprise the most valuable part of his labors while presiding justice of the first circuit. But his wonderful diligence and capacity for labor are shown in the fact that he found time in the midst of the arduous duties of his judicial position to edit in a greatly abridged form, and with head-notes entirely re-written, fifty-eight volumes of the reports of the decisions of the Supreme Court of the Unired States. These he compressed into twenty-one volumes and added a digest, the whole being completed before his retirement from the bench. The value of this edition is greatly enhanced by

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the fact that each case is followed by references to kindred decisions. A continuation of it is now being edited by Mr. Justice MILLER.

One of the great acts of the concluding portion of Mr. Justice CURTIS' life was his participation in the trial of the impeachment of President JOHNSON. He delivered the opening speech in defence of Mr. JOHNSON — an effort which fully sustained his great reputation. One of the last acts of his professional life was an opinion in which he held the "Potter" Wisconsin railroad law to be in derogation of the constitution of the United States and void. A contrary view of the question has been taken by a federal circuit court, composed of Mr. Justice DAVIS and Mr. Circuit Judge DRUMMOND, and this view is now fortified by the unanimous judgment of the Supreme Court of Wisconsin in an opinion of great length, a synopsis of which we publish elsewhere. But the question remains to by passed upon by that court whose judgment can alone decisively and authoritatively settle it.

Judge CURTIS was what may be termed a *working*, rather than a *jury* lawyer. He could not employ in the contests of the bar the commanding eloquence of Mr. WEBSTER, nor did he possess anything akin to the subtle and almost universal genius of Mr. CHOATE. But his logic was of a broad and masterly character, and his intellect was vigorous and penetrating. Add to this the almost superhuman capacity for labor which he possessed when in good health, and we have the key to the secret of his great success. He doubtless left behind a few who may claim equal eminence with him at the American bar, but they can almost be counted on the fingers of one's hand.

[From the Irish Law Times Reports.]

Master and Servant — Negligence of Captain of Merchant Ship — Injury to Sailor on Board — Liability of Owner of Vessel.

RAMSAY v. QUINN *et al.*

Irish Court of Common Pleas, June 11th and 29th, 1874.

Before MONAHAN, Ch. J., and MORRIS, J.

1. **The General Rule in such Cases.**—To render an employer liable for injury to one in his employ, through the negligence of another person also in his employ, it must be shown that the latter was not merely a fellow-workman, but was placed in a position of such authority as fairly to represent the employer himself.

2. **Exception—Captain and Seaman.**—The captain of a merchant-ship under his control and management is not a mere fellow workman of the seamen on board, bound to obey him, but is such an agent or representative of the owner of the vessel, that the latter, by whom he has been appointed, will be liable for an injury to a seaman, sustained by him through the captain's negligence during the voyage, while the seaman is acting in obedience to an order given by the captain.

Demurrer.—The first count of the summons and plaint was as follows: "For that, at the time of the committing of the grievances hereinafter mentioned, the defendants were possessed of a certain ship called "The Vespa," then being navigated by their servants under the sole control and management of one William M'Cullagh, who was captain of said ship, appointed in that behalf by the defendants, and as such captain governed and directed the said ship and the seamen and servants thereof, and whose orders as such captain the said seamen and servants were bound to obey. And one John Ramsey, for certain hire and reward therefor to be payed to him, agreed with the defendants to serve and do the work and duties of an able-bodied seaman on board the said ship, under the control and orders of the said captain, during a certain voyage from Troon to Belfast, and the said John Ramsey thereupon entered on board the said ship as such seaman upon the terms aforesaid, and the plaintiff says that, whilst said ship was on said voyage and the said William M'Cullagh was captain of said ship as aforesaid, the defendants' said captain negligently, unskilfully, and improperly ordered the said John Ramsay and the other seamen on board the said ship to abandon said ship, and the said John Ramsey and the other seamen did, in obedience to the said orders, and as they were bound to do, then proceed to abandon the said ship, by reason whereof the said John Ramsey, whilst he was in the act of so abandoning said ship, in obedience to and in execution of said order so unskilfully and improperly given as aforesaid by the defendants' said captain, was drowned, and within twelve calendar months next before this suit, lost his life."

Demurrer, on the grounds that the above count disclosed no personal negligence on the part of the defendants; that the captain and John Ramsay were fellow-servants, and that the only negligence averred was that of the captain; that the count did not state, or show any obligation on Ramsay to obey the order; that the facts alleged disclosed no obligation on the defendants; that, if the order were unlawful, Ramsay was not bound to obey it, and if lawful the defendants were not liable.

Boyd, in support of the demurrer. The defendants are not liable unless they have been guilty of negligence in the selection of the captain of the vessel, and yet no such negligent selection is averred. When one fellow-servant has been injured by another fellow-servant, the master is not liable, unless he has been guilty of negligence in selecting an unskilful or incapable servant in the person who has done the injury. Tarrant v. Webb, 25 L. J. C. P. 261; Wilson v. Merry and Another, L. R. 1 Sc. App. 327; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 282. The captain of a vessel and a seaman, notwithstanding the difference of their social positions and the nature of their employment, are fellow-servants. Tarrant v. Webb. Again, the plaint alleges that the captain "negligently, unskilfully, and improperly ordered" the deceased to abandon the the ship, and that while acting "in obedience to said order," and as he was "bound to do," he was drowned. Now, if this order were such as described, the deceased was not bound to obey it, and if the order was a proper one, and in obeying it the deceased lost his life, the defendants were not liable.

M'Mahon, Q. C. (with him *Frazer*), *contra*. The captain of the vessel is the agent of the defendants, and for an act negligently done by him resulting in the death of the deceased, they are liable. He is not a mere fellow-servant of each member of his crew. In Story on Agency (7th Ed. p. 124-128), the peculiar official position of the captain of a vessel is defined. He can hypothecate the ship; he is treated not as an ordinary agent, but as a special employer or the owner of the ship; he unites in himself the double powers of the absolute and temporary owner or charterer of the ship; the law treats him as having a special property in, and charge of the ship. The master of the ship is the person entrusted with the care and management of it, and the employers or owners of a ship are responsible for the contracts of their captains, while they are not responsible for the contracts of their mariners, because these latter are not appointed for the purpose of conducting the business of the ship, but only for laboring in its navigation under the orders of the master. Abbott, Shipping Laws, 11th ed. 93, 101-2. If a captain of a vessel be guilty of any default of duty, his employers are responsible for his acts in those things that respect his duty under them, though they are not answerable for his conduct in those things which do not respect his duty to them, *e.g.*, if he commit an assault on the voyage. Ellis v. Turner, 8 T. R. 531. Again, the mariner is bound to obey every lawful order of his captain. Once the voyage commences, it is his duty to navigate the ship at all perils. No matter what danger he may incur, he is entitled to no special remuneration, because he simply performs his duty. Abbott, Shipping Law, 153. Even when an order to abandon the ship has been given *bona fide* to the crew, although the danger did not justify such an order, yet the crew is justified, and therefore bound to leave her. "The Florence," 16 Jur. 573.

Boyd, in reply. *Cur. adv. vult.*

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MORRIS, J.—The defendants have demurred in this case to the first count of the summons and plaint. The widow of a seaman named John Ramsey, has brought this action against the owners of a vessel called "The Vespa," to recover damages for the death of her hushand. The count which has been demurred to, states that the ship was under the sole control of one William M'Cullagh, who was the captain of the ship, and appointed to that post by the defendants, that acting in that capacity he governed the ship and the crew, and that the crew were bound to obey all orders given by him, as captain. It then states that the deceased, Ramsey, entered into the defendants' service as an able-bodied seaman, and that as such he went on board "The Vespa," commanded by said William M'Cullagh. It next states that the deceased started on a voyage, and that during that voyage the captain negligently, unskilfully and improperly ordered the said Ramsey and other seamen to abandon the ship, and that in obedience to such order, and as they were bound, the deceased Ramsey and the rest of the crew proceeded to abandon the ship, and in the execution of the order Ramsey lost his life. The demurrer is taken on the ground that no action will lie against the owners of the ship, upon the authority of a great number of authorities, commencing with Priestly v. Fowler, 3 M. & W., and culminating with Wilson v. Merry, L. R. 1 Sc. App. 326. All these cases establish that no action will lie against an employer for injuries to one fellow-servant through the negligence or want of skill of another fellow-servant, no matter in what capacity he may be, provided both are the servants of the same person. The distinction between the ordinary case of fellow-workmen and that where one of the parties employed occupies a position superior to that of the other—being, for example, a foreman or superintendent—appears to have been removed by Wilson v. Merry. But in that case I find nothing repugnant to the principles laid down in Murphy v. Smith, 19 C. B. N. S. 361, that when an employer has an agent or representative, held to be so by the jury, and who is not merely a fellow-workmen of the party sustaining the injury, the employer is liable for an injury to his servants, occasioned by the neglect or unskilfuness of his agent or representative.*

Now, in what class are we to place the captain or master of the vessel in this case? Is he merely the fellow-servant of the deceased, or the agent and representative of the defendants? In my opinion he comes within the latter class. He is the agent and representative of the owners during the voyage. His position is thus defined in the best books on this subject. So he has authority to bind the owners for repairs and necessaries, and it is within his competence to settle claims for demurrage.

That being so, and coupled with the statements in the summons and plaint, that the ship was under the control and management of the captain, that he was appointed by defendants, that he governed and directed the ship, and that the seamen on board were bound to obey his orders, we consider that, the liability of the defendants depending on the question whether the captain was the agent or representative, that question cannot be decided in their favor on demurrer to the count. The demurrer must be overuled. Any other question the defendants wish to raise must be raised by a plea to the count.

MONAHAN, C.J.—I quite concur with my brother Morris in the judgment he has given. But I would prefer to rest my opinion on the averments in the summons and plaint as to the authority delegated by the defendants to the captain, all which averments the demurrer admits. Resting my opinion on those averments, the demurrer must be overruled.

DEMURRER DISALLOWED.

Plaintiff's attorney: *John Rea.*

Defendant's attorney: *W. Harper.*

*See the cases fully collected, 2 Tay. Ev. 6th Ed., 1,027; Smith, M. & S. 3rd Ed. 207-8.—[ED., *I. L. T. Rep.*]

—THE democrats of New York have nominated Hon. Theodore Miller for judge of the court of appeals.

Alienation of Homestead by Husband Without Consent of Wife—Remedy of Wife.

PARALEE WILLIAMS, BY NEXT FRIEND, v. J. B. WILLIAMS, *et al.*

Supreme Court of Tennessee, April Term, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" THOS. J. FREEMAN,
" JOHN L. T. SNEED,

Alienation of Homestead without Consent of Wife—Wife's Remedy—Bill quia Timet.—Under the constitution and laws of Tennessee, a conveyance of the homestead property by the husband, without the wife joining in the conveyance, is absolutely void; but such a conveyance, nevertheless, so far endangers the rights of the wife, that she may maintain a bill in equity to remove the cloud from her title, and have her homestead rights declared.

Mr. Chief Justice NICHOLSON delivered the opinion of the court.

J. B. Williams, being the owner in fee of a small tract of land in Henderson county, which, with the improvements thereon, was worth less than $1,000, on the 28th of December, 1872, sold and conveyed the same to John M. Meals, and executed to him a deed in fee simple, with covenants of seizin and general warranty. In this conveyance, complainant Paralee, who is the wife of said J. B. Williams, did not join. By her next friend she files her bill, alleging these facts, and also that this tract of land is all the real property owned by her husband or herself, and that at the time of the conveyance, her husband and herself were in the actual possession of the land as their homestead, and that they still continue in possession thereof, but that the deed so made by her husband, without her joining therein, constitutes a cloud upon her rights under the homestead law, and she prays that the cloud be removed, and her rights declared and protected. The bill was filed against J. B. Williams and J. M. Meals, as to both of whom the bill was taken for confessed.

Upon the hearing, Chancellor NIXON dismissed the bill, and complainant has appealed.

The constitution secures a homestead, in the possession of each head of a family, and the improvements thereon, to the value, in all, of one thousand dollars, and exempts the same from sale under legal process, during the life of such head of a family. The plain intention of this provision is, not merely to protect the husband, or the head of the family, in the possession and enjoyment of the homestead, but the protection of the interests of the wife and the minor children, constituted a leading consideration for the adoption of the provision. This fact is apparent, by the prohibition against the alienation of the property without the joint consent of husband and wife, when that relation exists. To give complete protection to the wife and children, the homestead is not only exempt from the reach of creditors of the husband, but he is deprived of the power to defeat the enjoyment of the homestead by his wife and children, by selling and conveying it, except by deed in which she joins. And the legislature in giving legislative effect to these provisions, requires that the conveyance shall be regulated by the laws as to the conveyance of land by married women; that is, the conveyance can be effective only upon the privy examination of the wife. Code, sec. 2114 a.

It is manifest from these constitutional and legislative provisions, that while possession of the homestead is the essential feature in the exemption from sale under legal process, or by the deed of the husband, the wife is recognized as having a present, subsisting and continuing interest in the maintenance and preservation of the benefits of their possession, and that she has such a right in the land, connected with the right of possession, that when that right is violated she is entitled to claim the protection of the courts.

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In the present case, the husband has undertaken, in contravention of the express prohibition of the constitution and the statute law, to convey the entire title of the homestead tract, without the consent, and against the will of his wife. It is now a rule of property, made permanent by the fundamental law, that every head of a family is deprived of the right to alienate the homestead, unless his wife joins in the conveyance. It follows that such conveyance is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife's homestead right, and the wife by her next friend, has such an interest in the preservation of the homestead, as entitles her to invoke the protection of a court of chancery, by bill *quia timet*, to have the cloud upon her rights removed, and her homestead rights declared.

The decree of the Chancellor will be reversed with costs, and a decree rendered here in accordance with this opinion.

DECREE ACCORDINGLY.

Fraudulent Title Deeds.

The secretary of state of New Jersey, who, under the laws of that state is also *ex officio* insurance commissioner, has been investigating the affairs of the Palisades Insurance Company, a rotton concern doing business at Jersey City, and the investigation has disclosed the fact that the assets (!) of the company (nominally about $200,000) consist entirely of spurious bonds and mortgages upon real estate in New York, Brooklyn and Jersey City.

It has also led to the discovery of an organized system of swindling by the officers of the company and their confederates through the medium of forged title papers to real estate in the cities above mentioned. In the preparation of these instruments no formality which would aid in carrying out the deception was overlooked; they appeared to be in all respects regular in form and substance, duly executed, acknowledged and recorded, and when produced by the victims were in each case accompanied by full abstracts of title given by well known, trustworthy and competent, but unsuspecting lawyers.

The full extent of these forgeries is not yet known; already, however, the disclosures are of such a character as to have produced a feeling of uneasiness, apprehension and distrust amounting almost to a panic among mortgagees, owners and dealers in real estate. A New York paper thus describes the situation: "Every one who owns real estate, or has lent money on real estate security is eagerly examining his titles, or anxiously comparing the signatures on his conveyances, to prove their genuineness. The traffic in real estate has therefore almost ceased. The conspirators moulded to their purposes the very legal requirements that were intended as the safeguards of real property. The registration of conveyances was designed to render them indestructable and indubitable, to spread before every purchaser the full chain of ownership of what he wished to buy. By a single slip, one forged link in the chain, albeit surrounded by the same legal restrictions as the genuine, the safest of all investments is made the most untrustworthy, and the hundreds and thousands of inheritors and accumulators of bond and mortgage securities are aroused to the fact that their fancied securities may be worthless."

The facility with which certificates may be obtained from justices of the peace and other officers authorized to take acknowledgments to instruments affecting the title to real estate renders the perpetration of frauds of this description an easy possibility. So far as our observation has gone, all that is necessary is for some person to appear before the officer, acknowledge the deed to be his act, pay the requsite fee, and thereupon solemn attestation will be made under the hand and seal of the officer that the party constituent "*is personally well known*," to him, notwithstanding the fact may be that such party was an entire stranger, of whose identity he knew absolutely nothing, and of whom he had never heard before that particular occasion. Under an issue involving the genuineness of an instrument, the acknowledgment to which was taken under such circumstances, the valueless character of the testimony of the officer must be apparent.

Such certificates are neither a compliance with the letter nor spirit of the statute, and the looseness of the practice which prevails in this respect renders necessary greater circumspection on the part of those who are directly interested.—[*Washington Law Reporter.*

[Communicated.]

The Administration of Law in Kentucky.

EDITORS CENTRAL LAW JOURNAL:—I have been accustomed to read your excellent journal, with pleasure and profit, since its establishment. During this time I have rarely, if ever, had occasion to dissent from the views advanced, or statements of facts contained in your editorials. You will pardon me, therefore, while I call your attention, and the attention of your readers, to an article that appeared in the CENTRAL LAW JOURNAL, for September 10th, 1874 (*ante*, p. 448), under the title of the "Administration of the Law in the South," for the purpose of correcting, what appears to the writer, to be an erroneous statement concerning the laws of Kentucky.

In doing this, it is not my purpose to inquire into, or discuss the causes that have led to the rather unusual state of affairs that has existed, very recently, in some portions of this commonwealth. But I must be permitted to say that the extract from the Louisville Courier-Journal, incorporated into the article alluded to above, and which pretends to describe the condition of affairs in Kentucky, is more sensational than truthful. It is true the times are sadly out of joint, in this, as well as other states that do not lie *south* of Kentncky; but withal, I venture the assertion, that, with the exception of a few counties —not exceeding five or six—life and property are just as secure in this commonwealth as they are in the northern or western states.

In the article alluded to, on the "Administration of the Law in the South," you accept, as true, the condition of things described by the extract from the Courier-Journal, and refer it to two causes—"for one of which the people are responsible," you say, and for the other, the courts; and by way of fixing the responsibility upon the courts, you refer to the fact, that "as early as 1822 the Court of Appeals of Kentucky, decided that a statute, prohibiting the carrying of concealed weapons, was unconstitutional," and that "this rule" has only been changed "*within a comparatively recent period;*" and cite, as evidence of this change, and I infer the *time of the change* also, the very late authority of Hopkins v. Com., 3 Bush (decided in 1868), and Cutsinger v. Com., 7 Bush, decided in 1870. In this you erred, as the "rule" had been changed long before either of these cases was decided.

In the present constitution of Kentucky, which went into effect on the 11th day of June, 1850, it is provided in art. 13, sec. 25, "that the rights of the citizens to bear arms, in defence of themselves and the state, shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms."

In pursuance of the authority granted by the constitution, the general assembly passed an act to prohibit the carrying of concealed deadly weapons, March 10th, 1854; (Stan. Rev. Stat., p. 414); and since that time, amendatory and distinct acts, upon this subject, have been passed, and the penalty for carrying concealed weapons has been gradually increased, from a small fine, until now the penalty is a fine from $25 to $100, *and* imprisonment, in the county jail, from ten to thirty days. Gen. Stat., p. 359.

Since the passage of the law of March 10th, 1854, the laws upon the subject of concealed weapons have been uniformly upheld by the courts of this state, and the most rigid construction given these statutes, consonant with the rules of law, for the purpose of insuring the conviction of offenders; and in one instance (Cutsinger v. Com., 7th Bush), the court has decided that a person carrying a pistol concealed, although proven for a *harmless* purpose, is a violator of the law, and subject to its penalties. Hence you will see that the "rule" was changed more than twenty years ago, and not "within a comparatively recent period."

Leaving the law of concealed weapons and passing to that of homicide, you say, in the article alluded to, that "since the late war the same court has, in a series of decisions, enunciated the extraordinary and startling doctrine that a man whose life has been threatened, by another, *may kill his adversary on sight*, whenever and wherever he may chance to meet him;" and reference is made to Phillips v. Com., 2 Duvall; Carico v. Com., 7 Bush, and Bohannon v. Com., 8 Bush.

Whatever warrant there may be, in the cases in 2 Duvall and 7 Bush., for the "extraordinary and startling doctrine" above referred to by you, there is certainly none to be found in the case last quoted, of Bohannon v. Com., 8 Bush, 481. Upon the contrary, the law is stated with clearness by Lindsay, J., who delivered the opinion of the court as follows:

"However this may be, the *threats* of even a desperate and lawless man, *do not, and ought not, to authorize the person threatened to take his life;* nor does any demonstration of hostility, short of a manifest attempt to commit felony, justify a measure so extreme.

"But when one's life has been repeatedly threatened by such an enemy, when an actual attempt has been made to assassinate him, and when, after all this, members of his family have been informed by his assailant that he is to be killed, on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if upon such an occasion he *casually meets* his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has a right to believe that the *presence* of his adversary puts his *life in imminent peril*, and he can *secure his personal safety in no other way* than to kill him, he is not obliged to wait until he is actually assailed. He may

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not hunt his enemy and shoot him down like a wild beast, nor has he the right to bring about an unnecessary meeting, in order to have a pretext to slay him; but neither reason, nor the law, demands that he shall give up his business and abandon society to avoid such a meeting."

The opinion from which this ext act is taken was pronounced in 1871, and surely does not enunciate "the extraordinary and startling doctrine" that "a man, whose life has been threatened, may kill his adversary on sight, whenever and wherever he may chance to meet him;" and the other cases in 2 Duvall and 7 Bush, have rarely, if ever, been so construed. However that may be, they are expressly overruled in the case of Bohannon v. Com., above cited, and are not the law when they conflict with that case. The principles above enunciated by Judge Lindsay are so reasonable and just that there would be little "security for life" in a state whose code of laws did not recognize them. KENTUCKIAN.

REMARKS.—On reading the foregoing, we cheerfully concede that we were in error as to the matters indicated by "Kentuckian." We did not wish to make any invidious comparisons between different sections of the country. We desire to have what we wrote considered, as John Randolph would have expressed it, "the *verba ardentia* of an honest mind," sincerely desirous of seeing the supremacy of the law vindicated everywhere. We do not forget that the South occupies an exceptional position, from the fact that her population is composed of two races, so distinct in all their characteristics, that social science despairs of ever seeing them moulded into a homogeneous people. Nor do we forget that those states have lately been the theatre of a desolating civil war, and that such wars have never failed to leave behind for years after their cessation, traces of strife and disorder. We admit that the times are "sadly out of joint" in the North as well as in the South. We remember the time (in the year 1854) when it was claimed that there was not a person in jail in the state of Vermont; and now it is reported that murders have become so frequent in that commonwealth, that some of the inhabitants talk of emigrating on that account.

Obtaining Money by False Pretences—Evidence of Obtaining it on Prior and Distinct Occasions.

The recent case of The Queen v. Francis (22 W. R. 663) is one of much importance as regards the law of evidence in criminal cases. The question whether it is allowable in prosecutions for obtaining money under false pretences to give in evidence other instances of the obtaining of money under similar circumstances, has hitherto been involved in uncertainty. In R. v. Robuck (25 L. J. M. C. 101), where a prisoner was indicted for fraudulently obtaining money from a pawnbroker by pretending that a chain which was not silver was a silver chain, evidence was admitted to prove that the prisoner, a few days after the offence charged in the indictment, offered a chain similar in appearance to another pawnbrowker as a silver chain, requesting him to advance money upon it. Objection was made to the admissibility of the evidence, and the point was reserved, but the judgment in the Court of Criminal Appeal turned upon another point. In R. v. Holt (9 W. R. 74) a commercial traveller, employed to take orders, but forbidden to receive moneys, obtained money by falsely pretending that he had authority to receive it. Evidence that he had subsequently obtained money from another customer by a like false pretence was admitted, and the prisoner was convicted. The question was reserved whether this evidence was rightly admitted, and the court quashed the conviction, saying that on the facts stated in the case they could not find any ground for saying that the evidence was admissible. In neither of these cases did counsel appear for the prisoner; in the former the point as to the admissibilty of the evidence was not raised in argument (see 25 L. J. M. C., at p. 102, note) or adverted to in the judgment, and in the latter, no reasons are given by the judges.

In a recent case, however, the point was expressly reserved and fully discussed, and the court lay down a rule upon the subject. The facts, so far as they concerned the abstract point of law, were very simple. The prisoner obtained money by pretending that a certain ring was made of diamonds, when in truth it was composed of crystals. In support of this charge, evidence was given that on a prior occasion the prisoner had obtained money by pretending that a silver chain coated with gold was made of pure gold. This latter piece of evidence was objected to as inadmissible, and the point was reserved, but the Court of Criminal Appeal held that it was admissible. "It seems clear upon principle," said Lord COLRIDGE, C.J., in delivering the judgment of the court, "that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

The question may be put thus: In a series of similar transactions by the same person, which is more probable — repeated error or repeated fraud? If this question were put barely, the answer must be, repeated error is more probable than repeated fraud, for error is more common than fraud. But add the circumstances that the transactions are of a lucrative kind, that the statement is in each case are of essential importance to the transaction (and is not therefore made *per incuriam*), and that the untrue statement is always in favor of the person making it, and the question must be answered differently. The man who in a series of lucrative transactions makes statements which are in fact untrue, and which are always to his own advantage, may properly be held guilty of fraud, unless he is able to offer a satisfactory explanation. But by what accumulation of circumstances is the mere suspicion of fraud which a single such instance raises changed into such a certainty of fraud as will justify a finding of fraud as a fact? It is impossible to say. But each instance increases the weight of the evidence.

Take the analogous case (which has been recognized by the legislature) of uttering counterfeit coin coupled with the possession of other pieces of counterfeit coin (24 and 25 Vict. c. 99, s. 10). Can it be denied that the possession of other counterfeit coins give good reason to suppose that the utterer knew the coin to be couterfeit? But how many connterfeit coins possessed will lead to the inference of knowledge? Clearly a roll or packet of coins would be conclusive. But the possession of one coin is some evidence. Is there any difference between the nature or grounds of the inference in this case and in that in question?

There are many circumstances to be taken into account in estimating the *weight* of such evidence. The lapse of time, making exact proof of the circumstances imputing guilt, or tending to exonerate, difficult; the number of articles or instances, and many other circumstances not admitting of definite description, must be brought carefully before the jury, and are likely to be fairly and candidly considered by them. But if any such instance *tends* to prove the knowledge which is in question—and it must be admitted that it does so tend—there seems no ground on which it can be pronounced inadmissible.

The reason of practical necessity on which the admission of such evidence has been based is in itself not complete; but, as a supplementary argument, is of great weight. That reason is thus expressed by HEATH, J., in Whiley's case (2 Leach C. C., at p. 986)—"The charge in this case puts in proof the knowledge of the prisoner, and, as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." Unles indirect proof of the guilty knowledge is admitted, it would be impossible in many cases to prove this essential element in the offenc e.

It has been urged, on the other hand, that upon principle it seems difficult to stop short of the admission of evidence of independent acts to show the prisoner to be a bad man, for that is to make it less likely that he was acting under a mistake; but evidence of particular acts to show bad character is not admissible. It may be difficult to draw the line in principie, but is it not perfectly defined in practice? The admission of evidence to prove that a prisoner has been pursuing a course of acts of a similar kind to that with which he is charged, where guilty knowledge of a particular set of facts is one of the issues to be proved, is a different thing from admitting evidence of any criminal act to prove a general bad character. The difference between the two cases is greatest in the point which is alleged as constituting the strongest objection to the admission of the former kind of evidence—the alleged hardship on the accused caused by taking him by surprise and so depriving him of the opportunity of rebutting the evidence. In the first case the prisoner or his advisor must be aware that guilty knowledge is one of the facts to be proved against him: that it cannot be proved from the circumstances of the transaction itself, and that if proved at all it must be proved from certain previous transactions *of a similar nature*. There is a specific class of acts pointed out, as to which the prisoner must be prepared with evidence. On the other hand, if evidence of acts showing general bad character were admissable to prove guilty knowledge, the prisoner would be without clue as to what kind of offence would be given in evidence. "The observation respecting prisoners being taken by surprise, and coming unprepared to answer, and to defend themselves against extrinsic facts," says Lord ELLENBOROUGH in R. v. Whiley (2 Leach. C. C., at p. 985), "is not correct. The indictment alleges that the prisoners altered this note *knowing* it to be forged, and they must know that without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they altered it with a *guilty knowledge* of its having been forged or whether it was altered under circumstances which showed their minds to be free from that guilt."

Still we cannot but feel that (since it is not to be presumed that prisoners will have the benefit of legal advice) an indictment merely charging the prisoner with a particular act does not give him such warning as he is entitled to, that other similar acts will be put in evidence, and we would repeat what we said

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before (17 S. J. 479) with reference to the question of evidence raised in R. v. Cotton, that it seems to us worthy of consideration whether the true remedy for the alleged hardship on the prisoner caused by the admission of the class of evidence to which we have referred, would not be to change the fixed practice which now prevails, and to indict the prisoner in one indictment for all the cases of false pretences in respect of which evidence is proposed to be given.—[*Solicitors' Journal.*

Book Notices.

MEMORIES OF WESTMINISTER HALL. By EDWARD FOSS. Vol. II. James Corkcroft & Co., N. Y. Soule, Thomas & Wentworth, St. Louis, Mo. 1874.

The second volume of this interesting collection of incidents, anecdotes and historical sketches, relating to Westminister Hall is published, and fully justifies the character which we ascribed to the first volume. This volume is made particularly interesting by its very full and clear account of the Tichborne trial, accompied by illustrations of the court and counsel, and *fac similes* of the hand writing of Roger Tichborne and Arthur Orton, as shown in letters introduced on this remarkable trial.

LIVES OE THE CHIEF JUSTICES OF ENGLAND. Contiuation by Sir JOSEPH ARNOULD, late judge of the High Court of Bombay. Vol. 6. St. Louis: Soule, Thomas & Wentworth, 1874.

This volume brings down the Lives of the Chief Justices, to the retirement of Lord Denman, in 1850, and the appointment of Lord Campbell as his successor. Lord Campbell wrote the lives of the chief justices to Denman's time, and the 5th and 6th volumes of the present edition (the handsomest and best ever published in this country) are appropriated to Arnould's life of Denman, who for over seventeen years, filled so honorably and ably, the high office of Chief Justice of England. Denman presided in the court during an important era in the history of our more recent jurisprudence, and earned the title of the "good and great" chief justice. Mr. Edward Everett in a letter to him, on the occasion of his resignation truthfully observed: "Your course as a statesman and magistrate, and in both capacities, as a great asserter of liberal principles, has probably commanded a more unanimous sympathy in the United States than even in your own England." Every American lawyer will feel a more intimate acquaintance with English law, by reading the lives of these sages—lives full of struggle, but crowned with lasting and well deserved honors.

Notes and Queries.

BURLINGTON, IOWA, Aug. 31, 1874.

EDITORS CENTRAL LAW JOURNAL:—Suppose I should desire to take the deposition of a witness, a resident of any country in Europe; for illustration say Berlin, Prussia, the testimony to be used in trying a cause in Iowa. How would I proceed to get the deposition? Please answer fully.

CONSTANT READER.

ANSWER.—A commission (*dedimus potestatem*) should be sued out of the office of the clerk of the court, upon "reasonable notice," directed to some *commissioner of deeds, notary public, consul* or *consular agent* of the United States, either by name or by the designation of his office, within the limits of whose official jurisdiction the witness is. Iowa Code of 1873, §§ 3725-3727. We are not aware that any of the American States have "commissioners of deeds" in foreign countries. It would seem clear that such a deposition could, under section 3725 of the Iowa code, be taken before a notary public in England, or a notary France, or before the corresponding officer in Germany. But the safest way would be to write to the secretary of state for the name of the consul or consular agent of the United States, within whose jurisdiction the witness is, and direct to such consul or consular agent a commission, with interrogatories, as in other cases, enclosing an adequate fee.

Another mode, which it is supposed any court of justice may resort to, indepently of any statute and by virtue of its inherent powers, is by a *letter rogatory*, addressed to a foreign tribunal within whose jurisdiction the witness is, requesting such court, *in furtherance of justice*, to cause the deposition to be taken, and promising to do the same thing, when required, for the court of which this favor is requested. This mode of taking the depositions of witnesses residing abroad, is detailed in 1 Greenleaf on Evidence, § 320 and note 3. It may be added that, in taking such a deposition, the forms of our law, and not of the foreign law, must be pursued. The letter rogatory should therefore be accompanied with the usual *instructions*.

ST. LOUIS, MO., Sept. 12, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. is renting a store by the month from C., at $40 per month. B. offers him $200 to move out and give him possession. A. accepts the offer with proviso that he be allowed to remain until he gets another house. In two weeks time he moves out and tenders the key to B., which B. refuses to accept.

The contract was not in writing. Was it within the Statute of Frauds? Is it an "interest in lands?" W. F.

We shall be pleased to have some of our readers answer the above question and refer to the authorities bearing upon it.

JACKSON, TENN., Sept. 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. is a citizen of Tennessee, and as such is entitled to the benefit of the exemption laws of said state. He, however, concludes to move to Illinois, and in pursuance of this intention goes to Illinois, selects a location, and writes to his family and friends hear that he has determined to locate in I., in the state of Illinois. He soon after returns to Tennessee, sells off a portion of his property, boxes up the remainder, marks the name of his future home in Illinois on the different articles, and hauls them to the depot for shipment, when they are attached. He moves his family to Illinois, comes back to Tennessee, and replevies the goods attached, claiming them under the exemption laws of the state of Tennessee. When does a person cease to be a citizen?

Please give us an article in your next settling the points raised by the above stated facts, and oblige yours truly, T. A. B.

ANSWER.—One of the editors of this journal is preparing for publication an extended essay on the law of homesteads and exemptions. When he gets to the chapter embracing the above named topic, he will endeavor to comply with the above request.

Summary of our Exchanges.

The Irish Law Times, for August 29, has leaders on Irish Municipal Elections, The British Association at Belfast, the Irish Jury System, and the Principles of Life Assurance. Its reports contain in Cleary v. Lenihan, an intersting decision in the law of slander, which we shall notice in our notes of cases hereafter and in Ramsey v. Quinn, an interesting exposition of the law of master and servant, holding that the master of a ship and a seaman are not *fellow-servants* within the rule which exempts the master from liability for injuries committed by one servant on another, while engaged in a common employment. This we publish in full this week. It also pays Mr. Justice WAGNER, of the Supreme Court of Missouri, the compliment of republishing his able opinion in Harriman v. Stowe (*ante*, p. 400). It also reports other cases, but they would not be of interest to our readers.

The American Law Times Reports, for September, contain Hill v. Whitcomb, United States Circuit Court, District of Massachusetts (Shepley, J.) infringement of patent. Also Grover & Baker S. M. Co. v. Florence S. M. See 18 Wall. 553. Also Brady v. American Steamship Co., which we have heretofore noticed.

Also three decisions in bankruptcy of Mr. District Judge Blatchford; that in *re* Scull, which we have already noticed (*ante*, p. 399); that in *re* Hill, where the learned judge holds that the signature of his *initials* to a memorandum upon the petition prior to June 22, 1874, do not warrant the signing of an order of adjudication, after that date, *nunc pro tunc*; and that in *re* Keeler, where he holds that the admission of the debtor that the terms of the law have been complied with will not dispense with such allegation.

Also a decision of Mr. District Judge Longyear, rendered January last, holding that notaries public are officers before whom affidavits may be taken and bills and answers verified within the meaning of existing laws; and that affidavits entitled as in a cause pending, when no such cause was in existence, cannot be read unless the entitling be rejected, which, if it render the affidavits meaningless in material particulars, will not be allowed.

The Legal Intelligencer, for September 11, publishes a number of interesting decisions of the Supreme Court of Pennsylvania.

In Columbia Ins. Co. v. Masonheimer, the court say that the secretary of an insurance company is the organ of communication with the policy holders, and has authority to inform a holder of the cancellation of his policy. On such cancellation there can be no recovery of the assessment on premium rate. The language of the secretary in this case is construed to be a notification of cancellation.

In Warfel v. Frantz, it is ruled that if a surety signs and delivers his bond on the express condition that his co-sureties should sign it, unless such condition is complied with, it cannot be enforced. Express assent to such condition by the obligee is not necessary.

The following is the syllabus of Bucher v. The Dillsburg & Mechanicsville R. R. Co.:

A subscription to stock of a proposed railroad, made upon a blank sheet of paper, which, it was stipulated, should not be binding or attached to the

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"heading" (which contained the terms of the association) until the subscriber had inspected and approved the instrument, is not binding until that assent.

Semble, that there can be no valid subscription to the stock of the company incorporated under the act of April 4th, 1868, without the payment of ten per cent. by each subscriber.

And the following that of Hickman v. Blackmire:

As a general rule, "dying without issue" means an indefinite failure of issue, and such a limitation would create an estate tail. But such construction is controlled by the manifest intent of the testator, otherwise gathered from the whole will.

In this case it was held that the phrase referred to a definite failure of issue, and that by the limitation the devisee took the defeasible estate; which terminated at his death.

In French v. Schooner Victoria, The Hazel Dell and Victoria—two sailing vessels close hauled, and having the wind on different sides—were beating up a narrow inlet against a head wind, when a collision took place. *Held:*

1. That by the 12th and 17th Articles of the Rules and Regulations for preventing Collisions, (13 Stat. 58,) it was the duty of the Hazel Dell—the wind on her port side and being the overtaken vessel—to give way and to keep out of the way of the Victoria.

2. That whilst by the 18th Article the Victoria, under ordinary circumstances, was entitled to hold her course, she was bound by the 19th Article, from the special circumstances of the particular case, to depart from the rule in order to avoid the immediate danger.

3. That the evidence brought the case within the principles of The Maria Martin, (12 Wall. 31,) and the damages caused by the collision should be devided equally between the libellant and respondent.

The Intelligencer also republishes from this journal, Hamlin v. Pettibone (*ante*, p. 404.

The Pacific Law Reporter, for February 15, publishes Minturn v. Smith, U. S. District Court for California, Sawyer, Circuit Judge,—subject, tax deed, injunction, cloud upon title.

Also the decision of the Supreme Court of California in *re* Ah Fook, *et al.*, being a party of lewd and debauched Chinese women brought over on the steamer Japan. The court hold that the "Burlingame Treaty" does not prevent the state legislature from prohibiting the landing in the state of persons deemed and designated under the law as objectionable for reasons personal in themselves and not dependent on nationality; and that the legislature has the power to authorize the commissioner of immigration to determine whether particular individuals come within the prohibitions of the state law.

The Pacific Law Reporter, for September 8, reports the case of the St. Helens Mill Co., U. S. District Court for Oregon, in which Mr. District Judge Deady, rules the following points:

A corporation cannot execute a deed otherwise than under its seal.

A lien by way of mortgage can on only be created by a deed under seal.

An assignee represents the rights of the creditors and each of them, as well as the bankrupt, and may therefore maintain or defend proceedings in regard to the property of the latter, which on grounds of public policy or otherwise, he would not be allowed to.

A corporation cannot make a deed unless the directors, or a majority of them, meet together as a board, and so determine; and the only evidence of such meeting and action is the "record" required to be kept by the secretary.

A stockholder's meeting has no authority to elect a president and secretary of the corporation.

Meeting of stockholders without notice is invalid.

It also publishes without a syllabus the case of The San Francisco & North Pacific R. R. Co. v. Bee, under the following heading: "Corporation—Conveyance—Levy—Consideration—Breach of Statute."

Its other cases are of local importance only, and have no syllabus.

The Chicago Legal News closes its sixth volume with its number for September 19, and furnishes an index and table of cases.

It publishes an opinion of the United States Circuit Court for the Northern District of Illinois, Drummond, J., in Wheeler v. Bates, holding that since the passage of the statute of February 16th, 1874, the United States Circuit Courts in Illinois have, in proper cases, jurisdiction of actions of forcible entry and detainer; that such action is a "suit of civil nature" within the meaning of the act of Congress of 1789.

Opinion of the United States District Court for the Northern District of Illinois, Blodgett, J., in *re* McDowell *et al.*, construing the recent amendment to the bankrupt law, and holding, as a general rule, that when a debtor has had a meeting of his creditors, duly called and held, and has had his proposition for a settlement duly considered and passed upon, he should abide by the decision then had, and not be permitted to annoy creditors by requiring their attendance at further meetings. In the case before the court the object of the meeting failed, by reason of the failure to properly instruct the attorneys who represented the dissenting creditors, and another meeting was directed to be called for the purpose of again considering and acting upon the debtor's offer for a composition. The editor ot the Legal News says: "We do not remember to have seen any decision upon the point involved in this case. It is undoubtedly the first under the new provision of the bankrupt law."

Also an opinion of the United States District Court for the District of Oregon, by Deady, J., in *re* Comstock, holding that the provision of the act of June 22, 1874, amendatory of the bankrupt act, requiring one-fourth in number and one-third in amount of the creditors to join in a petition for an adjudication in bankruptcy, in cases commenced prior to its passage and since December 1, 1873, does not apply to any such cases in which there had been an adjudication prior to the date of the act; that a petition in bankruptcy is a suit, and an adjudication of bankruptcy thereon is a final judgment, which is beyond the power of Congress to set aside. We suppose this point may now be regarded as settled. See *re* Raffauf, 10 N. B. R., 69; 6 Chicago Legal News, 341; *re* Angell, 6 Chicago Legal News, 341; *re* Rosenthal, 1 Cent. L. J., 364; 6 Chicago Legal News, 342; *re* Pickering, 1 Cent. L. J., 372; *re* Obear, and *re* Thomas, id. 362.

The Legal News also publishes the decision (in full) of Mr. District Judge Blatchford, in *re* Franke. See *ante* p. 448.

Also an opinion of the Supreme Court of Illinois by McAllister, J., in Badgly v. Votrain, holding, under the written assignment recited in the opinion, where a grandfather assigned to one of his grandchildren certain notes and mortgages, but never delivered them, and was to collect and have the interest thereon during his life, and they were to be delivered at his death to the grandchild, and if the grandchild died first they were to be retained by the grandfather, that said assignment was in its nature testamentary, and that after the death of the grandfather intestate, a court of equity had no power to decree that his administrator should deliver up the notes and mortgages to the grandchild, or the one-third of the estate, which was also, by the terms of the instrument, to be given to the same grandchild. "This opinion," says the editor of the Legal News, "is of unusual interest. It would seem, however, to be but carrying out the provisions of our statute, which requires wills to be executed in the presence of two witnesses, etc. There certainly is good reason for requiring instruments, in their nature testamentary, which are not calculated to dispose of the property of the donor until his death, to be executed in accordance with the provisions of the statute of wills."

[Want of space obliges us to defer noticing some of our exchanges already received, until next week.]

Legal News and Notes.

—GOVERNOR COKE, of Texas, was formerly a judge of the supreme court of that state.

—JUDGE PECK, of the Supreme Court of Vermont, has been elected governor of that state.

—IT is said that Hon. Judah P. Benjamin's law practice in London brings him $40,000 a year.

—CHIEF JUSTICE CHURCH, of the Court of Appeals of New York, declined to run for governor of that state.

—SENATOR MERRIMON, of North Carolina, was formerly a judge of the superior court of that state. He resigned in 1867.

—HON. ISAAC F. REDFIELD, has been appointed a member of the board of trustees of the University of Modern Languages, at Newburyport, Mass.

—HON. JOSEPH D. BEDLE, one of the associate justices of the Supreme Court of New Jersey, has been nominated by the democrats for governor of that state.

—MR. BIGELOW'S forthcoming work on the law of Torts will probably be issued during the coming winter. It will be a complete work of the kind, and will have a large sale.

—HON. O. M. ROBERTS, Chief justice of Texas, has been a resident of Eastern Texas for 33 years, and like Mr. Justice NAPTON of Missouri, is now holding a place on the supreme bench of his state for the third time.

—WE notice, by strictures made in some of our exchanges, that the Forum, a quarterly legal review, published in Baltimore, Md., has not been careful in giving due credit to its various sources of information on law decisions. This is a serious charge against one so dependent upon other publications for his matter, for the Forum is emphatically an *olla podrida* of legal decisions, gathered from various sources. We hope our brother will more strictly observe the courtesies of journalism.—[*Daily Register.*

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—IT is stated that a number of Wisconsin grain shippers have kept all bills paid for freight since the Potter law went into effect, and now that the supreme court has affirmed the constitutionality of the act, they will proceed to sue the companies for the difference between the lawful rates and those paid, and also for penalties.

—NEW HAMPSHIRE COURTS.—The following are the names and ages of the judges of the Superior Court of Judicature, and the Circuit Court of New Hampshire, as at present consituted :

Superior court of judicature : Edmund L. Cushing, C J., age 67 ; William S. Ladd, age 44 : Isaac W. Smith, age 49.

Circuit court : William L. Foster, C. J., age 51 ; Edward D. Rand, age 53 ; Clinton W. Stanley, age 43.

—THE Supreme Court of California, in a *habeas corpus* case of twenty-three Chinese women, brought to San Francisco per steamer Japan, has decided that the state law, which regulates such immigration, is constitutional, and remanded the women to the master of the steamer Japan to be returned to China. An attempt has been made to get the case into the federal court, on the ground that it involves the construction of a treaty between the United States and China.

—SOME time since, before the Supreme Court of Illinois, the question was argued whether an indictment charging three men jointly with striking the prosecutor with a club would support a conviction—in other words, whether three men could, at the same time, strike a fourth man with the same club. We should think such a case would be one calling for expert testimony before the jury, rather than capable of being settled upon a motion in arrest of judgment ; since the question would seem to depend entirely upon the length of the club. Mr. Attorney-General Edsall represented the club, and Professor Van Buren Denslow, of Chicago, argued the case for the clubbists. We have not learned how the question was decided.

—HON. JOHN S. KERR, a lawyer of Memphis, Tennessee, a member of the legislature of that state, fell dead at a dinner-table on the 15th instant. Col. Kerr stood well at the bar, but his extremely active and restless temperment, unfitted him for the patient plodding, which is necessary to the highest success as a lawyer. He was extremely attached to his friends, and affable and courteous to all men. We doubt whether he had any enemies, except what are termed political enemies, and toward these he was generous and candid. He did not belong to that school of politicians who ostracise others on account of their opinions. He was, in short, a liberal and generous representative of the *young South*, and his death at this time, in the flower of his strength, and in midst of his usefulness, is a matter for deep regret.

—A CONVENTION of insurance commissions which has recently held a session at Detroit, passed resolutions to the effect that taking mortgages to secure subscription to stock is unlawful and adverse to the interests of the insuring public ; that taxation of aggregate receipts of insurance companies is wrong ; that the usual return of companies in their annual statement of assets should not include the company's own stock or loans on it, or stock in any other company of the same character, office furniture, supplies, money advanced agents on premiums more than three months overdue ; and recommending that laws be framed to prohibit reinsurance after six months from the time the reinsured risk was taken, except upon the written consent of the policy-holders.

—CLUSERET, whom most Americans have heard of, has had a law suit with the publishers of a Swiss journal. He had an engagement with them to write souvenirs, but they, finding that the sale of their journal was likely to be suspended in France, got frightened and refused to publish his articles. He sued them for 16af. for copy already furnished, and 10,000f. damages for the loss of the money he might have made on copy to come. There was a contract, and the court held that the editors had fair opportunity to know what sort of literary material Cluseret would furnish ; that they had stopped him and he was ready to go on. So he was judged right in his demand, and received a verdict ; but not for 10,000f., as the court did not take him at his own valuation, but cut the damages down to 800f.

—THE LITCHFIELD LAW SCHOOL.—The first law school in the country, of any note was founded at Litchfield, Ct., by Dr. Bellamy, about twenty-five years before the revolutionary war. The law school at Litchfield owed its origin to Tappan Reeve, a native of Long Island, a graduate at Nassau Hill, a son-in-law of President Burr, and so a brother-in-law of Aaron Burr, vice-president of the United States, and was begun in 1784, just after the revolution was over. Some time afterward Judge Reeve formed a co-partnership with James Gould, a lawyer in Litchfield, and a graduate of Yale College, who became the head of the school in 1820, on the retirement of Judge Reeve, and afterward associated himself with Jabez W. Huntington, afterwards senator of the United States and judge of the Supreme Court of Connecticut. Down to 1833, about five years before the death of Judge Gould, there had been educated at Litchfield 1,024 lawyers from all parts of the United States, of whom 183 were from the Southern states. In this number are included fifteen United States senators, five cabinet officers in the general government, ten governors of states, fifty members of Congress, forty judges of the highest state courts, and two judges of the Supreme Court of the United States.—[*Springfield Union.*

—THERE appear to be some peculiarities in matters legal in the Orient, as the following extracts from some of our exchanges would seem to testify : Liu Chang-yeo, Governor of Kwangsi, denounces the acting magistrate of Ts'uan Chow for "recklessness and wanton severity." The governor had already heretofore laid down strict rules concerning the method to be pursued by district magistrates in capital cases. All persons found guilty of murder were to be sent to the high provincial authorities for sentence, and only in extreme cases was authority to be granted, on application, for execution on the spot. Notwithstanding this, the functionary complained of — who was already laboring under a charge of wrongfully releasing a prisoner on bail while in another magistracy — has actually of his own motion beheaded a prisoner, without awaiting the reply to the application he had sent up for permission to execute the sentence locally, on grounds wholly inadequate. The reason alleged for this precipitancy is that the prisoner was in so precarious a condition that, unless executed forthwith, it was doubtful whether he would live long enough to be made a public example. A rescript directs that the offending magistrate be stripped of his rank, and placed on trial to answer for his shortcomings.—[*Irish Law Times.*

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

Railroads.—Liability of Company for Wanton and Malicious Acts of Employees.—Where the servants of a railroad company, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable for such injuries. Opinion by WALKER, J. C. B. & Q. R. R. Co. v. Dickson, 63 Ill, 151.

———. **Comparative Negligence—Erroneous Instruction in Regard to—Whether will Reverse.**—In an action against a railroad company to recover for injuries to the plaintiff, occasioned by alleged negligence of the defendant, the court, at the instance of the plaintiff, instructed the jury incorrectly in regard to the rule of comparative negligence : *Held*, as the evidence showed no negligence on the part of the plaintiff to compare with that of the defendant, the latter could not be heard to complain of the erroneous instruction. Ibid.

———. **Constitutional Law—Regulating Speed of Railway Trains, etc.**—By the grant of corporate franchises to railroad companies to procure the right of way and operate their trains by the power of steam, the state does not deprive itself of its inherent power to enact all police laws necessary and proper to protect the life and property of its citizens. Opinion by THORNTON, J. T. P. & W. R. W. Co. v. Duran, 63 Ill. 91.

2. By such charters, unlimited discretion in the regulation of the speed of trains is not conferred. Among the rights reserved, and which must inhere in the state, is the power to regulate the approaches to, and the crossing of, public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid speed of railway trains. The exercise of corporate franchises must yield to public exigencies and the safety of the community. Ibid.

———. **Ordinance—Speed of Railway Trains.**—The corporate authorities of the town of Cuba enacted the following ordinance : "That it shall be unlawful for any railroad company, by themselves or their agents, to run at a greater speed within the corporate limits of the town of Cuba than five miles per hour ;" and provided a penalty for its violation, not less than $10 nor more than $100 : *Held*, That the corporate authorities had the power under the statute to pass the same, and that while it was somewhat informal, its meaning was plain enough to be easily understood. Ibid.

———. **Negligence—Evidence of—Burden of Proof.**—Where a railroad company runs its trains through the limits of an incorporated city or village at a greater rate of speed than is permitted by the ordinances of such city or village, if any live stock is killed by such train, the killing, by the stat ute, will be presumed to have been done through the negligence of the company ; and in an action by the owner of the stock, proof of the killing and violation of the ordinance will make out a *prima facie* case of negligence, and throw the *onus* upon the company to rebut this presumption of law. Ibid.

———. **When Liable for Injury to one Employee through the Fault of Another.**—If a servant of a railroad company be injured through the incompetency and unskillfulness of a fellow-servant, or in conse-

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quence of defects in machinery or track, and the company be guilty of negligence in the employment and retention of such agent, or in the construction and repair of its machinery and track, it is liable in damages. Opinion by SCOTT, J. Chicago & Alton R. Co. v. Sullivan, Adm'x, 63 Ill. 293.

———. **Habitual Intemperance** of a conductor, under circumstances bringing knowledge thereof to his employers, is sufficient to render them liable for injury resulting therefrom. Ibid.

———. **Contributory Negligence.**—Partial or slight negligence and inattention of the party injured will not bar recovery, when palpable negligence of the employer is proven. Ibid.

———. **Action Against for Killing Employee, by what Law Governed.**—An action by a wife against a railroad company for the homicide of her husband by the negligence of its servants, in the runntng of its train, is an action depending for its existence on the law of the state where the homicide occurred, and when such homieide occurred in the state of Tennessee, the right of action is in such person or persons as is provided by the law of Tennessee. Western & Atlantic Railroad Company v. Mary Strong. Supreme Court of Georgia, Sept. 8, 1874, opinion by MCCAY, J.

———. ———. **Who Must Sue.**—When the right of action for the homicide of a husband and father, is given by law to the personal representative, for the use of the wife and children, the wife cannot sue alone and in her own name. Ibid.

———. ———. **Nature of the Action.**—An action for the homicide of a husband by the running of rail cars, charged to be by reason of negligence, either in the railroad company or its servants, is an action, sounding in tort, and not an action excontractu, but in determining whether the railroad company is liable, the relation of the deceased to the railroad, whether as an employee, or passenger, or stranger, are essential elements in deciding whether the killing was wrongful. The rights of the wife or the representative to sue, depends upon the wrongfulness of the killing, and if the killing occurred under such circumstances as, by the laws of the place of the killing, or by a legal contract between the parties, the railroad company was not guilty of any breach of duty to the deceased, the right of action does not accrue. Although the language of our code, section 2971, would seem to give a wife the right to sue for homicide of her husband, in broad terms and without qualification, yet, in deciding whether a right to recover damages in any case exists, it must appear that the killing was a wrong, that is, that the defendant in such killing was guilty of a *breach of duty*, express or implied, which was due to the deceased, and if there was no such breach there can be no recovery. Ibid.

———. ———. **Right of Railroad Company to Limit its Liability by Contract.**—If a railroad employee contract with his employer that he will assume all the risks of his employment, and will not hold the company liable for the negligence of its servants, and he be killed under such circumstances as, under his contract, and under the law, he could not, had he lived, have recovered damages for an injury received, then his wife cannot recover damages for his death. The basis of the right of action in both cases is a breach of duty implied by law or assumed by contract, and if there be no such breach by the defendant, the wife cannot recover. Ibid.

NOTE.—The contract in the foregoing case between the railroad company appears to have been executed upon the following blank:

Office of the Western & Atlantic Railroad Company, ———— 187.—

This agreement witnesseth, that ———— has, at his own request, this day been employed on said railroad; and it is hereby understood between the parties and expressly agreed that the said ———— in consideration that the said Western & Atlantic Railway Company will hire and pay him the wages stipulated, which is more than he can get elsewhere; will take upon himself all risk connected with or incident to his position on the road; and will, in no case, hold the company liable for any injury or damage he may sustain, while so employed, in his person or otherwise, by what are called accidents or collisions on the trains or road, or which may result from the negligence, carelessness, or misconduct of himself or any other employee or person connected with said road, or in the service of said company, *or from any other cause.*

And it is fnrther agreed, that the company is to pay the said ———— for no time lost from its service by accident, disability, or otherwise, but is to pay at the rate which may from time to time be agreed upon, only for the services actually rendered by the said ———— and the company reserves the right to discharge him, whenever they are not satisfied to retain him. And the said ———— expressly waives and relinquishes any and all legal rights he may have, that are in conflict with this contract, and assumes all risk.

In witness whereof, the said ———— and said company, by Joseph E. Brown, its president, have hereunto set thesr hands and seals

———— [SEAL]

———— [SEAL]

PRESIDENT W. & A. R. R. COMPANY.

We have not seen the full opinion in the case of which we give an abstract above; but we are clearly of the conviction that the clause in the above blank form of contract which we have italicised, is contrary to public policy, and one which no court of justice ought to enforce. The correct principle, in our judgment, is that the state is interested in preserving the lives of its citizens; and hence will not permit a railroad company, or any other person or corporation, to stipulate against civil responsibility for homicides committed through its own negligence. This view becomes still more clear, and strikes the mind with more force, when it is considered that the state punishes such negligent homicides *as felonies.* We doubt whether any part of such a contract, which stipulates against liability for the consequences of the negligence of the railroad company, ought to be sustained. See an able discussion on this question by Mr. Justice BERRY of the Supreme Court of Minnesota, in Jacobus v. St. Paul, etc. Ry. Co., *ante*, p. 375.

If considerations of public policy will supervene to prevent a common carrier from stipulating against the consequences of his own negligence, in respect to the care of inanimate merchandise, may not such considerations be much more strongly urged where a master endeavors, by contract, to stipulate against responsibility for the negligent killing or injuring of his servant? In those exceptional cases where a recovery is permited against a master by a servant, for an injury caused by a fellow-servant, it is upon the theory that the master, as well as the servant, has been negligent—that is, that the master has been negligent in selecting an unskilful servant. So far, therefore, as the above contract seeks to change any existing rule of law, it seems clear that it is against public policy and void. The idea that the state will permit one of its citizens, for an increase of wages, to contract away his life or personal safety by a stipulation with another citizen, which, in effect, says, "if you injure me or kill me through your negligence, neither I, in the one case, nor my personal representative in the other, will hold you responsible"—is monstrous.

Besides, to sustain such contracts as valid, cannot fail to have a tendency to diminish the care exercised by the railway company in the selection of its servants; nor can it fail to increase the number of reckless and irresponsible servants in the employ of the company; and in both of these ways *the danger to the traveling public is increased*—another reason why such contracts conflict with public policy. Indeed, to sustain such contracts seems as impolitic as a rule of law would be which would require the persons on board a ship in distress to throw over the sailors in order to save the passengers; for as respects the sailors, "unless these abide in the ship, all will perish."

Statute of Frauds—Sale by Auction—Memorandum in Writing—Entry in Sales book by Auctioneer's Clerk.—The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on the 28th of March, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as lot 49. The defendant had a sales-ledger, which was headed "Sales by Auction, 28th March, 1872," in which the plaintiff's mare was also numbered 49; but neither the catalogue nor the conditions of the sale were annexed to the sales, ledger, nor were they referred to therein. On the 28th of March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale and knocked down to M. for £33, and thereupon the defendant's clerk wrote in the columns of the sales-ledger, left blank for this purpose, the name of M. as purchaser, and the price. M. afterward refused to take the mare:—*Held*, that the catalogue and the conditions of sale were not suffieiently connected with the entries in the sales-ledger to make a note or memorandum in writing of a contract by M. to satisfy section 17 of the statute of frauds. *Semble*, that the entry by the clerk was not by an authorized agent so as to bind the purchaser. Pierce v. Corf, L. R., 9 Q. B. 210.

Master and Servant—Service for "Twelve Months Certain"—Notice—Continuance of Service beyond the Twelve Months.—The defendant agreed to serve the plaintiff as a traveler and agent "for twelve months' certain," after which time either party should be at liberty to terminate the agreement by giving the other a three-month's notice. *Held*, (by Bramwell and Pigot, BB., Kelly, C. B., dissenting), that at the close of the twelve months the agreement could be determined by either party without any notice, and that the stipulation as to a three-mouths notice only applied in case the engagement was prolonged beyond the twelve months. Langton v. Carleton, L. R., 9 Ex. 57.

Right of Creditors to Oppose Bankrupt's Discharge.—A creditor has no absolute right to appear and oppose the discharge of a bankrupt after the return day of the order to show cause, though the proceedings may have been adjourned for other purposes. But the court may permit opposition to be made at any time before the discharge is granted, and if a creditor who has duly filed specifications of opposition is about to withdraw them, other creditors may be permitted to carry on the opposition, on good cause shown. *In re* Houghton, U. S. Dist. Court, Dist. of Mass., by LOWELL, J.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. } ST. LOUIS, THURSDAY, OCTOBER 1, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.
S. D. THOMPSON, Ass't Editor. }

COMMON CARRIERS—JUDGE BALLARD'S RECENT DECISON.—The recent opinion of Mr. District Judge Ballard on the liability of express companies in case of the loss of goods in railroad accidents (*ante*, p. 436), appears to have attracted an unusual degree of attention among the profession, no less on account of the importance of the question itself, than on account of the strong reasoning with which the learned judge enforces his view of it. We elsewhere print two communications criticising his opinion, to which we ask the attention of our readers.

LAW SCHOOLS.—The Albany Law Journal congratulates the State of Pennsylvania on the fact that it possesses but one law school. It says:

There are some reasons why our neighboring state should be congratulated on having but one law school. The principal reason is that the profession will not be likely to be crowded with young lawyers possessing but a smattering of theoretical knowledge of the law, and knowing absolutely nothing of the practical features of the law. In New York we have the disadvantage of as many as three law schools, which are empowered to give a diploma entitling the graduate to admission to the bar, after a purely theoretical study of the law, comprising a period of from nine months to two years, in which the student learns no more law than any well-educated, non-professional person ought to know. Undoubtedly law schools have their uses; but, as at present conducted, they should be only accessory to a good practical office-training.

JUDICIAL INTEGRITY.—In an interview with a reporter of the New York Herald, Mr. Charles O'Conor so far forgot that discretion which becomes defeated counsel, as to intimate that the late decision of the New York Court of Appeals, in what are known as the "Ring Suits," was influenced by political motives. We regret that one who stands, both in respect of his ability and professional integrity, confessedly at the head of the American bar, should have set such an example to his professional brethren, and we trust it will turn out that the reporter misunderstood his remarks. We have been accustomed to hear laymen accuse judges of deciding legal questions on political grounds; witness, for instance, the insinuation made by the editor of Harpers' Weekly against the opinion of Chief Justice Chase in the legal tender cases. But until a judge commits a flagrant and palpable breach of duty, the good opinion of the bar should hedge him round about. Counsel should endeavor, by their courteous and honorable treatment of the judges, to make them *feel* that they are honorable men, whether they are intrinsically so or not. Such treatment will preserve the integrity of a good judge, and improve that of a bad one.

WHEN THE REVISED STATUTES OF THE UNITED STATES TAKE EFFECT.—The Daily Register, referring to an article in the Albany Law Journal on this question, says:

In Title 1, chap. 1, sec. 5, of the Revised Statutes of the United States, our learned brother of Albany will find the information—the lack of which causes him so much vexation—to wit: the time when the revised statutes take effect. By referring as above directed, all concerned will learn that all the laws of the United States in existence previous to December 1, 1873, which have simply been re-enacted, without any alteration, shall continue in force as heretofore; and that all of that part of the United States revised statutes which comprises a re-enactment of the general and permanent acts and resolutions of Congress, in force up to the time of such re-enactment, *with such modifications as are deemed expedient*, shall take effect at the *expiration of the session of Congress which shall be convened during one year following the president's approval of such revised statutes.*

It seems to us that this provision is sufficiently explicit. And yet, ever since our publication of this information, a month ago, we have been in receipt of quite a number of communications asking for the source of our information, and some of them questioning its correctness. We presume that all these persons, as well as our contemporary of Albany, have sought to find this provision in the tail, rather than in the head of the revised statutes.

According to the above, the revised statutes do not take effect *until the expiration of the next session of Congress.* If this is so, the editor of the Albany Law Journal, and the correspondents of the Daily Register, are not the only ones that need light on this question; for some of the departments of the government are now issuing instructions to their subordinates, based upon the revised statutes, and assuming them to be now in force.

POLITICS AND THE BENCH.—The Albany Law Journal, commenting on a recent article in this journal (*ante*, p. 435) on the subject of the propriety of judges permitting their names to be used as candidates for political offices, says:

While we have always deprecated the appointment or removal of judges on political grounds, or any connection of the judiciary with politics, we see no impropriety in a judge accepting the nomination to any office, provided he has the good taste to resign his judgeship immediately. If a judge finds politics more congenial than jurisprudence, let him, by all means, leave the bench. There are plenty of competent men of fine judicial minds who are content to remain upon the bench, and who have no fervant political ambition. To these the judicial offices belong by the highest right. The bench is of very little use to a judge in furthering his political schemes. If he has no other qualifications beside his judicial capacity, he will seldom be thought of for political office. But if a man is found to be qualified as well (or better) for a senator or governor as for a judge, there is no good reason why he should not be transferred from the bench to the senatorial or gubernatorial chair. Still it would not be without some advantages to so amend our constitutions as to make judges ineligible to political offices during their terms. It would perhaps add to the stability of the judiciary.

Judge Bedle, of the Supreme Court of New Jersey, who has accepted the nomination of a political party for governor, has not thought fit to resign his seat on the bench, but he had a sufficient appreciation of what became his position, to notify those who pressed his nomination, that he should under no circumstances take the stump, but should remain in retirement and allow the canvass to take care of itself.

REVISED STATUTES OF THE UNITED STATES—PUBLICATION OF THE SESSION LAWS.—The Boston Advertiser, alluding to the delay which has been occasioned in the publication of the revised statutes of the United States, and of the acts of the last session of Congress, makes the following judicious suggestions:

We suspect that the delay is due to the *indexes*, which, under the new system are in course of preparation in the Department of State. There is no doubt that the index to the statutes is a matter of very great importance; it is a work on which very great care should be bestowed, and from the nature of the case, cannot be hurried through without danger of errors. But for the immediate purposes of many people who desire to consult the session laws, an index is not necessary. It would seem, therefore, to be worthy of consideration, in view of the delay which this first year's experience has shown, to provide for the publication, always, of a pamphlet edition of the session laws of Congress, without an analytical index, as soon as possible after the close of the session. Perhaps the most convenient way of doing this would be in the form of an appendix to the

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Congressional Record. This would be a ready means of furnishing the public with the text of the national laws; it could be printed in small type, on ordinary paper, and thus be supplied at a very low price; and its early appearance would diminish the impatience with which the publication of the more elaborate edition, accompanied by the index, would be awaited. A pamphlet edition of this sort, suited for wide distribution would, moreover, remove the last excuse for the publication of the laws of the United States in newspapers of the various states, which, as it has heretofore been done, has been rightly regarded as involving a wasteful expenditure of money. The publication of the laws from time to time, during the session at which they are passed, or immediately after its adjournment, is of great convenience to the public. But a newspaper publication, many months afterwards, serves no useful purpose; and as a means of distributing government money to needy partisan journals, it is contemptible, by reason of the small amount which can fall to the share of each newspaper, inadequate, indeed, as compensation for the service actually performed.

PRESUMPTIONS IN SUPPORT OF JUDGMENTS.—We publish elsewhere a very able and elaborate opinion of Mr. Justice Field, sitting in the Circuit Court of the United States for the District of California, on the extent and limitations of the presumptions of law which attend the acts of courts of general jurisdiction. The case was originally tried before Mr. Circuit Judge Sawyer, and will be found reported, together with an elaborate opinion, in 1 Sawyer C. C., 309–343. The judgment of the circuit court was recently reversed by the Supreme Court of the United States, Mr. Justice Field delivering the opinion. 18 Wallace, 350. The case is now finally disposed of by the same learned justice at circuit, in the opinion which we elsewhere publish. The questions involved in this case are undoubtedly of much importance, and those having occasion to investigate them will derive much assistance from the study of this concluding opinion.

We cannot here avoid calling attention to the admirable manner in which the question was put by Mr. Galpin in his succint argument before the Supreme Court of the United States, against the validity of the judgment assailed. 18 Wallace, 356–360. In the following sentences he resolves the opposite view of the case into complete nonsense: "There is no presumption of law, from the existence of a judgment, that process was served, because no presumption can arise except in favor of a valid record; and there is no proof that the papers are a valid record, unless they contain proof of service. *Otherwise a record possibly invalid proves service, and the service thus presumed proves the record.*" "This," as was said by Mr. Justice Marcy, in Starbuck v. Murray, 5 Wend. 358, "is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact."

FEMALE LAWYERS.—Miss Goodell, the lady lawyer of Janesville, Wisconsin, cannot complain of the manner in which she has been advertised by the law journals, if that will procure her clients with retainers. The Chicago Legal News chronicled her advent to the bar, and made it the occasion of paying her a handsome compliment. When she won her maiden case, an action under the Wisconsin liquor law, the same paper joyfully chronicled her success, and we all rejoiced at it. The English and Irish law journals echoed our joy on the other side of the Atlantic. And now the Scottish Law Magazine has caught the echo, and the fame of Miss Goodell (and of Mrs. Bradwell, too,) resounds from the Frith of Forth to the castle of Inverness. It says:

"Many of the periodicals have been making merry over the fact that Miss Goodell, of Janesville, Wisconsin, has been admitted as a member of the bar. We do not see anything to make merry about Miss Goodell going into the profession. We have no doubt that good'll come out of it. If it is true that in one of the western states, one member of the bar who differed with another fired at him in court, and the judge was compelled to remark that if this kind thing went on much longer he was afraid he would have to commit somebody for contempt of court, we fancy that the admission of ladies to the bar of these states will have a beneficial effect by improving the tone of feeling and increasing the amenity of manners. The first intimation we saw of Miss Goodell's admission was in the Chicago Legal News, a legal periodical which is edited by a lady, Mrs. Myra Bradwell, and very well she does it, too. Another lady, connected with the same periodical, was not long since appointed assistant clerk in the state legislature of Illinois. In this country the success of female doctors has not been such a *succes d'estime* as to induce other ladies to attempt becoming female jurists. There may, however, come a time when (to quote the rhymes of one who evidently aspires to both the poetical and the prophetical qualities of the *vates*)—

> '" Ladies fair, in wig and gown,
> With stately step strut up and down,
> The noblest hall in this old town,
> With their attendant chivalry.
> And female advocates, I assure ye,
> Shall tickle the fancies of the jury,
> And put crown counsel in a fury,
> And cause a dreadful rivalry."'

But seriously, is not this a pretty small thing to make such a flutter about? If any woman of good moral character and qualified by the requisite study, desires to attempt to make a livelihood at the practice of the law, where is the man that is ungenerous enough to object? We may be divided in opinion as to whether that is her proper place, and as to whether she will succeed; but if that is not her proper place, a few failures on the part of those who attempt to succeed in it will put an end to the whole matter. We think that, in some respects, mankind and womankind are governed too much; that there is too much repression on the part of those who govern against those who are governed. If any woman thinks she can succeed at law, medicine or divinity, we believe in giving her the fullest liberty to attempt it. Whether that is her proper place is her business, and not ours. We are glad that Mrs. Bradwell has shown that she can edit a good law journal, and make money out of it, too, notwithstanding she was refused a license to practice law by the supreme court of her state. We are also glad that Miss Goodell has succeeded in winning her first case. In taking up the cause of woman against the groggeries, she has made such a beginning as becomes her position; and although we are not prepared to advocate sumptuary laws at this time, yet we should not shed tears if she should succeed in suppressing every rum hole in Wisconsin.

The Jury System.

The London Daily News makes the following observations on the English jury system:

The injustice and inequality of the system seem to us the worst thing that can be said against it. But it is also the defect which seems to occupy least of the attention of our reformers. The exemption of persons over sixty years of age is not nearly so useful a provision as would be some system of exemption for persons who could show that the task of serving as jurors would press on them with undue and special severity. Indeed the exemption for persons over sixty years of age is now practically an absurdity. Life has been greatly extending itself in England during our modern generations; and not merely life, but the period of full mental and bodily activity. No healthy man has in our days any notion of giving up active occupation merely because he is sixty years old. There is growing up, too, in the public mind the idea that a juror ought to be selected with some regard for his supposed qualification to discharge his duties. The old hap-hazard system of throwing out the judicial drag net, and hauling in an indiscriminate lot, does not seem likely to stand the test of many succeeding generations. The community contains a large

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proportion of persons more or less unoccupied, who are eminently fitted to perform the juror's work, and who would be quite willing to undertake the duties, if these might be accepted without an unseasonable sacrifice of personal interest to the public welfare. A good deal has been said now and then, with more or less irrelevant and inappropriate allusion to examples from classic history, about the danger of creating a "class" of jurymen. But making the most liberal allowance for the measure in which the practical may fall short of the theoretical, we cannot believe that there is anything very impracticable about the doctrine which insists that a stupid man, discharging a public duty at a heavy personal sacrifice, is not likely to prove so useful as an intelligent person willingly accepting the office.

The above is but a single instance of numerous expressions of the lay press, both of England and the United States, which indicate a dissatisfaction with the jury system as it has been developed and handed down to us by the sages of the common law. The feeling does not appear to take shape in favor of abolishing juries altogether, but rather in favor of reforming the jury system so as to secure—(1) a more intelligent class of jurors, and (2) a more general exemption from jury service of certain classes of business men, on whom such service entails great loss. We shall not attempt a discussion of the question at present, but will simply say that we do not see a way out of the difficulty in the plan proposed by the above writer. We think his suggestions, if carried out, would develop a class of *professional* jurors, and would remit the trial of issues of fact to the idle and vagabond elements of society; for if intelligence were the only qualification, enough intelligent men could be gathered together from these elements to perform the whole jury service of the country. Every large city has its swarms of intelligent vagabonds who would delight to be permitted to earn a subsistance by serving on juries, rather than be obliged to filch it from the tables of free-lunch saloons. But we should think it more worthy of consideration, whether the number of causes in which juries are impannelled might not be greatly reduced, with advantage to the administration of justice. We should think it more worthy of consideration whether, in all demands arising *ex contractu*, juries might not be dispensed with altogether. It is true that under the constitution of the United States, juries cannot be denied in actions at common law when the amount in controversy exceeds twenty dollars; but this is one of the amendments which applies only to the *federal* judiciary. Barron v. Mayor of Baltimore, 7 Peters, 243; Bonaparte v. Camden and Amboy Railroad Co., Bald. 220; Livingston v. Moore, 7 Pet. 551; Fox v. Ohio, 5 How. 434; James v. Com., 12 Sergt. & R. 221; Barker v. People, 3 Cowen, 686.

There is nothing in the national constitution which prevents the states from abolishing trial by jury altogether in their own courts. There certainly seems to be no reason, founded in public policy or otherwise, why the solving of questions arising out of contracts and complicated business and commercial transactions should require the aid of twelve men, inexperienced in the sifting of evidence, and in the determination of such questions, when the judge is constantly entrusted with the determination of similar questions, without a jury, when sitting in equity, and society does not seem to suffer from it. Would it not, then, be worth considering whether controversies of this character ought not to be determined by the judge as of course, both as to fact and law; and whether, where a jury is demanded in such cases, the party demanding it ought not to pay the cost thereby entailed, instead of such cost being borne by the public?

The Louisiana Case — Views of Hon. Reverdy Johnson.

Hon. Reverdy Johnson has, at the solicitation of Mr. Bennett, proprietor of the New York Hearld, written a letter to that journal, giving his views upon the legal questions involved in the Louisiana case. He takes the following positions: 1. That the President committed an error in recognizing Kellogg as the legitimate governor. 2. But notwithstanding this fact, the people of Louisiana had no right, by force of arms, to overthrow the government of Kellogg and to install the rightful governmet. 3. That the people of Louisiana having done so, it was the duty of the President to interfere with the power at his command, and to resist Kellogg and the government of which he was the head. These three propositions are not in Mr. Johnson's own language, but they embrace succint statements of the views he attempts to enforce.

Whilst we cordially sympathize with the general spirit of this letter, we cannot understand any process of reasoning by which the two latter of these propositions can be reconciled with the first. Assuming, as Mr. Johnson does, that the President's recognition of Kellogg's government was based alone on Judge Durell's celebrated order, and not upon the decision of a duly constituted state board of canvassers declaring Kellogg elected, then nothing is clearer than that it was erroneous. No respectable lawyer, so far as we know, doubts what Mr. Johnson asserts, that Judge Durell's order involved a clear invasion on the part of the judiciary of the *political* power of the government, and was wholly extra-judicial and void. The Dorr Rebellion case, Luther v. Borden, 7 Howard, 1, is believed to be decisive of this question. Nothing is more familiar to lawyers than the principle that a judgment of a court having no jurisdiction is a mere nullity —nothing—and binds no one, but that, on the contrary, it is the duty of every one to disregard it, and that he who acts in obedience to process emanating from it does so at his peril. We fully agree with Mr. Johnson's views on this branch of the case, where he says:

In the same case (Luther v. Borden) it was decided that when the President is called upon to protect a state against domestic violence, in the manner provided for by the fourth section of the fourth article of the constitution, he is compelled to determine whether the governor or the legislature of the state making the call is or is not legitimate, and his determination is conclusive. * * * Judge Durell had no authority whatever to pass upon the question whether Kellogg had been duly elected governor. That was a question which, when properly brought before the President, he was to determine for himself. The action of the judge possessed for him, nor for anybody else, no authority whatever. Consequently the President, when he recognized Kellogg, as he is understood to have done, exclusively upon the ground of that action, fell into an error. He abandoned—undesignedly, no doubt—the duty which the constitution devolved upon him, and sought authority for what he did under a judgment of a United States judge, which, as to him, was entirely void.

So far, Mr. Johnson's positions are clear, and it would seem, incapable of being overthrown. But we cannot understand upon what ground he rests the conclusion that the President's recognition of Kellogg is final and irrevocable except by Congress. This conclusion Mr. Johnson states in the following words, the italics being ours:

But the President having recognised Kellogg, whether upon sufficient evidence on not, that recognition was at once absolute and final. The people of the state, consequently, however unjust and injurious to them may have been the decision, possessed no right to subvert the government so recognized by force of arms, except as such right was a revolutionary one. A right of revolution can never be supposed to exist under an established government. Such a

right, indeed, supposes no existing legal authority, but asserts itself upon natural and elementary principles, such as are stated in our Declaration of Independence. But the states of this Union, however sovereign they are in many respects, are not wholly so. Each state is bound to the other states and to the United States, and the obligation is such that a right by force to change her form of government is not possessed by her, as its exercise might interfere with the relation that she bears to her sister states and to the paramount authority of the United States. * * * Notwithstanding all the sad consequences of the existence of the Kellogg government, the sufferers cannot legally find redress in violence. They must await the deliberation of Congress and the President, and must hope (I trust not in vain) that they will, at an early day, give them relief.

The President having recognized Kellogg, and that recognition never having been reversed by Congress, what is his duty in the existing emergency? That he cannot permit a state government to be subverted by domestic violence, without palpable dereliction of duty, is clear. When called upon in proper form to put it down, the constitution gives him no option in the matter. He is bound by its very words to bring it to a termination, and to restore the government atrempted to be overthrown. Kellogg's government, from the time it was recognized by the President to the occurrence of the late violence, was the only government known to the state. Every department—legislative, executive and judicial—existed under its authority. The President, therefore, is imperatively called upon to protect it and to reinstate it as it was before the violence took place, if he can. His recognition of it having been acted upon as conclusive of its legitimate existence, ***he has now no right to withdraw it. His decision is as binding upon him as it was upon the state. His jurisdiction over the subject was exhausted by its first exercise, and his subsequent conduct is to be governed by the same considerations which would control it if the legality of that government had never been called into doubt.*** What he is doing now, in my opinion, is what he is bound to do. An admission of a right to resort to violence to put down an existing government might, by its example, often lead to anarchy in every state—a condition of things more fatal to a people than any abuse of the elective franchise or governmental power.

We can well understand that, in the absence of any action on the part of Congress, it was the duty of the President to recognize one or the other of the contending parties as the rightful government of Louisiana, and to support with the military and naval power of the United States the government so recognized when properly called upon so to do. We can also understand that, the President having acted in the premises, his action, until reversed by Congress, is final, and concludes all other departments of the government, and all other persons; and that the people of Louisiana themselves have no right to resist it, except the right of revolution. But we cannot understand how it concludes the President himself. We cannot understand what there is in the nature of the case that prevents the President from undoing his own error. If the President, in the exercise of his political functions, to-day recognizes the government of Marshal Seranno as the legitimate government of Spain, no one can dispute that he may to-morrow withdraw that recognition, and recognize Don Carlos. If a court of justice, upon the trial of a contested election, install A. in the office of sheriff of a county, when in fact B. was duly elected, it may unquestionably grant a new trial, and upon a re-examination of the case, oust A. and install B. Is the President of the United States, in a juncture which involves the safety of our institutions, the only person who is incapable of undoing his own errors? If, by reason of acting on the judgment of a court which has no jurisdiction, he installs in office a usurper as governor of a state, is he, on discovering his error, estopped from undoing it — from deposing the usurper and permitting the installment of the rightful government? Whilst the President, in the recent juncture, was placed in a position of grave embarrassment, and whilst we admit that in view of the failure of Congress to act, his action was entirely consistent, we cannot perceive anything in the nature of the case which *obliged*, or which still obliges him, to support Kellogg, if, in fact, McEnery is the duly elected governor.

Railway Negligence — Contributory Negligence — Passenger with Arm out of Window.

The case of Pittsburgh & Connellsville Railroad Co. v. Andrews, decided by the Court of Appeals of Maryland, and reported in 13 Am. Law Reg., N. S., 566, is a valuable contribution to a class of cases which pass upon the question whether a railway company is liable to pay damages, where a passenger is injured by reason of his elbow being protruded from the car window, and coming in contact with some external object while the train is in rapid motion. The facts of the case were that the plaintiff purchased a ticket from McKeesport to Cumberland, and when injured was sitting in the second car from the engine. The train left Connellsville between ten and eleven o'clock at night, and when about half a mile from that station, while going at less than half speed, struck a freight-car which was left standing on a siding, in a position so near to the switch as not to permit the passage of the train without striking it. The locomotive struck the end of the freight-car, knocked it aside, and the train passed without any other collision, except a slight scratch to the sleeping-car, which was about nine inches wider than the others. No one was hurt except the plaintiff, whose right arm was broken in several places and permanently injured. The car in which he was riding did not come in contact with the freight-car, and it was admitted his arm at the time was out of the window. He was a man of mature years, and he would have received no injury if his arm had not been in this position. The defendant insisted that the jury should have been instructed that if they found the accident occurred as stated by the witnesses for the defence, then there was such want of ordinary care and prudence on the part of the plaintiff, directly contributing to the accident as would prevent him from recovering damages in the suit. This instruction the court below refused to give, and this refusal is held to have been error.

This case may therefore be quoted as deciding the principle that "if a sane person of mature years, while a passenger in a railroad car, without any controlling or justifying necessity or cause for so doing, voluntarily or inattentively protrudes his elbow or arm from the window, and it is injured by coming in contact with any external obstacle or force, it is such an act of contributory negligence on his part as will prevent a recovery, and that it is the duty of the court so to instruct the jury, as matter of law, notwithstanding the negligence of the company in permitting the obstacle to be placed too near the track of the passing train."

This principle is supported by the following cases: Todd v. Old Colony & Fall River Railroad Co., 3 Allen, 18; Pittsburgh & Connellsville Railroad Co. v. McClurg, 56 Penn. State, 294; S. C., 7 Am. Law Reg. N. S., 277; Indianapolis & Cincinnati Railroad Co. v. Rutherford, 29 Ind. 82; S. C. 7 Am. Law Reg. N. S., 476; Louisville v. Nashville Railroad Co. v. Sickings, 5 Bush, 1. The Court of Appeals of New York are supposed to have assented to the same principle in Holbrook v. Utica & Schenectady Railroad Co., 12 New York, 236.

On the other hand, a contrary rule has been asserted in

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New Jersey Railroad Co. v. Kennard, 21 Pa. St., 203; in Spencer v. Milwaukee & Prairie du Chien Railroad Co., 17 Wis. 487; and in Chicago & Alton Railroad Co. v. Pondrom, 51 Ill. 333. The first of these cases was a decision by Chief Justice GIBSON at *nisi prius*, and was affirmed by the Supreme Court of Pennsylvania in a *per curiam* opinion, but was subsequently overruled by the same Court in Pittsburgh & McConnellsville Railroad Co. v. McClurg, *supra*. And the Illinois case seems to proceed upon the doctrine of *comparative* negligence, which means that the negligence of the plaintiff and defendant respectively are to be compared, and that if the negligence of the former is but *slight*, while that of the latter is *gross*, the former may recover. This doctrine the Maryland court repudiate.

We confess to a predilection in favor of the Illinois doctrine of comparative negligence; but, assuming that it is within the province of the judge in all cases, to give the jury conclusive instructions as to whether certain admitted facts do or do not constitute negligence, we should prefer to rest our dissent from the doctrine of the Eastern courts, upon the assertion that for a passenger in a railway coach, to rest his arm in the window *is not negligence at all*, or at least, that it is negligence of so slight a degree that the law ought not to take notice of it. Because, leaving out the question of *skill*, which does not arise in a case of this kind, negligence consists in the doing or omitting of that which a man of *reasonable prudence* would not do or omit. Kernbacker v. Railroad Co., 3 Ohio State, 176; Tonawanda R. R. Co. v. Munger, 5 Denio, 255; Blyte v. Birmingham Water Co., 11 Exch. 781. But any person entering a railway passenger coach in warm weather when the windows are up, will observe that it is the constant and ordinary habit of passengers of all classes and of all apparent degrees of intelligence, to rest their elbows in the windows. Is a man to be held wanting in the prudence of a *reasonable* man, when he does no more than is commonly done by the human species in like circumstances? It therefore seems to us that if any conclusive instruction is proper in such a case, it should be that for a passenger to rest his elbow in the window of the coach, although it protrude slightly beyond the outer plane thereof, is not negligence *per se*.

Again, the windows of passenger coaches on American railways are ordinarily constructed with the sill but a few inches below the shoulder of the passenger who sits in the adjoining seat. This sill is flat and five or six inches wide. It could not be constructed so as to afford a more convenient and easy resting-place for the arm of the passenger, as he leans against the side of the car. By so constructing it, and leaving it open, when a single rod or wire whould keep the passenger's arm out of it, the railway company impliedly *invites* the passenger to rest his arm there, and impliedly promises him that no object shall be permitted to remain so near the track as to injure his arm, when naturally resting in that position. Shall it be tolerated, then, that one man may invite another into a pit-fall, and then escape responsibility on the ground that the injury would not have happened, of his victim been more circumspect and less confiding? The reasoning of Chief Justice GIBSON in New Jersey Railroad Co. v. Kennard, *supra*, appears to us more forcible and conclusive than any argument we have seen adduced in support of the contrary principle. He said to the jury:

A carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, provided it happen without negligence or misconduct on the part of the party injured. A carrier of passengers is bound to omit no precaution that may conduce to their safety. He is bound to guard beforehand against every apparent danger that may beset them. The dangers incident to travelling in railway cars are few compared with those incident to other modes of travel; but among the most prominent of them is risk of injury to limbs stuck out of the windows where the cars are not so constructed as to prevent it. Any one who has travelled by railway must have observed that even the most careful passengers forget the risk, and unconsciously suffer their elbows to slip out beyond the window-sill. What can the carrier do to prevent this?

No more is required than a few metallic rods set in the window perpendicularly or horizontally, or a netting of wirework, or even wooden slats. None of these would materially impede the circulation of air or abridge the comfort of the passengers, while it would make their safety sure. A car without any of these appliances is, to coin a phrase, not *roadworthy*, and a carrier is responsible for any loss that may happen from that cause alone. It is a notorious custom in railway cars, and it is proved to be so by the evidence in the cause, for passengers next to the windows to rest their elbows on the sills of them, and carriers are bound to take notice of the customs and habitudes of railway passengers, and to provide for them. If a passenger, therefore, sits and rides in a car, as others generally do, and receives injury from an imperfect construction of it, the carrier is liable for it.

But it seems to us that the radical mischief consists in the fact that courts presume to instruct juries that a given state of facts do or do not constitute negligence. We are well aware that this practice is so thoroughly established, and so well grounded in authority, that it seems presumption to assail it, but we cannot avoid thinking that it involves, on the part of the judge, a clear invasion of the province of the jury. The point which strikes us is that twelve men of sense, versed in the affairs of life, are better qualified than one man of theoretical learning, to say whether a given act or omission involves reasonable care, reasonable skill, or reasonable diligence. We could illustrate this question in various ways. Suppose, for instance, that a vessel runs upon a bar and founders at sea. Suppose that none of the facts attending the disaster are controverted—the rate of speed, the time of day or night, the direction in which the vessel was heading, etc.—would not a jury of men experienced in navigation be more competent to decide whether *reasonable* care was exercised, under the circumstances, than any admiralty judge? Again, in the precise case we are considering, is there anything that renders a single lawyer more competent than twelve experienced laymen to decide whether the riding with one's elbow out of the window of a passenger car involves a want of *reasonable* care? Is there anything in his legal learning that gives him a superior qualification for determining how reasonable men generally provide for their personal safety? Is he so deeply versed in ordinary human affairs—does he travel so much—is his observation so acute—does he have so much leisure to generalize his knowledge—that his judgment on a question of ordinary experience should be better than that of twelve other men?

We can well understand how a single judge should be better fitted than twelve jurors to weigh conflicting testimony. Scarcely a day of his professional life has elapsed wherein he has not been engaged in examining witnesses, penetrating disguises, detecting falsehoods, and exposing shams. This has been the business of his life; it is his occupation, his art. He is as much better qualified than a jury of laymen to weigh conflicting testimony and declare the result, as a single seaman is better qualified to direct the navigation of a vessel than a committee of twelve landsmen. And yet no judge ever

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dreams of arrogating to himself this function. There is, then, in what we are considering, this striking anomaly: that while a judge never arrogates to himself a function of a jury which he is far better qualified to discharge than they, yet he constantly withdraws from them a function which they are better qualified to discharge than he.

Presumptions of Law in Favor of the Acts of Courts of General Jurisdiction—Their Extent and Limitations.

GALPIN v. PAGE.

[S. C., 1 Sawyer C. C., 309; 18 Wall. 350.]

Circuit Court of the United States, District of California, August 31, 1874.

Before Hon. STEPHEN J. FIELD, one of the Justices of the Supreme Court of the United States.

1. **Collateral Attack of Judgments.**—The expression, "collateral attack," applied to judgments, means the presentation of grounds of invalidity other than those which have been established by the prosecution of a writ of error or an appeal, or other direct proceeding to vacate the judgment. Thus, where the judgment of a superior court, under execution, emanating from which title to land had been acquired, was reversed on appeal, it was not a collateral attack upon such judgment to urge against its validity the judgment of the appellate court.

2. **Whether the Rulings of the State Courts upon a Question of Jurisdiction Conclude the Federal Courts.**—Where the supreme court of a state lays down rules as to the presumptions which attend the acts of the superior courts of such state, its adjudication of the question stands, like the ruling of any other court, entitled to respect and consideration for the learning and ability of its members, but possessing no obligatory force upon the federal courts. Such a ruling, except so far as it expounds the state statute, relates to matters of general law, and not to questions of a local character, peculiar only to the state.

3. **The Relation of the Federal Courts to the State Courts.**—Whilst the Courts of the United States are not foreign courts in their relation to the state courts, they are courts of different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them.

4. **Right of the Federal Courts to Enquire into the Jurisdiction of the State Courts.**—Neither the constitutional requirement (, article 4, § 1), providing that "full faith and credit shall be given to the public acts, records and judicial proceedings of every other state," nor the act of Congress providing for the mode of authenticating such acts, records and proceedings (May 26, 1790), and declaring that when thus authenticated, they shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which the records are or shall be taken," precludes an enquiry into the jurisdiction of the court in which the judgment was given, or the right of the state to exercise authority over the parties, or the subject-matter of the judgment. And, although the act of 1790 includes the federal courts, these courts have the same power to make such enquiries as do the state courts.

5. **Same.**—A circuit court of the United States, sitting within a state, has the same power to examine into the jurisdiction of one of the courts of such state, as has a circuit court of the United States sitting within another state. The relation of the federal courts to the state courts is the same, whether sitting within or without the state.

6. **Collateral Attack of Judgments—Exceptions to the General Rule.**—The principle that when a judgment of a court of general jurisdiction is produced in evidence, it can only be collaterally attacked for matters apparent upon its record, and that, in the absence of such matters, the jurisdiction of the court must be conclusively presumed, is subject to qualifications and exceptions which arise where the proceedings or the parties against whom they are taken are without the ordinary jurisdiction of the court, and can only be brought within it by pursuing special statutory provisions.

7. ———. ———. **The Correct Principle** is that there is no presumption in favor of the judgments of courts of general jurisdiction, except as to *matters* and *persons* falling within the scope of that general jurisdiction When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority by which the extraordinary jurisdiction is exercised.

8. **Service of Summons by Publication—The California Statute** relating to service of summons by publication, construed.

9. **What Constitutes Record or Judgment Roll—Order of Publication—Case Overruled.**—The California statute, properly construed, requires full proof of the jurisdictional facts to be incorporated into the judgment roll. It follows that where a suit has been brought against a non-resident by publication of the summons, the judgment roll must exhibit the *order for publication* granted by the court or judge under the statute: denying on this point Hahn v. Kelly, 34 Cal. 391.

10. **Same—What may be Looked to on Collateral Attack.**—But if the foregoing proposition be not true—if the order of publication constitute no part of the judgment roll, then, in a collateral attack of the judgment, the remaining portions of the record of the proceedings would be of equal verity, and could be equally relied on, and the enquiry would not be confined to the judgment roll.

11. **Construction of Statutes Granting Service by Publication.**—Statutes permitting constructive service by publication in a personal action, in lieu of personal service, are to be strictly pursued.

12. **Suits in Rem** classified, and their nature discussed. Such suits are supported upon the theory that, as all property is supposed to be in possession of its owner, a seizure of property is notice to him.

13. **Same—Jurisdiction—Seizure of Property—Publication.**—But in actions against non-resident defendants, unless property is taken into custody at the outset of the proceeding, or unless publication of summons is made as provided by the statute, the court acquires no jurisdiction; and a purchaser under an execution issued in pursuance of such a judgment gets no title.

14. **Guardian ad Litem—California Statute.**—Under the California statute a court cannot appoint a guardian *ad litem* for an infant, unless the infant has been previously served with process.

Mr. Justice FIELD:—The material questions presented for consideration in this case have already been determined by the recent decision of the Supreme Court of the United States. It is unnecessary, therefore, to repeat at large the facts of the case; they are given in the report of the decision in 18 Wallace. It will be sufficient to state here its general features. The action is ejectment for the possession of certain real property situated within the City of San Francisco, both parties deraigning title from the same source, Franklin C. Gray, deceased, who died in the City of New York in July, 1853, intestate, seized of the premises in controversy. The plaintiff claims through conveyances executed by direction of the probate court of the city and county of San Francisco, which administered upon the estate of the deceased. The defendant claims under a purchaser at a commissioner's sale, had under a decree of a district court of the state, having jurisdiction in that city and county, rendered in a suit brought to settle the affairs of alleged co-partnerships between the deceased and others. The case turns upon the validity of this decree and the commissioner's sale had under it.

The suit in which that decree was rendered was one into which two suits, brought by different parties, had been consolidated. One of them was brought in 1854, by William H. Gray, a brother of the deceased; the other was brought in 1855 by Cornelius J. Eaton, who had been at one time a clerk of the deceased. Each of these complainants alleged a separate, distinct and dormant co-partnership between himself and the deceased, which embraced the commercial business in which the latter was engaged and all his real estate transactions. Gray alleged that his interest in the business and property of the co-partnership formed between him and the deceased was one-third. Eaton claimed that his interest in the business and property of the co-partnership formed with him was one-fourth. Each of these complainants, alleging an universal and dormant co-partnership between himself and the deceased, denied, one of them under oath, any co-partnership of the deceased with the other. Subsequently, however, they consented to a consolidation of their suits; and four days afterwards a decree was entered, and it would seem from the certificate of the judge appended to the decree that it was by consent of the parties, adjudging that each had been a co-partner with the deceased as alleged by him, and that both of these co-partnerships, dormant and unknown to each other as they were, embraced all the property and all the business of the deceased.

By the decree a reference was ordered to a commissioner to take an account of the business, profits and property of the two co-partnerships, with directions, upon the confirmation of his report, to sell all the property, real and personal, of both co-partnerships, and to execute proper conveyances to the purchasers. At the sale which subsequently took place, one of the attorneys of the complainant, Gray, became a purchaser of the premises in controversy. He afterwards conveyed an undivided half to his law partner, and devised the other undivided half to the defendant. His law partner some years later transferred his interest also to the defendant.

The deceased, Franklin C. Gray, left surviving him a widow,

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Matilda C. Gray, of whom a posthumous child was born in December following, named Franklina C. Gray. By the law of California the estate of the deceased vested in the widow and child in equal shares; and they both were made parties to the suits of Gray and Eaton; in the first suit the child being made a party by a supplemental bill. Both were non-residents of the state of California and residents of the state of New York; and their absence from this state and residence in New York were averred in the pleadings. Constructive service upon them, by publication under the statute, was therefore attempted. The widow appeared; and upon representation that service had been made upon the infant, a guardian *ad litem*, was appointed for her, and he consented to the consolidation of the two suits, and, it would seem, to the decree rendered.

Subsequently, upon appeal to the supreme court of the state, the decree of the district court in the consolidated suit was reversed, on the ground that no sufficient service of summons had been made upon the infant Franklina in the case brought by Eaton; and that, until such service, no guardian *ad litem* could be appointed for her; and on the additional ground that the evidence presented had not established a co-partnership between William H. Gray and the deceased. The case was accordingly remanded to the district court; and subsequently the two suits, after being on the calendar for trial for nearly a year, were dismissed. The plaintiff acquired his interest and brought the present action after this dismissal.

When the case was originally here, the circuit court decided that the record in the suits of Gray and Eaton, in the district court, did not show that due service of summons by publication had not been made upon the infant Franklina, and as the district court was a superior court of general jurisdiction, it must be presumed to have had jurisdiction of the subject-matter and of the parties in those suits; and that, in consequence, the sale and conveyance under the decree, notwithstanding its subsequent reversal on the grounds stated, passed a good title to the purchaser;—the court holding that where a record of a judgment of a superior court of general jurisdiction was assailed collaterally, it was not enough that the record did not affirmatively show jurisdiction, but that it must affirmatively show that the court did not have jurisdiction, or its judgment would be valid until reversed on appeal or vacated in some direct proceeding taken for that purpose. And so the court said that "at the time of the sale, a parchaser was entitled to rely upon the validity of the decree (in the consolidated suit), unless it affirmatively appeared on the face of the record that the court had no jurisdiction of the infant."

But the Supreme Court of the United States took a different view of the case, and held that the adjudication of the supreme court of the state, that no sufficient service of summons was ever made upon the infant Franklina, and that until such service no guardian *ad litem* could be appointed for her, was an adjudication that the jurisdiction of the district court over her had never attached, and that this adjudication was conclusive and binding upon the circuit court, and every other court, when brought before it for consideration. Into its soundness the circuit court could not look; for it possessed no revisory power over the decisions of the supreme court of the state. The adjudication constituted the law of that case, and settled, for all possible controversies, the character of the decree of the district court. Rendered without jurisdiction, that decree was always void, so far as it affected the rights of the infant Franklina, and unavailing to support any proceedings under it affecting her title.

But the Supreme Court of the United States in its decision went still further, and held that the rule stated by the circuit court, as to the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, was subject to many exceptions and qualifications and had no application to the case at bar; that such presumptions were limited to jurisdiction over persons within the territorial limits of the courts, persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common law. In these latter particulars, the decision was in affirmation of doctrines asserted by the circuit court in an elaborate and carefully considered opinion, delivered in 1865, in the case of Gray v. Larrimore, which grew out of the sale under the same decree of the district court which is now before us. The doctrines there asserted were followed in the subsequent case of Gray v. Murphy, and, until the decision of this case by the present circuit judge, were not regarded as open to contestation in the circuit court. In this case they were overruled by him upon the supposed obligation of the court to follow a decision of the supreme court of the state in Hahn v. Kelly, rendered in 1868, 34 Cal. 391. And to that case, frequent reference has been made by counsel on the present trial, and some of its positions have been pressed with great earnestness, as though they were decisive of the points now under consideration. That case was cited to the Supreme Court of the United States. Extracts from the opinion in the case constituted the principal argument before that court of one of the counsel of the defendants; and if its positions were not expressly mentioned in the opinion of that court, it was not because they had not been carefully considered.

That case was brought to quiet the title to a tract of land in Alameda county, and to restrain its sale. The plaintiff asserted title to the premises by virtue of a sale under a judgment recovered for the deficiency remaining of a mortgage debt, after application of the proceeds received upon a sale of the property mortgaged. The suit in which the mortgage was foreclosed and judgment for the deficiency rendered, was prosecuted without personal service upon the defendant, upon publication of summons; and the validity of the judgment was assailed upon the alleged ground that the attempted service of the summons by publication was defective and void. The decree, however, recited that it appeared to the court that the summons and complaint had been "duly served on the defendants according to law and the order of the judge of the court," and the supreme court of the state held that this recital was a direct adjudication upon the point, and was as conclusive upon the parties as any other fact decided, provided it did not affirmatively appear, from other portions of the record, that the recital was untrue. As there was no direct contradiction of the recital, and as no other objection than the one mentioned was taken, this ruling as to the effect of the recital disposed of the case and necessitated a reversal of the decree below. The court, however, in its opinion, did not confine its consideration to this point, but proceeded to lay down certain general rules as to the presumptions of jurisdiction attendant upon the judgments of superior courts of general jurisdiction, and to declare what constitutes the record in this state of such judgments, and the conditions upon which they may be collaterally assailed. Among other things, it is asserted in substance, and so far as anything in an opinion can be deemed an adjudication, which is not necessary to the decision, it adjudged:

1st. That a judgment of a court of general jurisdiction, could not be attacked collaterally, except for matters apparent upon its record; that it was not necessary that the jurisdiction of the court should affirmatively appear upon the record, but that, in the absence from the record of matters affirmatively disclosing a want of jurisdiction, either over the subject-matter of the action or the person of the defendant, such jurisdiction would be conclusively presumed; and that this conclusive presumption prevailed in all cases without reference to the character of the proceedings, or the residence of the parties against whom they were taken;

2d. That in this state such record of the court consists only of the papers and proceedings which compose what is designated in the Code of Procedure as the judgment roll; and, where jurisdiction is exercised over persons without the territorial limits of the court, by constructive service upon them by publication of summons, and judgment by default is rendered upon such survice, the record need not contain certain material proceedings, without which jurisdiction cannot attach, or any recital or evidence of such proceedings, because the legislature has not directed such proceedings to be incorporated into the so-called judgment roll.

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We do not regard the case at bar as one where any collateral attack is made upon a judgment of a superior court of general jurisdiction. The decree in the consolidated suit of Gray & Eaton is not here attacked collaterally in any proper meaning of that term. The adjudication of the appellate court in the same case, upon the character of that decree, is not offered by way of collateral attack; it is the exhibition of the result of a direct proceeding with reference to that decree had on appeal. When we speak of a collateral attack, we refer to the presentation of grounds of invalidity other than those which have been established by the prosecution of a writ of error, or an appeal, or some other direct proceeding, to vacate the judgment. We will nevertheless examine the position advanced by the supreme court of the state in the case named.

Before proceeding, however, to this examination, it is proper to say a few words respecting the light in which the ruling of the state court in that case is to be regarded in this court, and the right of this court to look into the jurisdiction of a state court when its judgment is produced in evidence.

In the first place, the ruling of the state court in Hahn v. Kelly, except so far as it gives a construction to the statute of the state, is not binding upon this court. In all that relates to the presumptions which attend the acts of the superior courts, and the circumstances under which they may be assailed, it stands like the ruling of any other court, entitled to the respect and consideration for the learning and ability of its members, but possessing no obligatory force. "Where private rights," says the Supreme Court of the United States in Chicago City v. Robbins (2 Black, 429), "are to be determined by the application of common law rules alone, this court (and the same is true of the circuit court), though entertaining for state tribunals the highest respect, does not feel bound by their decision." "It is undoubtedly true in general," says the same court in another case (Alcott v. Supervisors, 16 Wal. 687), "that this court does follow the decisions of the highest courts of the states, respecting local questions peculiar to themselves; or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments." The ruling of the state court in Hahn v. Kelly, except so far as it gives a construction to the state statute, relates to matters of general law, and not to questions of a local character peculiar only to the state. If the ruling of the court be correct, it applies not merely to judgments of the superior courts of general jurisdiction existing in California, but to the judgments of such courts existing in all other states.

In the second place, whilst the courts of the United States are not foreign courts in their relation to the state courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them. And it is well settled, that neither the constitutional requirement providing that "full faith and credit shall be given to the public acts, records and judicial proceedings of every other state," nor the act of Congress providing for the mode of authenticating such acts, records and proceedings (May 26, 1790), and declaring that when thus authenticated they shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from which the records are or shall be taken," precludes an enquiry into the jurisdiction of the court in which the judgment was given, or the right of the state to exercise authority over the parties, or the subject-matter of the judgment. As was said in Christmas v. Russell (5 Wall., 305), the judgments of the courts of one state are not foreign judgments in another state, under the constitution and act of Congress, nor are they domestic judgments in every sense; because they are not the proper foundation of final process, except in the state where they were rendered; and they are open to enquiry as to the jurisdiction of the court and notice to the defendant.

The act of Congress goes, perhaps, further than the constitutional requirement which relates to the faith and credit to be given *in* each state to the public acts, records and judicial proceedings of every other state, inasmuch as it declares the effect of the records and judicial proceedings of the states, when authenticated, as provided "*in every court within the United States*," thus making its provision applicable to the federal courts, as well as to the courts of the states. The power of Congress to prescribe the manner in which the records of the states shall be proved in the national courts, and the effect which shall be given to them, is independent of the constitutional provision. Still the law is to have the same construction in its application to the national courts as to the state courts. It leaves untouched the general principle that the jurisdiction of every court is open to enquiry, when produced in the courts of another sovereignty.

The Circuit Court of the United States for the District of California, has the same authority to examine into the jurisdiction as a state court of California when tis judgment is produced, as the Circuit Court of the Unted States for the District of New York has, when the same judgment is produced before that tribunal. All the circuit courts of the United States have the same relation to the state courts; and each will take notice of, and administer in proper case the laws of the states. This court, for example, will take notice of, and, in a proper case, administer the law of New York, just as it will take notice of and administer the law of this state. In all cases the jurisdiction of a state court may be enquired into; but the enquiry can proceed no further; the jurisdiction existing, the merits of the controversy involved are not open to examination.

We recur now to the rulings in Hahn v. Kelly. The first position, that when a judgment of a court of general jurisdiction is produced in evidence it can only be collaterally attacked for matters apparent upon its record, and that, in the absence of such matters, the jurisdiction of the court must be conclusively presumed, is with certain qualifications and exceptions undoubtedly correct. These qualifications and exceptions arise where the proceedings, or the parties against whom they are taken, are without the ordinary jurisdiction of the court, and can only be brought within it by pursuing special statutory provisions. As we had occasion to observe in a previous case, "all courts, even such as are designated courts of superior or general authority, are more or less limited in their jurisdiction; they are limited to a particular kind of cases such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as may arise upon the high seas, or to the use of particular process in the enforcement of their judgments." Norton v. Meader. When we speak of a court of general jurisdiction in civil cases, we do not mean one which has jurisdiction over all subjects, and all persons, and of all process; but we mean one which exercises a general jurisdiction, in law or equity, according to the well established principles known to those departments of jurisprudence, over subjects and persons within certain defined territorial limits. When a judgment of such a court is produced, relating to a matter falling within the general scope of its powers, the jurisdiction of the court will be presumed, even in the absence of the formal proceedings or steps by which the jurisdiction was obtained; and such jurisdiction cannot ordinarily be assailed except on writ of error or appeal, or by some other direct proceeding. But when the judgment of such a court relates to a matter not falling within the general scope of its powers, and the authority of the court over the subject can only be exercised in a prescribed manner, not according to the course of the common law; or the judgment is against a party without the territorial limits of the court, who was not served within those limits and did not appear to the action, no such presumption of jurisdiction can arise. The judgment, being as to its subject-matter or persons out of its ordinary jurisdiction, authority

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for its rendition must appear upon the face of its record. In other words, there is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority, by which the extraordinary jurisdiction is exercised. This doctrine is an obvious deduction from principle, and is sustained by adjudged cases almost without number in the highest courts of the several states, and in the Supreme Court of the United States. There is running all through the reports the emphatic declaration of the common law courts, that a special authority, conferred even upon a court of general jurisdiction, which is exercised in a mode different from the course of the common law, must be strictly pursued, and the record must disclose the jurisdiction of the court. On this subject the cases speak a uniform language, with scarcely dissentient voice.

The tribunals of one state have no jurisdiction, and can have none, over persons or property without its territorial limits. Their authority is necessarily circumscribed by the limits of the sovereignty creating them. Any exertion of authority beyond these limits would be deemed, as stated in D'Arcy v. Ketchum (11 How. 174), in every other forum an illegitimate assumption of power, and be resisted as mere abuse.

But over property and persons within those limits the authority of the state is supreme, except as restrained by the federal constitution. When, therefore, property thus situated is held by parties resident without the state, or absent from it, and thus beyond the reach of the process of its courts, the admitted jurisdiction of the state over the property would be defeated, if a substituted service upon the parties were not permitted. Accordingly, under special circumstances, upon the presentation of particular proofs, substituted service, in lieu of personal service, is allowed by statute in nearly all the states, so as to subject the property of a non-resident or absent party to such disposition by their tribunals as may be necessary to protect the rights of their own citizens. In this state, the statute, in terms, allows a constructive or substituted service in all cases, whether upon contract or for torts, where the person on whom the service is to be made is a non-resident of the state or is absent from it, whether the action be directed against property within the state, or merely for the recovery of a personal judgment against the defendant. But so far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident, except as a means of reaching property situated at the time within the state, or affecting some interest therein, or determining the status of the plaintiff with respect to such non-resident, it cannot be sustained as a legitimate exercise of legislative power. A pure personal judgment, not used as a means of reaching property at the time in the state, or affecting some interest therein, or determining the status of the plaintiff, rendered against a non-resident of the state, not having been personally served within its limits and not appearing to the action, would not be a judicial determination of the rights of the parties, but an arbitrary declaration by the tribunals of the state as to the liability of a party over whose person and property they had no control. The validity of the statute can only be sustained by restricting its application to cases where, in connection with the process against the person, property in the state is brought under the control of the court and subjected to its judgment, or where the judgment is sought simply as a means of reaching such property or affecting some interest therein, or to cases where the action relates to the personal status of the plaintiff in the state

Aliens at peace with the United States are allowed access to the courts of the states, and unless the statute be limited in its application as stated, we must accept the conclusion that personal judgments for torts by one alien against another, neither of whom has ever been within our borders, may be recovered without personal service, by publication, and subsequently enforced against any property belonging to the defendant, that may by chance be brought into the country. It would certainly be a strange application of the statute if an inhabitant of Asia could recover in that way in our courts a personal judgment for an alleged tort committed against him in his own country by one of his countrymen.

An attachment of the property of a non-resident is allowed by the law of this state in all actions upon contracts, express or implied. This remedy, with the ordinary power of a court of equity to enforce mortgages and other liens, and to take property into its custody where there is danger of its removal beyond the state or of being wasted, and the information imparted to third parties by filing a notice of *lis pendens* where an interest in real property is the subject of the litigation, affords sufficient protection to citizens of the state, without the assumption of any territoral jurisdiction over non-residents. Be this as it may, any such assumption can find no support in any principle of natural justice or constitutional law.

"Where a party is within a territory," says Mr. Justice STORY in Picquet v. Swan (5 Mason, 43), "he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may by attachment go to compel his appearance, and for his default to appear, judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*. * * * The principles of the common law (which are never to be lost sight of in the construction of our own statutes,) proceed yet further. In general, it may be said, that they authorize no judgment against a party, until after his appearance in court. He may be taken on a capias and brought into court, or distrained by attachment and other process against his property to compel his appearance; and for non-appearance be outlawed. But still, even though a subject, and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in court."

"Jurisdiction is acquired," says the supreme court in Boswell's Lessee v. Otis (9 Howard, 348), "in one of two modes; first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by attachment or a bill in chancery. It must be substantially a proceeding *in rem*."

A substituted service is usually made in the form of a notice published in the public journals, as in this state. "But such notice," says Cooley (p. 404), in his treatise on Constitutional Limitations, "is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control of the state; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another state or county, and there have recovery against him upon the judgment as an established demand. The fact that process was

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not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. Where a party has property in a state, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

In Cooper v. Reynolds (10 Wall. 308), similar doctrines are laid down by the Supreme Court of the United States. In that case, the plaintiff had sued the defendants in Tennessee for false imprisonment, and upon affidavit that none of them were to be found in his county, sued out a writ of attachment against their property. Publication was ordered by the court, notifying them to appear and plead, answer or demur, or that the suit would be taken as confessed, and proceed in *ex parte* as to them. Publication was had, and the defendants having made default, judgment was entered against them, and the attached property was sold under it. The purchaser having been put into possession, the original owner brought ejectment for the premises. In considering the character of the attachment suit, the court, speaking through Mr. Justice MILLER, said: "Its essential purpose or nature is to establish, by the judgment of the court, a demand against the defendant, and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

"But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

"If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

"That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

The writer of the present opinion thought some of the objections taken to the preliminary proceedings in the attachment suit referred to, were well founded, and dissented from the judgment of the court; but, in the doctrine laid down in the above citation he always has concurred. It is, in our judgment, the true doctrine and the only doctrine which is consistent with any just protection to the citizens of other states. Such is the constant intercourse between citizens of different states, at the present time, that the greatest security to property would exist if purely personal judgments, obtained *ex parte* without personal citation, upon mere publication of notice, which, in the great majority of cases, would never be seen by the parties interested, could be made available for the seizure of property afterwards brought within the state. That law would be intolerable, if valid, which would permit citizens of another state to come into this state and recover personal judgments for all sorts of torts and contracts, upon mere service by publication against citizens of different states who have never been within the state or possessed any property therein. If such judgments could be upheld they would become the frequent instruments of fraud in the hands of the unscrupulous, and be sprung on the property of the unsuspecting defendants when the transactions giving rise to the judgments have passed from their memory, or the evidence respecting the transactions has perished. We do not think it within the competency of the legislature to invest its tribunals with authority having any such reach and force; certainly no presumption in favor of their jurisdiction can arise when a judgment of this character is produced against a non-resident who has never been within the state, and did not appear to the action. Hare & Wallace's Notes to Smith's Leading Cases, vol. 1, p. 838; Picquet v. Swan, 5 Mason, 535; Monroe v. Douglass, 4 Sand. Ch. 182.*

The second position laid down in Hahn v. Kelly, requires us to consider what papers and proceedings constitute the record of a court of general jurisdiction, which may be looked into when a judgment of that court rendered against a person without the territorial limits of the court, upon constructive service by publication, is assailed collaterally for want of jurisdiction. In that case it is held that such record consists only of the papers and proceedings which compose what is designated in the Code of Proceedure as the judgment-roll; and that it need not contain the affidavit of the party and the order of the court, without which constructive service of the summons by publication cannot be made.

The statute, authorizing constructive service by publication of summons upon non-resident and absent parties, requires certain facts to be presented by affidavit to the court in which the action is pending, or to a judge thereof, or to a county judge. If it appear upon such presentation, to the satisfaction of the court or judge, that the facts exist, an order may be made for the publication of the summons, and such order must prescribe the period and designate the paper in which the publication is to be made; and if the residence of the defendant be known, the order must also direct a

*In Oakley v. Aspinwall (4th Comstock, 520), Mr. Chief Justice BRONSON, in delivering the opinion of the Court of Appeals of New York, said: "When the courts of any state render a judgment against one who was not a citizen of that state and was not brought into court, the judgment is held absolutely void everywhere else, although it may have been expressly authorized by the legislature of the state where it was rendered. I doubt whether such a judgment is of any force in the state where it was rendered. Under our form of government it is questionable, to say the least, whether the legislature can, in any case, without an express license from the people, authorize a judgment which shall operate *in personam* against the defendant who neither appeared nor was in any way served with process. That state must not boast of its civilization, nor of its progress in the principles of civil liberty, where the legislature has power to provide that a man may be condemned unheard."

In Webster v. Reid (11 How. 459), it appeared that the legislature of the Territory of Iowa had directed that suit might be instituted against the owners of half-breed lands lying in Lee county in that territory, and notice be given to the owners through the Iowa Territorial Gazette. Suits having been instituted by notice in that way, and judgments recovered, the Supreme Court of the United States declared that they were nullities. "These suits," said Mr. Justice MCLEAN in delivering the opinion of the Court, "were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not, does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold."

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copy of the summons and complaint to be forthwith deposited in the post-office directed to him at his place of residence. The service of summons is deemed complete at the expiration of the time prescribed by the order for publication.

The statute, in the same title which treats of the manner of commencing civil actions, after stating the manner in which service shall be made in case of personal service, and in case of service by publication, provides in sections almost immediately following that, "proof of the service of summons shall be as follows: 1. If served by the sheriff, his certificate thereof. 2. If served by any other person, his affidavit thereof. 3. In case of publication, the affidavit of the printer or his foreman or principal clerk, showing the same; and on an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited."

In another part of the same statute, in a different title and chapter, treating of a different subject, "the manner of giving and entering judgment," it is provided that immediately after entering the judgment, in case the complaint be not answered, the clerk shall attach together the summons with the affidavit or proof of service, and the complaint with a memorandum endorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment; and that these papers shall constitute the judgment-roll in the case.

Now, it is evident that the language of the statute in the first title mentioned, declaring what shall be proof of service of the summons, must be limited to the action of the persons making the service or publication, of which the sections immediately preceeding in the same title speak; as if the language were as follows: "Proof of the service of summons by the sheriff or other person, or by a publisher of a newspaper, as above provided, shall be as follows." The obvious meaning intended is, that the proof of service, which the parties performing the particular duty prescribed must furnish, shall be the certificate or affidavit designated. It does not mean that such certificate or affidavit shall be all that is required on the subject of service, but only all that is required of those particular persons. Any other construction would lead to this absurd result, that an affidavit could be used to establish conclusively a fact to which it makes no reference. Publication of a summons in a newspaper is not service of the summons, nor is an affidavit of such publication proof of service. The publication to be of any avail, must be in a paper designated and for the period prescribed by the order of the court or judge. The terms of such order must therefore be connected with the affidavit, or the proof will amount to nothing. The affidavit by itself is only a portion of the proof, a solitary link in the chain required. The printer is not supposed to know anything of the order, and is not called upon even to refer to it in his affidavit.

When, therefore, the record of the judgment comes to be made up, it must necessarily include the order of the court, or it will disclose no proof of service. And when the statute requires the clerk to attach, with other papers, the proof of service, it means not merely the affidavit which the publisher may furnish as part of such proof, but the order also, without which the affidavit establishes nothing. It is in giving to the provision, declaring the proof which the officer or person making personal service, or the printer publishing the summons, shall furnish of their acts, the effect of a declaration that no other proof of the service was necessary, that error, in our judgment, was committed in Hahn v. Kelly.

That the ruling in that case left the judgment-roll a defective and imperfect record, seems to have been felt by the court, for it says: "In our judgment, it would have added to the completeness of the record to have made the proof of service by publication include also the affidavit of the party, and the order of the court directing publication to be made, for, in point of law, they constitute a part of the mode; but the legislature has not seen proper to do so, and we can no more add to their will than we can take from it."

For the reasons we have stated, we do not admit that the statute sanctions any such defective record; but, on the contrary, we are clear that, properly construed, it requires full proof of the jurisdictional facts to be incorporated into the judgment-roll.

If, however, we are mistaken, and the order, which is the foundation of and the only authority for the publication, is no part of such roll, or, if not mistaken, we are bound to accept as correct, the construction of the statute given by the state court, then enquiry into the jurisdiction of the court cannot be limited, on a collateral attack, to the contents of the roll. The remaining record of the proceedings would be of equal authority and verity, and could be equally relied upon. The record at common law, which imported absolute verity, was a history of all the acts and proceedings in the action, from its initiation to final judgment, enrolled upon parchment for a perpetual memorial and testimony. These rolls were called records of the court, and were, in the language of Blackstone, "of such high and supereminent authority that their truth was not to be called in question." A record, professedly embracing only a portion of such acts and proceedings, cannot be entitled to similar implicit credit, and cannot equally close the door against collateral attack. The use of the same designation to indicate a different collection of acts and proceedings, cannot, of course, carry with it the same import. If the legislature should declare that only that portion of the proceedings in an action which constitutes the judgment itself, should be enrolled, it would not be any less illogical to insist that to that enrollment parties should be confined when questioning the jurisdiction of the court, than it is that they shall be confined to any other defective record of the proceedings in the action.

When constructive service by publication in a personal action is authorized by statute in place of personal citation, the rule prevailing in all courts is, that the statute must be strictly pursued. We are not aware that this doctrine has been denied in any state court. It has been repeatedly asserted by the supreme court of this state in the most emphatic manner. "A contrary course," said that court in Jordan v. Giblin, in 1859, "would encourage fraud and lead to oppression." 12 Cal. 100. "A failure to carry out the rule thus prescribed," said the court, speaking through Mr. Justice SANDERSON, in Ricketson v. Richardson (26 Cal. 149), "in any particular, is fatal where it is not cured by an appearance." In Forbes v. Hyde (31 Cal.), 342, decided in 1866, the same doctrine is recognized. There the objection to the insufficiency of an affidavit made to obtain an order of publication, was allowed on a collateral attack to the judgment under which the plaintiff claimed title in ejectment. As the statute only requires certain facts to appear by affidavit *to the satisfaction of the court or judge*, we should be inclined, in the absence of this decision, to hold that defects in the affidavit could be taken advantage of only on appeal, and could not be urged collaterally. We cite the case, however, not only because it reiterates the rule of strict construction, but because of the special reason it gives for its enforcement in this state, in the observation that there is probably "no state in which so many have waited, and are still waiting, for their adversaries to depart in order that suit may be brought and judgment obtained against them on publication without actual notice." "It may be important," continues Mr. Justice SAWYER, in delivering the unanmous opinion of the court, "to the interests of those who suppose they have acquired rights under this class of judgments, that they should be upheld. But it is equally important that the interests of parties, who have only been constructively served with process, and who, in many instances, have had no actual notice till they have been condemned unheard, should be protected. If a judgment is void for want of jurisdiction, all those who have acquired interests under it, have done so in full view of the condition of the record; while, on the other hand, a defendant is liable to have an unjust judgment rendered against him without any knowledge of the pendency of the action till it is too late to protect himself. An appeal is no adequate remedy where a party has no notice; for the

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time to appeal is very brief, and may expire before actual notice is obtained. In the language of the court in Smith v. Rice (11 Mass. 512), "the very grievance complained of is, that the party had no notice of the pending of the cause, and of course no opportunity to appeal."

Now, if the rule in Hahn v. Kelly be correct, we have this singular result: that whilst the statute must be strictly followed before jurisdiction can be acquired over the person, a party against whom a judgment is rendered is precluded from examining the proceedings by which alone it can be seen whether the statute has been followed. In other words, the court says, no jurisdiction is acquired by the court if the requirements of the statute be not pursued, but the record of the proceedings taken shall always be a closed book.

If the order of the court is no part of the judgment-roll it cannot be brought before the court on appeal, unless a statement or bill of exceptions be made up; and either of these proceedings supposes the presence of the parties or counsel. If any other direct proceedings are taken they might result in vacating the judgment, but under the ruling in the case cited, the record being regular on its face, the purchaser, if a third party, would be protected, and the wronged defendant be left to the doubtful chances of recovering the value of his property by action against the plaintiff.

From the examination we have thus been able to give to the case of Hahn v. Kelly, we do not find in it sufficient reasons to depart from the old and well established rules formerly recognized in the supreme court of this state, the observance of which, as we are more and more impressed every day, is essential to the protection of the rights of all citizens, whether resident or non-resident of the state.

The proceedings for constructive service by publication, which the statute authorizes, are, as stated by Mr. Justice SANDERSON in the case of Ricketson v. Richardson, "in derogation of the common law;" that is, they are not in accordance with the course of the common law.

It was the boast of that law that it condemned no one in his person or his property without his day in court. That there must be citation before hearing, and hearing, or opportunity of being heard, before judgment, was a cardinal principle which pervaded all its judicial proceedings. And when the articles of compact contained in the ordinance of 1787, for the government of the North West Territory, declared that its inhabitants should always be entitled "to judicial proceedings according to the course of the common law," it was believed by them that they had in that guarantee the assurance of full protection to all their private rights; and that the language was not used "mainly for ornamental purposes," having a certain "rotundity of sound which is pleasing to the ear," but leaving "no definite impression upon the understanding."* Hahn v. Kelly, 34 Cal. 411. The common law recognized no such proceeding as a personal judgment without the appearance of the party, and probably in no other case than Hahn v. Kelly were proceedings to outlawry ever cited as a mode "amounting or equivalent to constructive service," by which a common law court obtained jurisdiction. "By the strict rules of the common law," says the Supreme Court of New Jersey in Hess v. Cole (3 Zab. 116), "it was necessary in every suit, not only that the defendant should be served with process, but that his appearance to the action should be effected. Every student is familiar with the cumbrous machinery and complicated process by which the courts sought to compel the *appearance* of the defendant. He is familiar also with the principle, that if the defendant was contumacious and refused to appear to a mere civil action, the proceedings were at an end. No judgment could be rendered. Every common law record shows upon its face that the defendant was either in custody, or was summoned or attached to answer to the action. And, however inconvenient may have been the strictness with which the principle was applied, and the extent to which it was enforced in ancient common law proceedings, the principle itself is by no means peculiar to the common law. It pervades, in fact, every code of law and every well-regulated system for the administration of justice."

The opinion in Hahn v. Kelly is not only singular in its reference to proceedings to outlawry for want of appearance of a party; but the citations from Blackstone, to show that the courts of chancery would proceed to judgment upon a constructive service of process at all analagous to service by publication, establish nothing of the kind; and only seem to do so because they are detached from their context in the volume. They relate to proceedings to compel the appearance of parties *after service of the subpœna*, which is the original process in chancery, as any one will see, who will read the whole page in Blackstone from which the citations are taken.

Service of the subpœna could indeed be made by leaving a copy at the actual residence of the defendant, as well as by delivering a copy to him personally. And in special cases where an absent or absconding defendant had appointed a person to act as his agent in the matter litigated, substituted service upon such agent in lieu of the principal, was, upon application to the court, sometimes allowed. Adams' Equity, 324; Hobhouse v. Courtney, 12 Simons, 130. But it was not until the statute of 5th George II., c. 25, that proceedings could be taken by publication, without service in one of the modes indicated. That statute authorized proceedings by proclamation published in the London Gazette, and read in the parish church and posted in the Royal Exchange, where a defendant had absconded to avoid service. It did not apply to a citizen or subject of another government who had never been in the realm.

Passing from Hahn v. Kelly, we proceed to consider the other positions taken by the defendant to defeat a recovery. It is contended by her counsel: 1st. That the cases of Gray and Eaton were suits *in rem*, and that the decree in the consolidated suit bound the property without reference to the defective service of summons upon the infant. 2d. That the district court had authority to appoint a guardian *ad litem* for the infant without previous service upon her; and 3d. That the decree in the consolidated suit was not reversed as to the widow Matilda.

1st. Suits *in rem* may be divided into four classes: 1st, those which are directed primarily against particular property, and are intended to dispose of it without reference to the title of individual claimants; 2d, those which are instituted to determine the status of particular property or persons; 3d, those which are, in form, personal suits, but which seek to subject property brought by existing lien or by attachment, or some collateral proceeding, under the control of the court, so as to give effect to the rights of the parties; and 4th, those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered. Proceedings in admiralty for the forfeiture of a vessel or goods are instances of the first kind; the suit is there brought against the vessel or goods directly, without reference to the rights of persons, and all parties are notified to appear by a designated day and assert their claims, or the property will be condemned. Proceedings in the probate court, upon the validity of a will, are instances of the second kind; the judgment, when rendered, operating directly upon the status

*In speaking of these terms—"proceeding according to the course of the common law"— the court in Hahn v. Kelly uses this language: "Some words are used to express ideas, and others to ornament them. The more we turn this expression over and examine it by the light of reason, for the purpose of determining to what use it has been put, the more we are inclined to the opinion that it has been used merely from force of habit, or mainly for ornamental purposes. It has a certain rotundity of sound which is quite pleasing to the ear, but leaves no definite impression upon the understanding. It is simply equivalent to a knowing look or a solemn shake of the head, and doubtless it was first used in that sense. When first employed, its use was harmless, for there was then no mode of procedure except such as the common law prescribed, but its continued use where the modes of the common law have been superseded is mischievous."

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or condition of the instrument determining its validity or invalidity. Proceedings by attachment against the property of debtors, or to foreclose a mortgage, or other lien upon property, or to partition real estate, are instances of the third kind. Proceedings to compel the execution or cancellation of a conveyance of real property in the state, and proceedings to wind up and dispose of partnership property, are instances of the fourth kind. The third and fourth classes mentioned are not strictly proceedings *in rem*; but so far as they affect property in the state, they are treated as substantially such proceedings.

In proceedings *in rem*, notice of some kind is required, but as all property is supposed to be in the possession of its owner either in person or by agent, a seizure of property is, of itself, considered to impart notice of the proceeding to the owner. Therefore, where the property is, at the outset, taken into the custody of the court, the law is less strict in requiring further notice, either generally, by proclamation to all persons, or specially to the reputed owner. But where the property to be affected is not thus at the outset taken into custody, there is no constructive notice given by the proceeding; and the same notice, as provided by law, must be given to the defendant, as in actions where a personal judgment for damages is alone sought. "A proceeding," says the Supreme Court of Vermont, in Woodruff v. Taylor (20 Vermont, 65), where the law on subject of suits *in rem* is stated with great clearness, "professing to determine the right of property where no notice, actual or constructive is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It will be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court."

The suits of Gray and Eaton were partly *in personam*, and were, at the same time, intended to subject property in the state to the disposition of the court; but as the property was not taken into custody at the outset, there was no constructive notice given to the owners or claimants by the proceeding, and the absent and non-resident defendants could only be brought before the court by publication of summons, as provided by statute, and this, as the supreme court held, was never done, so far as the infant Franklina was concerned.

2d. As to the authority of the district court to appoint a guardian, *ad litem*, for the infant, without previous service upon her, it is sufficient to observe that the supreme court of the state on appeal decided that no such authority existed. The statute requires service of summons on all infants, before a guardian *ad litem* can be appointed, and makes no difference in this respect between an infant of a few months and one nearly attaining his majority, and the service can no more be dispensed with in the one case than in the other. Besides, there is wisdom in the provision requiring service even upon an infant in its cradle, for the papers, through its nurse or relatives, would almost be sure in such case to find their way into hands of parties who would look after the interests of the child. Be this as it may, it is the proceeding required by the legislature before the jurisdiction of the court can attach; and as Chief Justice TANEY said of a mere formal objection which was insisted upon in the supreme court, nothing is unimportant or to be disregarded which the legislature has prescribed as a condition for exercising the jurisdiction of the court. Where personal service cannot be made by reason of the non-residence in the state or absence of the infant, service must be made by publication as in other cases. Such publication is the prescribed condition to the exercise of jurisdiction over the infant.

3d. The objection that the decree of the district court in the consolidated action was not reversed as to the widow Matilda, is not founded upon fact. There was but one decree, though the court speaks, in its opinion, as though there were two separate decrees before it. This is an evident inadvertance in the language of the court, arising from the fact that the objections to the validity of the decree were taken to the seperate proceedings had before their consolidation. The case was remanded for further proceedings, and on filing the remittitur, the question evidently arose as to what proceedings should be had, and after hearing counsel for the parties, the court ordered a new trial on all the issues as to all the parties. Upon this order the case remained on the calendar of the district court for trial for over a year, and was then dismissed. The order of dismissal was entered in the consolidated suit, and it would appear for greater caution in the seperate suits also.

The decree as to the infant Franklina being void for want of jurisdiction in the district court over her, all proceedings founded upon such decree, so far as her rights are concerned, necessarily partake of the same infirmity. The purchaser of the premises being one of the attorneys of the plaintiff Gray, the law, as held by the supreme court, imputes to him knowledge of the defects in the proceedings which were taken under his direction and that of his partners. The conveyance of the undivided half to his law partner was made after the reversal of the decree, and the latter also took his interest with similar knowledge of the defect. Independently of this fact their title fell with the reversal of the decree. On this subject we can add nothing to what was said in the opinion of the supreme court, except that the doctrine of Reynolds v. Harris was reaffirmed in the late case of Reynolds v. Hosmer reported in 45 California, 617.

As to the claim for rents, we are of opinion that the cost of filling up the water lot, which was a valuable and permanent improvement, is a just offset to the rents received, or which might have been received, by the defendant.

It follows, from the views we have expressed, that the plaintiff is entitled to judgment for the possession of the premises; and such judgment will be entered upon the findings filed—with costs.

JUDGMENT FOR PLAINTIFF.

BANKRUPT ACT — DISCHARGE OF BANKRUPT — IMPORTANT RULING BY MR. JUSTICE MILLER. — On the 30th of September, Mr. Justice Miller, sitting in the Federal Circuit Court at St. Louis, made a highly important ruling in *re* King, a bankrupt holding that section 9 of the amendment of 1874, to the bankrupt, act, in relation to the discharge of bankrupts, applies to cases pending at the time that act took effect, as well as to cases thereafter commenced. We shall publish the full opinion next week. The same point has been ruled in the same way by Mr. District Judge Hopkins of the Western District of Wisconsin in *re* Perkins, which we shall also publish in our next. These two cases deny the conclusion of Mr. District Judge Blatchford, in *re* Franke, *ante*, p. 448; S. C., (in full) 6 Chicago Legal News, 414.

The importance of these rulings will be seen when it is considered that there are a large number of cases pending in the United States Courts here, and elsewhere, in which the bankrupts have never applied for discharge, because, under the provisions of the former laws, they were unable to comply with the law's requirements, either by procuring the consent of creditors, or the payment of the required percentage of the debts proved. All these obstacles now disappear, and any bankrupt who has been adjudicated such on the petition of his creditors may be discharged, if he has never been guilty of any fraudulent acts which are a bar to the discharge.

[Correspondence.]

Common Carriers—Liability of Express Companies—Opinion of Judge Ballard in Bank of Kentucky v. Adams Express Company.

MESSRS. EDITORS:—In a note to the opinion of Judge Ballard, published in your journal at page 436, you remarked upon the importance of the question decided, in the above case, and, after referring to the conflicting decisions, closed by suggesting that the better view was against the one there held. A mature examination of the question has convinced me that your impressions are correct. In view of the great public importance of the question, I propose to examine the foundations of the doctrine announced in the opinion.

Brief statement of the facts in the case are as follows: The defendant, the

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Adams Express Company, became liable to the Bank of Kentucky, the plaintiffs, for the carriage of a package of money, from New Orleans to Louisville. The package was delivered at New Orleans and a receipt given in the usual form, and containing a stipulation against liability of the company for loss by fire. While *in transitu*, in the usual manner, upon the usual line of railroad, in charge of the defendant's messenger, by a railroad accident, the package of money was destroyed by fire. The railroad upon which the package was carried and lost was not owned or controlled by the defendant.

The bank sued for the money upon the theory that the fire occurred through the negligence of the defendant, or of some one else, whose negligence was imputed to the defendant, and claimed on the trial that the evidence showed negligence on the part of the railroad company, and that the defendant was liable to the plaintiff for a loss occasioned by such negligence. But the court instructed the jury that they should disregard the evidence on the question of the negligence of the railroad company, holding that the defendant in such a case is only responsible for the negligence of itself and its employees.

To sustain his view of the case, the learned judge assumes that the express company is but an "*ordinary bailee for hire*," is only bound to ordinary diligence of itself or its servants, and as the railroad company was not its servant, and as the railroad was not under its control, it was no way responsible for the negligence of those who controlled the railroad and its carriages. The whole opinion is based upon these propositions, and is made up of illustrations based upon them.

Now, if it shall turn out that there are some peculiarities attaching to the relation of the express company here, as carrier, which do not apply to ordinary bailees for hire; for instance, suppose that it shall appear that upon principle, in cases like this, the carrier must not only *himself* be free from negligence producing the excepted *peril*, but that *all who execute his contract of carriage*, whether as agents, servants, employees or sub-carriers, must be *equally* free from negligence, then the theory must fall: and, therefore, to refute the theory, we have but to show either that this distinction exists, or that this latter liability attaches to ordinary bailees for hire. The result is the same in either case.

The law has regard to names, and forms, and definitions for the protection of rights, and the preservation of principles, but they should not be used to violate the former, or to pervert the latter; and in cases like the one under consideration, the question should not be so much whether the party sought to be made liable comes within a certain technical definition or description, and whether certain incidents are usually attached to, or certain duties generally devolve upon, persons answering this definition or description, as to ascertain in the particular case whether, under the principles and rules of law applicable to the facts, the defendant has been guilty of a breach of contract or duty which entitles the plaintiff to his action. It is by no means safe, in these inquiries, to rely too implicitly upon definitions given in other cases, often given by judges in cases only partially similar, and without much attention to the question whether they are generally accurate, or accurate at all, except in the particular case in which they are used.

Hence, in this inquiry, I shall pay little attention to the question whether the defendant is indeed an "ordinary bailee for hire," or not.

I will now endeavor to consider the question as it strikes me, and by showing that my view is right, and thereby demonstrate that the reasoning of the learned judge is unsound.

The elementary principle underlying the duties and responsibilities of common carriers, is their absolute liability for all losses unless caused by act of God or public enemies. (It is admitted here that the defendant is a common carrier.) Now the courts have held that this stringent common law liability may be limited by special contract between the carriers and the owners or consignors of goods. But as this very strict liability was established in a great part to protect the public against the *negligence* of carriers and their employees, the law only permits this limitation with a qualification, viz: These carriers shall be permitted to limit their liability by contract, but they shall be required, in good faith and without negligence, to carry out their contracts of carriage, and if such carriers stipulate against loss by a certain peril, and the goods be lost by this peril, still, if the peril, or the loss by the peril, was produced by the carrier's negligence, then, notwithstanding the exemption, he shall pay for the goods; because it is against public policy to permit a party by contract to exempt himself from liability for loss by negligence; and in such a case the burden of proof is on the carrier to show *not only a loss within the terms of the exception*, but also *that the proper care and skill were exercised to prevent it*. Graham v. Davis, 4 Ohio St. R. 363. Now, concerning what does this principle of public policy require the absence of negligence, and the exercise of diligence and skill? I answer, concerning the custody and carriage of the goods. Upon whom, and concerning the acts of whom, does this rule against negligence operate? I answer, emphatically, upon the contracting carrier who is claiming exemption under his contract for exemption from loss by the excepted peril; and the rule requires freedom from negligence, that is, proper diligence on the part of every one who has any connection with the carrying out of the contract of transportation. For it is of the very essence of the rule of public policy, that if the loss occurs within the exception, and the exception be relied upon, it shall not prevail, if the loss was produced by the negligence of the carrier himself, or any one executing the contract for him.

How is public policy affected by the question, whether the contracting party carry the goods himself, or whether he put them on another man's cars and hire him to carry them? In the former case he is liable for losses occurring through his own negligence; whatever his contract may be, the law holds him absolutely.

Why should the rule be different should the goods be lost by the negligence of him who is hired by the first carrier to carry the goods? The consignor has no right to claim that the carrier whom he employed shall actually carry the goods. He may carry them on his own vehicles, with his own motive power, upon his own road or the public rivers, as a railroad or river carrier. Here his liability is unquestioned. Or the carrier may, as in the present case, and as is the usage of express and transportation companies, undertake the carriage and receive the whole price for the same, and hire the use of the coaches of railroads and rooms on steamboats in which the goods are kept and carried for hire by the railroads and boats, but in the charge and under the control of the messengers or the servants of the express or transportation companies, and therefore in the actual manual possession of such companies. Now this process of carriage by the car, and the motive power, and under the care of the messenger, is the carrying contracted for. It is but one carrying, and all the instrumentalities used are but the means for the production of the one result, the carriage of the goods. Who is the carrier here? It is not denied the express company is. Whose instrumentalities are these?—the coach, the messenger, the motive power? I answer, the express company's. It employs them, pays for them, and they are the only appropriate instrumentalities by which its contract can be carried out, and without which it could not be fulfilled, and it may be appropriately said here, "*qui facit per alium, facit per se.*" Now does not public policy, as well as natural justice and common sense, demand that before the carrier here can defend under its exemption, it must show an absence of negligence in the use of all these instrumentalities necessary for the fulfillment of the contract? The contract and all the appliances for its fulfillment are alike, in legal effect, the contract and appliances of the express company, as much as if it had owned the locomotive, coaches and other machinery, together with the road and all its equipments. DeMotte v. Saraway, 14 Wendell, 225. What matters it to the owner of the goods whether the carrier owns the road or cars, or hires them? What injury is it to the carrier that it is to be held liable for the negligence of men whom it does not control? If they are not its servants, still it contracts with them for the use of their vehicles and motive power to transport its goods, and they are liable to it for negligence in their use in its service.

If then, as I insist, the negligence of the railway company, in such a case, is the negligence of the express company, the liability of the latter to the owner of the goods carries with it a corresponding liability from the railroad company to the express company.

I concede that this proposition simply illustrates the reasonableness of the rule I maintain, and I am aware that it is said the owner of the goods may pass by the party with whom he contracted and sue the party guilty of the negligence. This may be true, but it does not change the question.

For the owner of the goods selects his carrier and makes his contract; he has a right to sue on that, and has no right to be turned over to a stranger for indemnity, one perhaps irresponible, and at all events one with whom he did not voluntarily deal; while if the express company be liable the shipper has only to look to the man or company whom he selected, and with whom he contracted. Judge Ballard, in all his arguments and illustrations, lays great stress upon the proposition, that the defendant is not to be held liable for negligence of parties over whom it has no control; and as a reason why it should not be so held, he insists that the liability relied on for a recovery is not the liability of the express company as a common carrier, but is only the liability for negligence. But I submit, with great deference, that this position is bare assumption. It may be true that great judges have given sanction to it, but it is utterly without foundation in principle or reason. A common carrier with his liability qualified is none the less a common carrier, except only as his liability is qualified. His liability for negligence was always one of the incidents of the relation, and although carriers were regarded as insurers, and you might charge them in assumpsit and assign non-delivery as a breach, and they could only plead "*act of God*" or "*the King's Enemies*," still you had your election to sue the carrier in *case* for so negligently dealing with the goods, while in his possession for carriage, that they were lost. This common law liability has never been altered, cannot be qualified, and is the *gist* of the action in the case under consideration, and you may call the defendant as many names as you choose here, but still it is a common carrier, liable to account for loss or

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damage to the goods arising from negligence in carrying the same, or while in its possession for carriage.

That this carrier employs instrumentalities to execute its contract which it cannot control, is no ground of complaint on the part of the shipper, or of exemption on the part of the carrier. The goods being in its possession from their delivery, whoever deals with them does so with its assent, the same being implied, the acts of those dealing with them while thus in its posession, are its acts. The shipper contracts for freedom from negligence in the handling and transportation of his goods. Whether the carrier chooses to accomplish that by relying simply upon the common carrier's liability of his sub-carrier or co-carrier, or whether he have a special contract, are matters wholly indifferent to the shipper, if he receive what he contracts for. This is all he can ask for. Nor does this rule impose any hardship to the express company, as it has its remedy over upon its sub-carrier or co-carrier.

It strikes me that this view is far more in consonance with the analogies of the law, and far more consistent with the mutual rights, duties and liabilities, both of carriers and shippers, than the one announced in the opinion under review. In the one case the shipper has his remedy against his carrier for loss of his goods through *negligence for their carriage*, whether the carrier carry them himself, on his own cars, or on another carrier's; or whether he superintend the carriage himself, or commit it wholly to others. And if the carrier carry the goods upon trains controlled by others, and loose the goods by their negligence, he has his remedy over. While in the other case, if the carriage be contracted for by a carrier who carries his goods on the vehicles of others, and the carrier who furnishes the vehicles and the motive power destroys the goods by his carelessness, the owner has no remedy on his contract, nor any at all against the carrier with whom he chooses to deal. But if he has any remedy, it is an action against the actually negligent party, who may be, and generally is, hundreds of miles away from the place of contract.

It seems to me, therefore, that to overturn the former and establish the latter rule, with the results stated, require a more substantial reasons than the one assigned, to-wit: That the carrier who limits his liability by contract, is only a common bailee for hire, and is therefore only liable for the negligence of its own servants, and when such a carrier, under such a contract, carries his goods on the vehicles of another carrier, over whose emyloyees he has no control, he is not liable for their negligence. For convenience of reference I cite the authorities which sustain my view, including those in the former note. Hooper v. Wells, 27 Cal. 11; Chisterer v. Am. Ex. Co., 15 Minn. 270; Redfield on Carriers, sec. 56, 14 Wendell, *supra*; 4 Ohio St. R., *supra*; 5 Am. L. R. N. S. 16 (Judge Redfield). Against these authorities upon the *precise point*, Judge Ballard's opinion stands alone, so far as I know.

[Correspondence.]

Judge Ballard's Opinion (ante, p. 436) in the Express Company Case.

September 21, 1874.

EDITORS CENTRAL LAW JOURNAL.—Judge Ballard in his opinion in The Bank of Kentucky v. Adams Express Co., published in the CENTRAL LAW JAURNAL, of the 3d inst., in a criticism upon the case of Hooper v. Wells, Fargo & Co., cites the following passage from the opinion of the court (27 Cal. p. 30): "Defendants had the means of holding the proprietors of those various vehicles, used in the business of expressmen responsible to them, had they chosen to do so. If they did not take proper means to secure themselves, it was their own fault." Upon which he makes the following observations: 'But I cannot see how any argument can be drawn from this to show that defendants were responsible. Every bailee or depository may hold any one responsible for destroying or injurings good in his possession, but it cannot be maintained that he is responsible for such destruction or injury, unless he by his negligence contribute to the same. *Besides the plaintiff had his remedy against the proprietors of those other conveyances which occasioned the loss*, (see the N. Y. Steam Navigation Co. v. Merchants Bank, 6 How. 882) *and it might be retyrted, 'that if he did not take the proper means to secure himself it was his own fault.'*"

The learned judge does not seem to be aware, or at least does not refer to the fact, that the passage cited by him, and another similar passage at the bottom of page 34, have reference to the act of Congress, "to limit the liability of ship-owners, and for other purposes" (9 Stat. at L. 635, Sec. 2). Under this act the plaintiff had no remedy against the owners of the exploded steamer, for he did not "laid" his gold upon the steamer, and the retort of the learned judge does not quite meet the case. The argument drawn from the act may not be entitled to much weight, but it certainly does not weaken the position. However this may be, it would seem that the learned judge misconceived the allusion to the statute, which it must be confessed is not so pointed as it might have been. Doubtless, the court took it for granted, that a statute so important would be generally known.

LEX.

[From our own Corresondent.]

Judge Shaw.

BOSTON, September, 1874.

EDITORS CENTRAL LAW JOURNAL:—Lemuel Shaw was appointed Chief Justice of the Supreme Judicial Court of Massachusetts, and took his seat on the bench at the September term of the court at Lenox, for Berkshire, in 1830. He had tried and argued many cases with and against Prescott, and Sullivan, Webster and Hubbard, Gorham and Cooke, Fletcher and Rand, Blake and Samuel D. Parker, Leland and Fuller, and Townsend and Kilborn Whitman, the great lawyers of that time, and he had generally prevailed. And it is really instructive to look into the reports and see how he prevailed. It was never by cheat or any dextrous artifice or vicious practice, nor yet by what passes for eloquence or oratory, but simply through the clearness of his understanding and his ability to interpret and make others understand the case as he undersood it. It is sometimes said, men want words to express their thoughts. My belief is, the difficulty is not often in the want of words, but in the want of understanding. A child that understands will somehow make you understand.

At the time of his appointment, Judge Shaw was associated as a partner with Sidney Bartlett, Esq., already then distinguished in his profession, and now, as is well known, one of the most eminent among the lawyers of the United States. The firm in 1830, had a large and lucrative practice. Before proceeding in the discharge of the other appropriate duties of the court, Judge Shaw made a most excellent address to the bar, in which he sketched the life and character of his predecessor, Judge Parker. The address is printed in the appendix to the 9th Volume of Pickering's Reports. He gave no written opinion at that term. Many of the opinions at that time were only "*Per Curiam.*" His first written opinion was in the case of Bull v. Loveland, 11th Pick. 12, in which the general question was, whether a witness, against his own consent, can be called to testify to any fact pertinent to the issue between other parties, where such testimony may tend to charge him with a debt or subject him to pecuniary loss or liability, but where it does not tend to expose him to punishment or subject him to any penalty or forfeiture. And it was held that the witness might properly be called and examined in such a case,—a question of little or no interest now, when, in this commonwealth, and I believe in most of the states, the cases in which persons may be witnesses and those in which they cannot be compelled to testify, are clearly defined by statute. At the trial of Joseph J. Knapp, Jr., at Salem, in November, 1830, Judge Shaw did not sit. John Francis Knapp had been tried, as principal, in the same murder, a few months previously, before Putnam, Wilde and Morton, and it was probably deemed best by Judge Shaw, just then appointed, that he should leave to them to try the accessories also. Mr. Webster was employed by the law officers to aid them in the trials. John Francis Knapp had requested to have Robert Rantoul, Jr., then recently admitted an attorney of the court of common pleas, but not of the supreme court, assigned as one of his counsel, but the court refused the request, and William H. Gardner and Franklin Dexter were appointed. One cannot but wish that Judge Shaw had sat in these trials. The truth is, that with Judge Putnam, the defendants' counsel were overshadowed by Mr. Webster. He was in the zenith. They were—not, indeed, at the nadir, but yet not far enough up from the edge of the horizon to pour the glow on to Judge Putnam. One cannot but see, that on the question of the admission of the testimony of Coleman—that pious man who visited the prisoners in their cells, and told them how sorry he was to see them there, and that he would die before he would reveal what they might tell him, and so induced them to confess, and then told the court and jury, that, being a clergyman, he supposed he could not be required to disclose what was said to him,—and who, when he found he had not testified to enough to make his testimony competent in the judgment of Judge Wilde and Judge Morton, for want of which the prisoners must be acquitted,—and who also, after an adjournment, on coming into court the next morning, recollected and testified to just enough more to overcome the objections of these two judges, and so make his testimony competent—one cannot but see, I say, that in the argument on the admissibility of the testimony of this man, Mr. Dexter was right.

I have said, when it was known that Judge Shaw had given an opinion upon any question, discussion of that question stopped. One of the most notable instances of this, was the case of Sims. The last fugitive slave act was passed in September, 1850. Sims was held to service by James Potter, at or near Savannah in the state of Georgia, from whence he escaped to Massachusetts. Potter executed a power of attorney to one Bacon, to claim Sims and procure him to be delivered up. In March, 1851, Bacon came to Boston, with this power. No such fugitive had yet been delivered up in Massachusetts, on claim of the owner. An attempt had been made in the case of Crafts, in October, 1850, but Crafts had eluded the Marshal's deputies, and was now safe, and withal a hero in London. Shadrack, the property of Purser DeBuee, had been apprehended, and had got away from the deputy Marshal, at lunch

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time. The deputy, as he said, pointed his finger, and said—"shoot him!" but nobody had the tools, and Shadrack ran like a "quarter-horse," the crowd cheering as he went; nor let any thing green grow under his feet until he reached Canada. The deputy died without seeing Shadrack any more. Thus these two attempts ended. Sims was the object of the third.

In behalf of Potter, the owner, Bacon made a complaint to George T. Curtis, Esq., a Commissioner of the Circuit Court of the United States, for this district; upon which complaint Mr. Curtis issued a warrant, directed to the Marshal or either of his deputies, commanding him or them, in the name of the President of the United States, forthwith to apprehend Sims, and bring him before the said commissioner, at the court house in Boston, to answer to the complaint, and then and there to be dealt with according to law. The warrant was put in the hands of one Byrnes, a deputy Marshal. Francis Tukey was Marshal of the city of Boston. He was the most efficient police officer that Boston ever had. He undertook to make the arrest; and before the next morning Sims was found, thrust into a carriage, and hurried off to the court house. The trial went on before Mr. Commissioner Curtis. There was great excitement all about the city. Business was suspended. The streets leading to the court-house were crowded. There were more pistols in the court room than Mr. Moulton had in that eventful night in Mr. Beecher's chamber. Meanwhile Mr. Samuel E. Sewall presented to Judge Shaw a petition for a writ of *habeas corpus*, and spoke briefly in favor of the writ. But the court refused to grant the writ, on the ground that no sufficient cause for granting it was shown in the petition. A few days afterwards Mr. Rantoul and Mr. R. H. Dana, Jr., presented another similar petition; and Mr. Rantoul argued: 1, The commissioner is required to find the fact that service is due to the claimant,— which is to exercise a judicial power; whereas, the commissioner is not a judge within the meaning of the Constitution of the United States, and since his decision of that fact is made conclusive, the act is unconstitutional and void. 2. That congress had no power to legislate at all upon the subject. Judge Shaw gave the opinion of the court, at the conclusion of the argument, deciding: 1. Before a writ of *habeas corpus* will be issued, sufficient probable cause must be shown; and that in this case no such cause was shown. 2. He proceeded to consider the circumstances under which the constitution was made, and the great social and political objects and purposes which the people of the United States had in adopting it, and the relations which the several states held to each other, and he arrives at the conclusion that it was intended to guaranty to the owner of a slave, living within the territory of a state in which slavery is permitted, the rights conferred upon such owner by the law of such state. 3. That the purpose of the act was to regulate and give effect to the right secured by the constitution. It contemplated a prompt and summary proceeding. It secured to the claimant the aid and assistance of certain magistrates and officers, so as to enable the owner to exercise this right in a more regular and orderly manner, and without being chargeable with a breach of the peace; and that Congress had a right to vest the power of inquiry—whether regarded as judicial or otherwise—in magistrates such as these commissioners. The whole court concurred. Afterwards, Judge Shaw supplemented this opinion with a "Note"—7 Cush. 285. Sims was sent back to Savannah. There was no further discussion as to what the law was. The next most notable such instance was Fisher v. McGirr, in which the liquor law of 1852 was declared to be unconstitutional.

PELHAM.

Summary of our Exchanges.

The Pacific Law Reporter, for September 22, publishes an opinion of Mr. Circuit Judge Sawyer, expounding the Pacific Railroad Land Grant, and passing upon several questions relating to Mexican grants.

It also publishes Thompson v. Fland, Supreme Court of California. This is an opinion on a motion for a rehearing. It has no syllabus, but is headed "Assignee—Note—Conversion—Collateral Security."

In People v. Perdue, the Supreme cour of California refused to hear an application for bail by a prisoner who had appealed from a judgment sentencing him to the penitentiary for manslaughter, because the district judge had not exercised his legal discretion in the matter.

The Legal Intelligencer, for September 25, contains several decisions of the Supreme Court of Pennsylvania, with very brief head-notes. These are as follows:

Wilmoth v. Thomas & Canfield: The payment of taxes is a questinn of fact for the jury. The plaintiff cannot recover without actual possession.

McCrone v. Humrick: A., who took the deed for certain property, which was actually paid for by B., and afterwards conveyed it to B. in fulfillment of the trust, has no right of action against C., who purchased the property at sheriff sale as B.'s property, before the deed to B. had been made, and while the legal title was in A.

Miles v. Miles: A husband's ground for divorce can only be such as stated in the acts of 1854 and 1855. The court should, before granting the husband's divorce under the act of 1855, consider the question of the amount of alimony to be granted to the wife.

Mishler v. Reed: *Bona fide* purchasers of negotiable paper for value cannot be affected by private understandings between third parties. [We should think so. But isn't this too much brevity?]

Brubaker's Adm'rs. v. Taylor: When the plaintiff is called as a witness by the defendant under the act of April 15th, 1869, the defendant has a right to examine her as if under cross examination.

In Sleek v. Turner, the court (Sharswood, J.) hold, following Wilson v. City Bank, (*ante*, p. 40) that a judgment dated more than four months prior to the adjudication of bankruptcy, but entered, and execution issued thereon within that time, is not *ipso facto* fraudulent.

Smith v. Johnson, holds that a fence that is not on the line, but has been put entirely on the property of the adjoining owner by him is under his complete control.

In Culbertson's Appeal the widow guardian of the minor children, and the administrator of the decedent, entered into an agreement by which certain money in the administrator's hands was to be held until the death of the widow, she receiving the interest, and then the principal to go to the children. *Held*, that when the children were all of age, they, in conjunction with the widow, could compel the administrator to pay over the principal.

Head-note to Seeds v. Kahler: A wife may purchase property on the credit of her separate estate, and hold it against the creditors of her husband.

Head-note to Fry's Appeal: Where the funds arising from a sheriff's sale are insufficient to pay liens prior to judgment, it is error to apply any of the fund in payment of the costs on such judgment arising prior to the issuing of the *fi. fa.*

The Chicago Legal News, for September 26, publishes the opinion of the United States District Court for the Eastern District of Michigan, Longyear, J., in the case of the tug Champion, holding that a person who furnished supplies in a foreign port, to a vessel owned and registered in Detroit, had a lien upon such vessel which could be enforced in said court, but that upon the assignment of such claim the lien became divested, and neither the orginal claimant nor the assignee could sustain a libel against the vessel to enforce the payment of the claim.

Also an opinion of the Supreme Court of Illinois, by Walker, C. J., in Mix v. People, holding that a levy in excess of the per cent. allowed by the constitution is void only for the excess, when the amount authorized can be separated from the portion that is illegal; that the section of the law of 1872 requiring the proper authorites of towns, etc., to certify to the county clerk, on or before the second Tuesday of August, the several amounts which they require to be raised for taxation, is not directory, but peremptory; that this law does not apply to the auditor's certificate; that the equalization in this case was unjust and unconstitutional. What the learned chief justice says upon the principles governing equalization, will repay careful study, and should the cour apply these principles to future tax cases, as we have no doubt it will, the people will soon see that it is for their interest to elect competent men to levy and collect their taxes, and the manner of executing our revenue law will soon be reformed.

Also an opinion in the same court by Scott, J., in Korf v. Lill, holding, in a mechanic's lien case, that the certificate of the architect is conclusive of the rights of the parties, unless impeached for fraud or mistake; that it would impose a great hardship upon a contractor to make him liable for damages on account of defective work done by a sub-contractor, after the sub-contractor had been fully paid under the direction of the architect, who was the agent of the owner; that in the absence of any agreement for notice of the decision of the architect, the parties will be deemed to have waived it.

Also an opinion of the Third District Court of Utah, by McKean, C. J., in *ex parte* Sanders, refusing to admit an alien to citizenship who denied the constitutionality of the law against polygamy.

The Albany Law Journal, for September 26, contains a report of the case of Matthews v. Massachussetts National Bank (*ante*, p. 469): It is proper to state that this opinion is much longer and more elaborate than the same opinion as published by us, and contains citations of many authorties. The opinion as we gave it, was furnished us by a correspondent in Boston, and after the issue of our journal containing it had been printed, we received in phamphlet form the more elaborate opinion which the Albany Law Journal now publishes. Whether the opinion, as given by us, is an adjudgment, or whether as given by the Albany Law Journal it is a second edition of the original opinion, we are as yet unable to say.

[Want of space obliges us to omit until next week, a notice of our other exchanges received this week.]

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. }
S. D. THOMPSON, Ass't Editor. } ST. LOUIS, THURSDAY, OCTOBER 8, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.

SOME RECENT BANKRUPTCY CASES.—The case of Franke, 6 Chi. Leg. News, 414, in which Mr. District Judge Blatchford ruled that the 9th section of the amendatory bankrupt act of 1874, applies only to *future* cases, and that consequently a bankrupt, who had been adjudicated such prior to June 22, 1874, was not entitled to his discharge unless his estate would pay fifty per centum of the claims proved against it, has attracted considerable attention. We received almost simultaneously with each other, three opinions overruling this position, namely, that of Mr. Justice Miller, Federal Circuit Court at St. Louis, in *re* King; that of Mr. District Judge Lowell, District of Massachusetts, in *re* Griffiths, and that of Mr. District Judge Hopkins, Western District of Wisconsin, in *re* Perkins. These we print elsewhere. The opinion of Mr. District Judge Hopkins will attract attention, from the fact that he holds that *voluntary* bankrupts, who were adjudicated such prior to the passage of the late act, are likewise entitled to their discharge, without reference to the percentage of their assets, or the consent of their creditors, although their assets must have paid fifty per cent. of their debts under the law as it previously stood, and thirty per cent. under the law as it now stands, unless a certain number and value of creditors consent to the discharge.

INJUNCTION BY FEDERAL COURTS AGAINST STATE TAXATION.—The injunction suits pending in the Federal Circuit Court at Saint Louis, Bailey v. Atlantic and Pacific Railroad Company, *et al.*, (*ante.* p. 418), which have for their object the enjoining of the tax collectors along the line of certain railroads in Missouri from collecting the taxes lately assessed by the state board of equalization, have been exhaustively argued at the present term before Mr. Justice Miller, Mr. Circuit Judge Dillon and Mr. District Judge Treat. The court, without reaching any definite result, made a very important order, and laid down a principle applicable to all future cases of this character, which is, in the language of Mr. Justice Miller, "that whenever a party comes into this court to ask this court to enjoin the collection of taxes, or the collection of part of a tax, if there is any part which they admit to be due or just, or which the court can see in the statement made in the bill ought to be paid, there must be an allegation in the bill conforming to the fact, that they have paid it, or that they have tendered it; and it is not a sufficient allegation to come and say that we are willing, or even that we have paid it in to the court, because the state is not to be stayed in its revenue, which is admitted to be due in that way; and a party claiming that he will not pay his taxes or any portion of them, cannot screen himself during the course of a long litigation from paying that which must be paid, and which everybody can see must be paid, by setting up a contest over that which is doubtful, and which may, or may not, be necessary to be paid."

The court made an order applicable to each of the railroad companies concerned, by which some sixty per cent. of the amounts assessed against each of them is to be paid by the second of January next, or the bills will stand dismissed.

TWO RAILWAY CASES.—The recent decision of the Supreme Court of Missouri, which we elsewhere print, in Baker v. Chicago, Rock Island and Pacific Railroad Company, introduces into the jurisprudence of Missouri a principle which has been settled elsewhere, namely, that where the owner of land, by a written or parol license, grants permission to a railroad company to construct its road over his land, in consideration of an agreement to perform some subsequent act by the railroad company, such as the fencing of the track, and in pursuance of such license the road is constructed, but the subsequent condition is not performed, the land-owner cannot maintain ejectment, but can maintain a bill for specific performance or an action for damages. The recent decision of the same court, in Provost v. Chicago, Rock Island and Pacific Railroad Company, which we also print in another place, is similar in principle. It holds that where a railroad company has proceeded under the statute to condemn the land of a land-owner, for its roadway, and the land-owner objects to the damages assessed, and procures the appointment of a second commission, the company, in the meantime, paying into court the damages first assessed, and proceeding with the construction of its road (in pursuance of a provision in its charter authorizing it to do so) without further objection from the land-owner, the latter cannot, because the second commission awarded greater damages, which award was confirmed, and which damages the company has failed to pay, maintain ejectment for the land thus taken. The principle on which this case is made to turn appears to be, that although the payment of the land-damages is a condition precedent to the right of the railroad company to enter upon the land (Walther v. Warner, 25 Mo. 277), yet the owner, by permitting it to enter without objection, waived his right to pre-payment of the damages, elected to rely solely on his remedy to compel payment, should it be afterwards refused, and created an estoppel against himself, which would prohibit him from recovering the premises. In the former case, the doctrine applicable to the revocation of licenses is discussed by Mr. Justice Wagner with his usual clearness.

Admiralty Lien for Supplies and Materials in the Home Port.

At the present term of the United States Circuit Court for the Eastern District of Missouri, Mr. Justice Miller of the supreme court made an important decision on the above subject in the case of Taylor v. Steamer Commonwealth, on appeal from the district court. The learned judge of the district court held that there might be a lien in admiralty for the necessary supplies and repairs for a vessel furnished and made in the home port, and the correctness of this view was assented to and asserted by Mr. Justice Miller. The district judge held that the lien in such a case would not be displaced or defeated by reason of an agreement with the material-man by which the latter was to furnish security for the advances to the vessel, if such agreement was in fact never complied with or security given, but on this point his decision was reversed by Mr. Justice Miller. Undoubtedly the view of the learned justice is in

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accord with the spirit which has hitherto pervaded the decisions of the United States Supreme Court, and was required by those decisions, but, we may be permitted to observe that it has somewhat of the flavor of the common law hostility to admiralty liens.

In delivering his judgment, which was orally pronounced, Mr. Justice Miller, in substance, observed:

The owners of the boat were residents of St. Louis, and the repairs were done in a home port. Our supreme court had decided very many times that no admiralty lien existed by reason of repairs and supplies in the home port of the vessel, and there is no decision of the Supreme Court of the United States reversing or changing that doctrine. But the sentiment of the profession of the country—that part of the profession which devotes itself to admiralty practice—and the sentiment, he thought, of parties interested in vessels, had been that this was not a sound doctrine. It is a doctrine which we have derived from the English courts. It is the doctrine of the English courts that no such admiralty lien can be had in the home ports of the country. The English courts say that a man has a lien while he has possession, and he may have such statutory liens as the law of the land gives him, but he has not a maritime lien for such services at home. We have heretofore followed that doctrine. It is not the doctrine of continental states, and it is not the doctrine of the civil law. The doctrine is the other way in continental ports. Our courts have held that supplies in a foreign port may be a lien on a vessel, on the ground that the owner is not there, and it is necessary these supplies should be made. As he had said, there is a strong feeling that the doctrine ought to extend to home ports, and a rule of the Supreme Court of the United States prescribed for admiralty, which forbids the bringing of suits *in rem* for this class of cases, has been repealed by the supreme court. He violated no propriety in saying that he thought the supreme court repealed the rule, that the question involved in these cases might come up for consideration. He had no hesitation in saying that if there was nothing more than he had stated, that Mr. Taylor had repaired the vessel for $20,000, he would affirm the judgment of the district court when it gave a lien and order the vessel to be sold to pay it. He thought the doctrine would be upheld by the supreme court. He had no doubt that the law adopted by the English courts is not the general maritime law, and in this country we are governed by the general maritime law as it may be gathered from all the maritime nations of the world. The English law, on the contrary, had been the result of that conflict between the courts of the common law, especially the Court of Queen's Bench, in Great Britain, which was jealous of all other courts. He had no hesitation in saying that the rule of allowing a lien for repairs ought to be extended to a vessel in a home as well as in a foreign port, and this work and labor would have constituted such a lien, if the parties had permitted it to rest on the implied result of the work and labor done under such circumstances. Unfortunately they did not. They entered into a contract, showing on what they did rely. They made an agreement with the owners of the vessel before the work was done. The agreement was this: That if the repairs did not exceed $10,000, they were to be paid for one-half in cash and the other half in endorsed notes. If they exceeded $10,000 they were to be paid, one-third in cash and the balance in endorsed notes. This showed that there was other security relied on than the boat. It was clear that Mr. Taylor, in making the contract, never intended to rely on the security of the vessel itself. What was the use of relying on the vessel when he had cash for one-half and endorsed note for the other. Having made that contract, he could not rely on the vessel for a lien. It must have been the intention to rely on the credit of the vessel in order to give the right to an admiralty lien. Here the contract for other security shows that he did not intend to rely on the vessel for lien, and he has no lien, although the owners failed to keep their contract, to make the payment or give the stipulated security.

At the request of the learned justice an appeal was prayed and allowed to the Supreme Court of the United States, which will present to the court for authoritative decision some very interesting questions of admiralty law, not now free from doubt, and which urgently demand settlement.

It will be recollected that the first hundred pages of Mr. Benedict's work on Admiralty is devoted to a learned discussion of the question whether the constitution of the United States, in granting to the federal judiciary cognizance of "all cases of admiralty and maritime jurisdiction," intended to grant only such jurisdiction as had been left to the English Court of Admiralty by the enchroachments of the Court of King's Bench, or such jurisdiction as was possessed by the Colonial Vice Admiralty Courts at the time of the American revolution, on whether it was a broad and comprehensive grant, intended to embrace all subjects properly cognizable in courts of admiralty, according to the usages of the maritime nations of Europe. The last view is strongly urged by Mr. Benedict, and seems to be a favorite one with admiralty lawyers. This is the view entertained by Mr. Justice Miller, as will be seen from that part of the above abstract where he says that "in this country we are governed by the general maritime law, as it may be gathered from all the maritime nations of the world."

License to Construct Railroad on One's Land—Non-performance of Condition Subsequent—Ejectment.

ISAAC BAKER v. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

Supreme Court of Missouri, August Term, 1874.

Present, Hon. WASH ADAMS,
" DAVID WAGNER,
" WM. B. NAPTON,
" H. M. VORIES, } Judges.

1. **License to Railway Company to Construct Road on Plaintiff's Land—Ejectment.**—The plaintiff executed and delivered to the agent of the lessor of the defendant, a railway company, a written license to construct its road across his land, which license was not to be delivered to the company until it should comply with the law in regard to fences, cattle-guards and farm crossings. The company having constructed its road, without objection being made, across the plaintiff's land, and having failed to comply with these conditions, the plaintiff brought ejectment. *Held*, that this was not the proper remedy. The agreement to construct fences, etc., was a condition subsequent, and the plaintiff might maintain a suit for specific performance, or for damages.

The facts are fully stated in the opinion of the court.

J. H. Shanklin and *M. A. Low*, for appellant.

1. The Chicago and Southwestern Railway Company entered on the land in controversy and made valuable, costly and permanent improvements, with the leave, license and consent of the respondent, who agreed to relinquish his land damages, upon condition that the company should comply with the law in regard to fencing, etc. The conditions in the agreement were conditions subsequent and not conditions precedent. The respondent cannot now, after he has permitted said company to expend large sums of money thereon, recover the land with the improvements, because the company failed to fully perform the conditions of the contract. He can have the contract specifically performed, or may recover damages for the non-performance of it, or he may pursue the remedy that the statute gives—build the fence, gates and crossings and recover the cost of the company. Williamston and Tarboro R. R. Co. v. Battle, 66 North Carolina, 540; McAulay v. Western Vermont R. R. Co., 33 Vt. 311; s. c. 1 Redf. Am. Rail. Cas. 245; Hornback v. Cincinnati, etc., R. R. Co. 20 Oh. St. 81; Wilson v. Chalfant, 15 Ohio, 248; Knapp v. McAuley, 39 Vt. 275; Austin v. Rutland R. R. Co., 45 Vt. 215; Boston, etc., R. R. Co. v. Potter, 42 Vt. 265; Noyes v. Chapin, 6 Wend. 461; Pusey v. Wright, 31 Penn. St. 387; Ricker v. Kelley, 1 Greenl. Rep. 117; Rerick v. Kern, 14 C. & R. 267; Lefevre v. Lefevre, 4 S. & R. 241; Taylor v. Waters, 7 Taunt. 374; Blaisdell v. Railroad, 51 N. H. 483; Erie v. Delaware, etc., 6 C. E. Green, 283; Goodin v. Cincinnati, etc., R. R. Co., 18 Ohio State, 169; B. & O. R. R. Co. v. Strauss, 37 Md. 237; Illingworth v. Manchester, etc., R. R. Co. 2 Eng. Railw. Cas. 136 [*187]; Greenhalgh v. Manchester and R. R. Co., 3 Myl. & Cr. 794; s. c. 1 Eng. Railw. Cas. 68; Winter v. Brockwell, 8 East, 308; Hermon on Estoppel, 528; Clavering v. Thomas, 6 Ves. 689.

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2. A parol license executed, frequently amounts to a grant, and is irrevocable. The expenditure of money or labor by one man on the land of another, under a license given by the owner, will estop the owner from revoking the license, and wresting the possession of the land from the licensee. A license thus executed gives an absolute right, and the licensor will be estopped from revoking it to the injury of the licensee. A license by parol is as irrevocable as a license by deed; in either case the license may be revoked before it is executed, but not after. Winter v. Brockwell, 8 East, 308; People v. Goodwin, 5 N. Y. 568; Huff v. McAuley, 53 Penn. 206; Rhodes v. Otis, 33 Ala. 578; Dyer v. Connall, 4 Penn. 353; Bridge Co. v. Bragg, 11 N. H. 702; Liggins v. Juge, 7 Bing. 682; Woodbury v. Parshley, 7 N. H. 237; Addison v. Hack, 2 Gill, 221; Bigelow on Estoppel, 527; Herman on Estoppel, 437, Sec. 439.

4. Where one acquiesces in the occupation of his land for the construction of a railroad, without prepayment of the land damages, upon an understanding or contract for the future payment by the company, and the road is constructed and put in operation, he cannot afterwards, on failure to obtain payment, maintain ejectment for the land. McAuley v. Western, etc., R. R. Co., 33 Vt. 311; s. c. 1 Redf. Amer. Rail. Cas. 245; B. & O. R. R. Co. v. Strauss, 37 Md. 237; Hornback v. Cincinnati, etc., R. R. Co., 20 Oh. St. 81; Williamston, etc., R. R. Co. v. Battle, 66 North Carolina, 540; Kerr on Injunction, 348; Parrott v. Palmer, 3 M. & K. 632; Duke of Devonshire v. Elgin, 14 Beav. 530; Duke of Beaufort v. Patrick, 17 Beav. 60; White v. Wakley, 26 Beav. 20; Keer on Fraud and Mistake, 127–135; Oliver v. King, 8 D. M. & G. 118; High on Injunctions, 231, § 417; Elmslie v. Delaware, etc., 4 Whart. 424; Delaware, etc. v. Raritan, etc., 1 McCart. 445; Torrey v. Camden, etc., 3 C. E. Green, 293; Goodin v. Cincinnati, etc., R. R. Co., 18 Ohio State, 169.

5. The court ought to have declared the law as asked by appellants. It was proven by the testimony of the plaintiff's son that he knew that the work of constructing the railroad over the land in question was going on, and that he made no objections, but acquiesced in the act of the company in entering on the land and constructing their road, without prepayment of the land damages. In the exercise of the right of eminent domain, delegated to them, the railroad company had the power to appropriate the land against the will of the owner, subject only to his right to prepayment of his land damages, if insisted on by him. But for the constitutional limitation on this power, the company might be authorized to appropriate land without making any compensation to the owner. The prepayment is a condition precedent, made for his protection and benefit alone, and he may waive it if he choose.

When he stood by and saw the work going on and made no objection, the railroad company might well suppose that he did not insist on prepayment of his damages.

And the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his right to present payment, will conclude his right to arrest the claim in any such form as to stop the running of the road after it has been put in operation, whereby the public acquire important interest in its continuance. McAuley v. Western Vt. Rw., *supra*.

"Although railroad companies in some respects, resemble private corporations, yet as they are organized for the public benefit, the state regards them as matters of public concern. They are looked upon by the laws as corporations endowed with capacities for the promotion of the public good and for the diffusion of advantages to the state as a body politic." Dunn v. North Missouri R. R. Co., 24 Mo. 493.

The people along the line of this road, individually and as municipalities, have important interests in its continued operation, and the ejectment of the company from any portion of the line, at the suit of the respondent, would be to sacrifice the interests of thousands of the people of the state in an important line of commerce, and interrupt a United States mail route established by law, at the suit of an individual who has other adequate remedies not fraught with such consequences. High on Injunctions, 231, § 417; Elmslie v. Delaware, etc., 4 Whart. 424; Delaware, etc., v. Raritan, etc., 1 McCart. 445; Torrey v. Camden, etc., 3 C. E. Green, 293.

The statute of frauds can have no application to this case, because the company acquire title by exercise of the right of eminent domain, and not by grant from the owner. When land damages can be settled by agreement between the owner and the body exercising the right to appropriate, no proceedings to condemn, other than the actual appropriation, are necessary or proper. In such a case the owner receives his damages and the title passes by operation of the sovereign power to appropriate. No release is necessary to divest the owner of title. The law of grants between individuals is not applicable to such a case.

It is admitted as a general proposition that a vendee in possession, under a contract of sale, who fails to pay the purchase money, may be ejected by the vendor. But there is no similarity between such a case and the one at bar. The relation of vendor and vendee does not exist between the parties here, and no such relation is set up in the pleadings. No grant for a valuable consideration is alleged or claimed by either party.

It is not true that the respondent has no remedy by which he may recover land damages. If the entry was without his consent or acquiescence, he may maintain trespass, in which action the measure of damages would be the same as in a proceeding to condemn. Mueller v. St. Louis, etc., R. R. Co., 31 Mo. 262; Soulard v. City of St. Louis, 36 Mo. 546. Or he might sue for the value of the land. 1 N. H. 339; 7 Mass. 202.

He may have the contract specifically enforced, or may sue for the breach thereof. He is pregnant with remedies, all adequate.

It is not true that a right of easement, such as is claimed by appellants, can only be created by deed. In the case of Blair v. Smith, 16 Mo. 273, the supreme court held that "where the owners of contiguous lots mutually establish a boundary line between them and build up to it, and use and occupy according to it for a period long enough to show their agreement and acquiescence, although less than the period which would be a bar under the statute of limitations, they, and those claiming under them, will be estopped from afterwards claiming a different boundary." There was no element of fraud or mistake in this case. See also, Lindell v. McLaughlin, 30 Mo. 28, per Napton, J.: "Where a man misleads another by his acts or words, so as to cause the expenditure of money on the part of the latter, the former will not be allowed to change his assertions or claims to the detriment of the person mislead. It is a practical fraud, although no fraud may be intended, to permit this to be done." This was a question of a disputed boundary line, involving no misrepresentation or mistake. The decision was founded solely on the doctrine of estoppel by acquiescence.

Porter and *Turner*, for respondent.

WAGNER, J., delivered the opinion of the court.

This was an action of ejectment to recover possession of a strip of land composing a portion of the right of way of the Chicago and Southwestern Railway Company, on which the track is located and built, and the trains now running.

The defendant answered, interposing a general denial; and for further answer and defence, stated that during the years 1870 and 1871, the Chicago and Southwestern Railway Company, a corporation duly incorporated and organized under and by virtue of the laws of the state of Missouri, located and constructed said road from the city of Washington, in the state of Iowa, to the city of Leavenworth, in the state of Kansas, which said railroad ran through and across the land described in the petition. That after said railroad had been located across said land, and before the construction thereof had been commenced by said last named company, plaintiff, for the purpose of aiding in the construction of said railroad, made, executed and delivered to said last named

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company, a deed of conveyance, granting to the company the real estate to be held and used by them for the purpose of constructing and maintaining their said road thereon: and that said Chicago and Southwestern Railway Company, on or about the first day of October, 1870, entered upon said land and constructed their said railroad over and across the same, with the knowledge and consent and license of plaintiff, and continued from that time to occupy and use said land for the purpose aforesaid until about the 9th day of October, 1871, when they leased and demised all of their said railroad, and the lands appurtenant thereto, including the lands described in the petition, to the defendants.

That at the time of said leasing said Chicago and Southwestern Railway Company were in the possession of said strip of land by the acquiescence, leave, license and consent of plaintiff, as well as by right of said grant to them, and that being so in the possession thereof, they delivered the possession to the defendants who have ever since continued to occupy and use the same with said railroad; that ever since said 9th day of October, 1871, defendants have been running, and still are running and operating said railroad, and are running passenger and freight trains daily, etc. To this answer the plaintiff filed a replication, and the cause was submitted to the court without the intervention of a jury.

The evidence showed that the plaintiff lived near the railroad when it was being built; that he made no objection to their building the same on his land, and that he proposed giving them the right of way if they would fence the road and make cattle-guards and crossings within thirty days after the completion of the same. It was also shown that the plaintiff executed a relinquishment of the right of way to the land in controversy, conditioned that the company should comply with the law in regard to fencing, cattle-guards and farm crossings, and delivered the same to the agent of the company, upon the condition, however, that it was not to be delivered to the company till they complied with its terms. The relinquishment was never delivered by the agent to the company, they having failed to erect the fences and cattle-guards.

Upon the case as thus made, the defendants asked the court to declare the law as follows: "1. If the court finds that plaintiff acquiesced in the occupation of his land for the construction of the Chicago and Southwestern Railroad, without prepayment of his land damages, upon an understanding or contract with the Chicago and Southwestern Railway Company, that in thirty days after the completion of their road over plaintiff's land they would fence their road where it runs through plaintiff's land, and put in cattle-guards and farm crossings, in compliance with the requirements of the general railroad law of the state, and that the road is completed and in operation, even though the court finds that the road has not been fenced where it runs through plaintiff's land, he cannot recover.

"2d. If the court finds that plaintiff consented to the occupation of the land in controversy, for the construction of said railroad, and executed a conveyance of the right of way over the same to the Chicago and Southwestern Railroad Company, conditioned that said company should, in thirty days after the completion of said road over said land, fence said road where it runs through plaintiff's land, and put in cattle-guards and farm crossings, in compliance with the requirements of the general railroad law of this state, which said conveyance was placed in the hands of John M. McMichael, to be delivered to said company if its conditions should be complied with, even though the court finds that said company has not fenced said road, as by the terms of said conveyance they were required to do, the court must find for defendant."

The court refused to declare the law as prayed for by defendants, and then gave judgment for plaintiff. Whereupon the defendants bring the case here by appeal.

It is admitted that the defendants have not complied with the conditions upon which the plaintiff authorized them to enter upon his land, and build their road, and the only question is whether he can treat his permission as an entire nullity and recover the premises in ejectment.

In a case in North Carolina, entirely similar to this, a party proposed to a railroad company that he would give them the right of way to locate their road over a certain portion of his land, *provided* they would open, grade and put in order a street on the part in front of his house. The road was built, but the company failed to comply with the condition as to opening the street. The party afterwards notified the company that unless the condition was performed within fifteen days he should repossess himself of his land covered by the roadbed. The company then applied for an injunction to restrain him from carrying out his threatened purpose of repossessing himself of his land, and the court sustained it, holding that the opening of a street was not a condition precedent to the exercise of the right to locate. In the opinion, the judge who delivered the judgment of the court, remarks: "All that was done here was done by the consent of the defendant. Neither can there be any question as to the right of both parties to the specific performance of its side of the contract between them. If the plaintiff should bring an action for such a purpose, it will be entitled to a grant of the right of way upon a performance of its side of the contract. And if the defendant desire to hasten the company in such performance, he can bring his action, in which he will be entitled to have such performance within a reasonable time; or to have the contract rescinded." Williamston & Tarboro R. R. Co. v. Battle, 66 N. C. 540.

In the case of McAuley v. Western Vermont Railway, 33 Vt. 311, it was decided that payment of land damages was a condition precedent to the acquiring of title by a railroad company of lands taken for their road. But where an owner acquiesed in the occupation of his land for the construction of a railroad, without prepayment of the land damages, upon an understanding or contract for future payment by the company, and the road was constructed and put in operation; he could not afterwards, on failure to obtain payment, maintain ejectment or trespass for the land.

To the same effect is the case of Hornback v. The Cincinnati & Zanesville Railroad Co., 20 Ohio St. 81, and Earl of Jersey v. Britton Ferry Dock Co., L. R. 7 Eq. 409. Indeed we have been unable, after diligent research, to find any authority supporting the action of the plaintiff on the facts as developed in this case.

When plaintiff permitted the company to go on his land and construct their road-bed, it amounted to a license to them to do that work. The only condition was that they should make fences and put in cattle-guards in a certain time after the road was completed. This was a condition subsequent, and not a condition precedent. The entry under the license was lawful, and under such circumstances, after the expenditure of large sums of money by the defendants, and making a costly structure, can the plaintiff at his mere option and will revoke the license and maintain ejectment?

In Rerick v. Coons, 14 Serg. & Rawle, 267, the defendant had licensed the plaintiff to erect a structure on the defendant's land, by which a stream of water was directed to the plaintiff's mill. There was no writing, but the plaintiff had been at expense in erecting the structure. The defendant afterwards attempted to revoke the license and tore down the structure. The court, speaking through Gibson, C. J., held the plaintiff entitled to damages, and say.: "It is concluded that a mere license is revocable under all circumstances, and at any time. But a license may become an agreement on valuable consideration, as when the enjoyment of it must necessarily be preceded by the expenditure of money, and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for valuable consideration."

In this court in the case of Fuhr v. Dean, 26 Mo. 116, the principle is thus laid down: "A mere license may exist by parol, and ordinarily is not assignable, and is revocable unless it has been

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executed and the party has incurred expense on the faith of it, so that he would be injured by the revocation. 3 Kent, 452; Pierpont v. Barnard, 2 Selden, 279; Wood v. Leadbitter, 13 Mees. & Wells. 838. * * * * A license cannot be countermanded after it has been executed, so as to permit acts done under it to be treated as trespasses; and though sometimes it may not be easy to ascertain the point of time at which a parol license may be revoked, when it is no longer executory, and the licensee has expended money on the faith of it, and is in the enjoyment of the privilege connected with it, yet there must be a time at which it is revocable, otherwise it would create a permanent interest in land. It may be, however, that where acts have been performed upon the faith of a license, the party giving it may be equitably estopped from revoking it, to the injury of the other party, but the estoppel will be limited by the injury it is invoked to prevent."

A license is an authority or power, and marked with the incidents that usually accompany powers. Among these may be mentioned the right of revocation at any time, at the will or pleasure of the person creating the power, or granting the license. But the doctrine that a power may be recalled at the pleasure or discretion of the donor ceases to apply when the power is coupled with an interest, or is necessary to the possession or enjoyment of a right or title arising from the act or contract of the person who creates the power.

Messrs. Hare and Wallace, after a most thorough and exhaustive review of the cases bearing upon this subject, deduce the following conclusion: "From the cases which have been cited, we may deduce two things: one, that a license will be a full justification for the acts done under it, even where they consist in the exercise of an authority or privilege on land, and would, if repeated under an undefeasable right be in effect an estate or easement: the other, that a license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest which has been created by the licensor, or placed with his assent in a situation where the continuation of the license is essential to its enjoyment. These inferences obviously result from the general rule, that no one can recall a promise, or delaration made with a view to influence the course of another, after he has acted upon it; and thus place himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises under these circumstances to prevent the legal title from being used as a means of injustice. 2 Am. Leading Cases, 5th Ed. 569; 2 Smith's Leading Cases. 5th Am. Ed. 761.

In the present case the defendant entered upon the land of the plaintiff with his consent and license, and made valuable, costly and permanent improvements. There was an agreement to relinquish the right of way on condition that the company should comply with the law in regard to fencing and making cattle-guards, in a certain time after the road should be completed. This condition was not to be performed until after the road was finished and all the expenditures made. It would now be an act of great injustice to allow plaintiff to use his legal title in the manner contemplated by this suit. He had the right to annex whatever conditions he pleased upon his grant. He could have insisted upon the payment of damages before the company acquired any right to proceed with their work upon the land, or that they should have erected the fences, in the first instance, but when he gave them leave and license to do what they did, in consideration of their performing a subsequent condition, he cannot now bring ejectment and oust them from the possession. The interest was created by the licensor, and its enjoyment cannot be revoked in this way. The remedies for the plaintiff are adequate and ample. He may bring his bill for specific performance, and he may recover damages; or he may proceed to build the fences, cattle-guards and crossings, and compel the company to pay therefor.

The court below erred in its rulings, and the judgment should be reversed and the cause remanded.

The other judges concurring, except Judge Sherwood, who is absent. JUDGMENT REVERSED.

Bankrupt Act—Discharge of Bankrupt—Section 9 of the Act of 1874 Construed.

I. *In re* KING.

United States Circuit Court, Eastern District of Missouri, September Term, 1874.

Before Mr. Justice MILLER.

The ninth section of the amendments of 1874 to the bankrupt act, which relates to the discharge of bankrupts, applies to cases pending at the time that act took effect, as well as to cases thereafter commenced [Denying *re* Franke, 6 Chicago Legal News, 414.[

The bankrupts applied to the district court for a certificate of final discharge, upon the following facts:

On August 19th, 1870, a creditor's petition was filed against said bankrupts as co-partners, on which, August 26, 1870, an adjudication in bankruptcy was made upon the ground of suspension of payment of commercial paper, more than fourteen days. An assignee was elected September 23d, 1870. The administration of the estate was concluded February 26, 1873. The assets of the estate, which amounted to $575.60, cash, were received and disbursed by the assignee. No dividend was paid on unsecured debts. A secured debt for $250 was proved and paid. Unsecured debts aggregating $1,222.39 were proved and allowed.

All the debts proved were contracted subsequent to December 31st, 1868. Upon all, said King was liable as principal debtor. June 30, 1874, King filed, in the usual form, his petition for final discharge, which was referred to the register for his action in the premises, and thereupon a hearing was ordered and held upon said petition on the 13th day of July, 1874, after due and adequate notice by mail, and publication in the usual form as prescribed by law, to all creditors and others in interest. On that day the oath before final discharge, duly taken by said King, was filed, his last examination was passed, but no consent in writing of his creditors was filed, nor was any opposition made or entered to his application.

The district court, *pro forma*, refused to grant the discharge, and the bankrupt brings the matter before this court for review under the second section of the bankrupt act.

G. F. Maury, for the bankrupt.

Mr. Justice MILLER, orally delivering the opinion of the court, in substance, said:

It is conceded that the bankrupt should have a discharge unless the fact that his assets did not equal fifty per cent. of the claims proved against his estate disentitles him to his certificate, and this depends upon the construction to be given to section 9 of the act of 1874. In cases of involuntary bankruptcy commenced since that act took effect, it is clear Congress intended that the bankrupt should be discharged without respect to the amount of assets as compared with the amount of debts. But the enquiry here is, does this 9th section apply to cases commenced before the act of 1874 took effect and not then concluded, as well as to cases thereafter commenced? In my judgment it does, and the bankrupt who brings this petition is entitled to his discharge.

I have been shown an opinion of Judge Blatchford, in the matter of Franke, prepared with his usual care, in which a different conclusion is reached. His reasoning is ingenious, but, as it seems to me, somewhat artificial and not at all satisfactory to my mind. I think the general rule is that such remedial provisions do apply to pending cases, unless there is something to show that the legislature intended to exclude them, and I can discover no such intention in the 9th section, or any part of the act of 1874; and this conclusion is very much fortified by the express repeal of the provision in the original act requiring fifty per centum of assets, and by the consideration that the ninth section of the act of 1874

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covers the whole ground and provides for both voluntary and involuntary cases. Let it be certified to the district court that the bankrupt is entitled to his final certificate of discharge.

ORDERED ACCORDINGLY.

II. *In re* GRIFFITHS.

United States District Court, District of Massachusetts,

Before Hon. JOHN LOWELL, District Judge.

Bankruptcy—Discharge.—In cases of involuntary bankruptcy pending on the 22d day of June, 1874, as well as in those since commenced, the bankrupt, if otherwise entitled thereto, is to have his discharge, irrespective of the assent of his creditors or the amount of his assets. [Overruling *re* Franke, 6 Chi. Leg. News, 414.]

LOWELL, J.—The question presented by the register's certificate is whether section 9 of the act of June 22, 1874, applies to pending cases. It was settled by several decisions in Massachusetts, that such amendments of the law did affect all cases. *Ex parte* Lane, 3 Met. 213; Eastman v. Hillard, 7 Met. 420; *re* Bartlett, 8 Met. 72; Eddy v. Ames, 9 Met. 585. But as the law has been pronounced to be otherwise in relation to this statute, in an able opinion of Judge Blatchford's, I feel bound to give briefly my reasons for agreeing with the earlier decisions.

Section 9 says, in substance, that in cases of compulsory bankruptcy, the provisions of the former laws requiring the payment of a certain proportion of debts, or the assent of a certain number of creditors, as a condition of a bankrupt's discharge, shall not apply; but if otherwise entitled, he is to have the discharge without such payment or assent. And in cases of voluntary bankruptcy no discharge will be granted to a debtor whose assets shall not be equal to thirty per centum of the debts proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value; and the provision in section 33 of the principal act requiring fifty per centum of such assets, is hereby repealed.

It is plain, I think, that the section, on the face of it, applies to all cases in which a discharge is applied for after the passage of the act. It was so explained to the house of representatives by Mr. Tremain, who had the bill in charge, (Congressional Record, June 17, 1874, p. 60), and the words are almost precisely like those of the statute which was so construed in *ex parte* Lane, 3 Met. 213, in which Wilde, J., speaking for the court, said: "This court can have no authority to grant a discharge against a prohibition in the statute." And the other cases cited are similar. In all, the law was changed without any express application to future or past cases, and the court unhesitatingly applied it to both clases. This construction is aided by the express words of repeal which are found in sections 9 and 21. The repeal is unqualified, and I know of no rule which will authorize me to limit the scope of the enactment of repeal, unless it were, indeed, to save the rights or titles already vested.

And this brings me to what I venture to call the fallacy that such a change in the bankrupt law is retroactive if it is made to affect pending cases. A law which discharges debts already contracted, may well be called retroactive; and this law, if retroactive at all, would be so not merely as to cases begun, but as to contracts entered into before its passage. But it is well settled that a mere modification of the conditions upon which a discharge shall be granted to bankrupts, is not retroactive. "It is clear," says the eminent jurist already quoted, "that the appellant had no vested right to a discharge at the time of filing his petition. Such a right could be acquired only by proving, at the time of applying for a certificate of discharge, that he had in all respects complied with the provisions of statutes 1838 and 1841 (the latter of which was passed after he had been adjudged an insolvent), by which only a right could be acquired. The latter statute, therefore, is not to be considered a retrospective act, disturbing vested rights, but as altogether prospective in its operation, although it (the discharge) might depend, in some case, upon acts done before it took effect." 3 Met. 215.

The statute in *ex parte* Lane was much more like a retrospective act than is that of 1874, because it actually deprived the insolvent of a discharge for a preference given before the act went into operation. This law neither creates new frauds nor relieves a bankrupt from the consequences of any which he has committed, but merely lightens somewhat the arbitrary conditions before imposed on honest bankrupts as a preliminary to obtaining a certificate. Such a law is always held to be remedial. In *re* Billing, 2 B. R., 161; Revere v. Newell, 4 Cush. 587.

It is said that one section of the amended act explicitly declares its applicability to pending cases, and another limits itself to cases begun after a certain day. This is true of those sections. But most of the sections leave the matter to interpretation, and must be judged by the subject-matter. Thus, section fourteen says that all proceedings may be discontinued on the assent of a majority of the creditors. There can be no doubt that this covers all cases, whether begun before or after June 22. To settle a case in that way may disappoint some hopes of creditors, but it is remedial, and disturbs no vested rights. So of the section now under consideration. The words seem plain to my apprehension; and the cases cited show how such laws have usually been understood.

I do not mean that there may not be many pending cases which have passed the stage at which the law would be applicable to them, in which, for instance, the debtor or the creditors may have been already entitled to a decree, which only remained to be formally pronounced when the new law went into operation. But, speaking generally, I say that the law was prospective, and applied to all cases in which the actual right had not been acquired, and that all inconsistent acts are unconditionally repealed.

A much more difficult question, in my judgment, may arise in respect to voluntary cases, namely, whether the assent referred to is that of the given number and value of all creditors who have proved their debts, or only of those to whom the bankrupt is liable as principal debtor; but as this is a compulsory case, that point need not be decided now. DISCHARGE GRANTED.

NOTE.—The difficulty which the learned judge suggests, arising out of *voluntary* cases, is solved by Mr. District Judge Hopkins, in the following opinion.

III. *In re* PERKINS *et al.*

United States District Court, Western District of Wisconsin, September 26, 1874.

Before Hon. JAMES C. HOPKINS, District Judge.

1. **Discharge of Bankrupt—Amount of Assets—Consent of Creditors.**—From the fact that section 9 of the amendatory bankrupt act of 1874 repeals the provision of section 33 of the original act, which prohibits the discharge of the bankrupt unless his assets pay fifty per cent. of the debts proved against his estate, or unless a majority in number and value of his creditors consent; and from the further fact that this repeal carries with it the repeal of section 1 of the act of July 27, 1868 (15 Stat. 227), and also of section 1 of the act of July 14, 1870 (16 Stat. 276), by which section 33 of the original act was amended; and from the further fact that the remaining provisions of section 9 of the amendatory act of 1874, which provide that in cases of compulsory bankruptcy, the bankrupt shall be entitled to his discharge without reference to the amount of his assets or the consent of his creditors, and that in cases of involuntary bankruptcy, the bankrupt shall not be entitled to his discharge unless his assets shall be equal to thirty per centum of the debts, or unless he shall have the consent of one-fourth in number and one-third in value of his creditors,—are *prospective* only and do not apply to pending cases;—*it is held*, that bankrupts, both in voluntary and compulsory cases commenced before the 22d day of June, 1874, may be discharged, without reference to the question of the amount of assets, or the number of creditors assenting, provided they comply with the law in other respects. [Affirming in part, and denying in part, *re* Franke, 6 Chi. Leg. News, 414.]

2. ———. **Effect of Debts Contracted Before the First of January, 1869.**—But although the acts of 1868 and 1871 (above stated) may not be repealed, yet as to debts contracted before the 1st day of January, 1869, the bankrupt is entitled to his discharge without reference to the amount of his assets. [Acc. Re Franke, 6 Chi. Leg. News, 414.]

3. ———. **Effect of Renewal Notes.**—In fixing the time when the debt was contracted, if notes have been given in renewal of other notes, the debt will be deemed to

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have been contracted from the date of the original transaction, and not from the date of the renewal notes.

3. ——. ——. **Security Debts.**—Where the debtors opposing the discharge were sureties on the original notes made before the 1st day of January, 1869, as well as upon the renewal notes made since that date, they do not (whichever way the statute be construed) occupy a position to insist on the payment of any portion of the debt of their principal (a voluntary bankrupt) before he can be discharged.

The case is stated in the opinion.

Cassody & Carpenter and *Geo. B. Smith*, for bankrupts; *Orton, Keyes & Chynewoth*, for creditors.

HOPKINS, J.—The above named bankrupts, who were adjudged such, on their own petition, in March, 1873, in January last filed a petition for their discharge. Parker & Stone, two of their creditors opposed it, on the ground: 1st, that their assets did not amount to 50 per cent. of their debts; and, 2d, that they had not the assent of a sufficient number of their creditors. These objections, although filed before the recent amendments, were not brought to a hearing until after; and, as a matter of course, the first question which arose was as to the effect of those amendments. The counsel for the creditors claimed that the amendments applied and had changed the prior conditions upon which a discharge might be granted, and maintained that under section 9, of the act of June 22, 1874, these bankrupts, as these proceedings were voluntary, could not be discharged unless their assets were equal to 30 per cent. of their debts, or the prescribed number of their creditors had filed their consent thereto; that the other exceptions in section 33 of the original act, as amended, were repealed, and that it was now immaterial when the debts were contracted; that no discharge could now be granted unless the assets equaled 30 per cent. of all debts.

These various positions were controverted by the bankrupts' counsel. So it becomes necessary, first to determine whether the provisions of section 9 of the act of 1074, apply to cases pending, where an adjudication had been made before that act passed. On this question I am assisted by the opinion of Judge Blatchford in *re* Franke, 6 Chi. Leg. News, 414. In that case he holds that this section (9) is prospective only, that its provisions do not apply to pending cases, and, that the provisions upon the same subject in the prior acts, are not repealed by section 21 of the act of 1874, as to pending cases, because (he says) the provisions (of section 9), "have reference only to cases commenced after the passage of the act of 1874."

The conclusion that section 21 does not repeal the prior statutes as to pending cases, is incontrovertible, provided section 9 does not apply to such cases, for there would be no inconsistency between the acts unless they both applied to the same case or cases. So when it is settled that the last act refers only to future cases, it follows as a necessary sequence that the former acts are not repealed as to pending cases. I fully concur with the learned judge in his interpretation of the amended act, and agree with him that the provisions of the 9th section apply only to cases commenced after its passage. His views are in accord with those I expressed in Hamlin v. Pettibone, 1 vol. Central Law Journal, page 404, same case, 10, N. B. R. 173, in construing another provision of the act of 1874. I held in that case that section eleven applied to cases commenced after the passage of the act, and was not intended to apply to cases pending when passed, so as to make contracts valid that were void by the terms of the prior statutes (Hackly v. Sprague, 10 Wend. 113; Morton v. Rutherford, 8 Wis. 298; 2 Wis. 2371;) and that the repealing clause in section twenty-one was inoperative, except as to cases where the provisions of the amended act applied, and that as those provisions, then under consideration, did not apply to pending cases, the prior statutes were in force and unaffected by the repealing clause of the amended act.

The learned judge, in his opinion, referred to section 17, not noticed by me, as bearing upon the question as to what cases Congress intended the provisions of the amended act to apply. In that section it is enacted that "its provisions shall apply to cases of bankruptcy *now* pending or to be hereafter pending," from which, as well as from sections 10 and 12, it is fair to infer that the general provisions of the act were not intended to apply to pending cases. The general rule is that statutes are to have a prospective operation. In Harvey v. Tyler, 2 Wallace, 347, it is said "that it is a rule of construction that all statutes are to be considered prospective, unless the language is *express to the contrary*, or there is a necessary implication to that effect." And in United States v. Heth, 3 Cranch, 413, that "words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intent of the legislation cannot be otherwise satisfied. Sohn v. Waterson, 17 Wallace, 596. The act of 1874, construed according to these rules, must be held to apply to future cases except when otherwise provided.

If this was all there was of the 9th section, I should hold that the provisions of the prior law in reference to the conditions upon which a discharge could be granted, were still in force. This section, in the first place, provides, that in involuntary cases, the provisions of the original act, and of the amendments and supplements thereto, requiring the payment of any proportion of the debts by the bankrupt as a condition of his discharge, shall not apply, but that he may be discharged the same as if he had paid the required amount or had procured the consent of the requisite number of his creditors thereto.

But these provisions, according to our construction, only apply to cases commenced after the passage of the act, and do not authorize a court to order a discharge in pending cases without a compliance with the provisions of the prior statutes.

The next provision of the section (9) applies to voluntary cases, and reduces the value of assets from fifty to thirty per cent. and the proportion of creditors from one-half to one-fourth, to entitle a party to a discharge.

But this provision, like the preceeding one, only applies to future cases and does not affect the law as to existing cases. If this were all there was of the section, I should have no hesitancy in holding that the power of the court in granting discharges in pending cases was not changed. But it is not all. After prescribing these new conditions as to future cases, it reads, "and the provision of section 33 of said act of March 2, 1867, requiring fifty per cent. of such assets is hereby repealed." This cannot be treated as mere tautology. It must have some significance. It is true that section 33 had been amended by the act of July 27, 1868, 15, U. S. Stat. at L. 227, by inserting, among other things, in lieu of the word "pay," the words "equal to," but the fifty per cent. clause was retained.

The same section was further amended by the act of July 14, 1870, 16, *id.* 276, by declaring that the second clause of section 33, of the act of 1867, as amended by the act of 1868, should not apply to debts contracted prior to the first day of January, 1869.

Now, it seems to me that the obvious intention of this repealing clause in section 9, was to repeal the existing law requiring assets of the value of fifty per cent. of debts as a condition of obtaining a discharge. Unless this was the intention of Congress, the clause is destitute of meaning or operation. It is an express repeal of the provision of what was evidently supposed by Congress to be the law. It is different from the repealing clause in section 21, which depends wholly upon repugnancy. Judge Blatchford construed it as only repealing the section as originally passed, leaving the act of 1868 amending it in force. I think such construction too strict, and as not carrying out the palpable intention of Congress. It virtually nullifies the whole effect of the clause.

Technically, the 33d section of the act of 1867, in such respects as it had been changed by the amendatory act of 1868, had been repealed; so that unless the clause can be construed as embracing not only the original section and its amendments or "the section as amended," as it is spoken of in the act of July 14, 1870, it really has no significance or operation.

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It was unnecessary to insert such a clause for the purpose of giving effect to the 30 per cent. clause which preceded it, for that being inconsistent with the 50 per cent. clause in the prior statutes, was repealed by implication, so that unless it repealed the 50 per cent. requirement in the prior acts, I do not see that any effect can be given to it, which is contrary to all rules governing the construction of statutes. It is uniformly held to be the duty of courts to so construe a statute as to give effect to every part and clause if possible, and in this case effect can only be given to this clause, by holding that the repeal covers the 50 per cent. clause in the original section, and in the amendments of 1868.

I am, therefore, constrained to differ with the learned judge upon the meaning of this repealing clause, and must hold that the repeal of the provision, "requiring 50 per centum of such assets," applies to the amendatory act of 1868, as well as to the act of 1867.

The changes made by the act of 1874 are clearly in the interest of the debtor, and may be regarded as a disapproval by Congress of the energetic provisions of the original act as to him, and as expressive of its intention to relieve him of many of its requirements, among which the conditions imposed upon his obtaining a discharge, were perhaps the most embarassing. Having been often needlessly thrown into bankruptcy and ruined in business, it was not unnatural to increase the facilities for his discharge, by authorizing the court to order a discharge without reference to the amount of his assets in cases theretofore commenced. As the creditor had previously possessed great facilities for proceeding against him, it is apparent that Congress meant to give him increased facilities to obtain his rights, a discharge. This seems to be the spirit and meaning of the act of 1874; and I therefore hold that parties in both voluntary and involuntary cases, commenced before the 22d of June, 1874, may be discharged without reference to the question of the amount of assets, or the number of creditors assenting, provided they comply with the law in other respects.

But if I am wrong in this view, there is another answer to the objections interposed. If the statutes of 1868 and 1870 are in force, they do not include debts contracted before the 1st day of January, 1869. The claims proved up by the creditors opposing the discharge, are upon notes dated since that time, but the evidence, on the hearing, showed that they were given in renewal of notes given for a debt contracted before the 1st day of January, 1869. Now when was the debt contracted—when the renewal notes were given or when the liability was incurred? Notes are but the evidence of a debt, and the holder may surrender them and recover on the original consideration at his option. They are presumptively but an extension of the time of payment. Cole v, Sacket, 1 Hill, 516. The Kimbal, 3 Wallace, 37. The relation of debtor and creditor is considered for remedial purpose as having existed from the origin of the liability, and on application for a discharge, a bankrupt should be allowed to show when the debt originated or was contracted, and if before the 1st of January, 1869, I don't think a note given after that time would bring it within the category of a debt contracted after that date.

But it is insisted that this is not a complete answer to the objection, as the opposing creditors, Parker & Stone were sureties for the bankrupts upon the notes, and have paid them and proved their claims as sureties thereon. This is so, but the evidence shows also that they were sureties upon the original notes given before the 1st of January, 1869. The proof also shows that they did not pay until after January, 1869, and that they have proved their claim, as of the date of payment, and they insist that as between them and the bankrupts the debt must be considered as contracted at that time.

Section 19 of the bankrupt act authorizes sureties, endorsers and persons liable for the bankrupt, to prove the debt for which they are liable, when not proven by the creditor, without first paying it, and such debts being provable are released by the discharge. Now does the payment change the relation of the parties? A. surely cannot sue his principal at law until he has paid, and in such case, the suit is not upon the note but for money paid at the request of the principal. But the contract that the principal will pay the surety, if he has to pay the debt, arises at the time of making the instrument. The promise is implied from the request and signing. The obligation of the principal arises when the surety becomes liable for his debt. Stedman v. Martine, 15 East, 427. The surety's right of action is not complete until he pays; so the statute of limitation does not begin to run until that time. This liability of the principal is recognized by the bankrupt act in the provision that allows him to prove the claim before payment. I therefore hold that within the meaning of the bankrupt act, the liability of the principal to his surety must be considered as having been contracted when the instrument was signed.

This conclusion is supported by the cases of Mace v. Wells, 7 Howard, U. S. R. 272; Baker v. Vasse, 1 Cranch, C. C. R. 194; Craft v. Morse, 4 Comstock, 604, and Van Landan v. Coribie, 8 Taunt. 550, 3 B. & Ald. 13. As in this case the signing was before January 1, 1869, it necessarily follows that the opposing creditors do not occupy a position to insist upon payment of any portion of their debt before it can be discharged. Their objections are overruled and DISCHARGE ORDERED.

Taking Land for Railroads—Ejectment on Failure to Pay Damages—Waiver—Estoppel.

PROVOST v. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

Supreme Court of Missouri, August Term, 1874.

Present, Hon. WASH. ADAMS, " DAVID WAGNER, " W. B. NAPTON, " H. M. VORIES, } Judges.

1. **Taking Land for Railroads—Failure to pay Damages—Ejectment.**—Although the payment of the compensation fixed in the mode pointed out by law is a condition precedent to the right of a railroad company to enter upon the land of another for the purpose of constructing its road thereon, yet if the owner allows the company to enter upon his land and construct his road thereon without objection, he cannot afterwards maintain ejectment to expel it therefrom.

2. ——. ——. ——. **Case in Judgment.**—Where the charter of a railroad company provided that if, in condemning land for the roadway, the owner should be dissatisfied with the award, the company might, after the viewers had made their report, by tendering to the owner and paying into court the damages by them assessed, proceed with the construction of their work, as fully as if no disagreement had arisen; and where a jury of viewers reported the damages at $75, and, the owner objecting, other viewers were appointed, who afterwards assessed the damages at $175, which second assessment was confirmed by the court; and where the company, upon the coming in of the report of the first viewers, paid into court the amount of damages by them assessed, and thereupon entered upon the land and proceeded with the construction of their road across the same, the owners not objecting to such entry; and such road having been constructed and public travel established over it, and the company having failed to pay the increase of damages fixed by the second jury;—*it is held*, that the landowner cannot maintain ejectment. By permitting the company to enter without prepayment of the land-damages, he waived his right to the remedy by ejectment, and elected to rely solely on his remedy to compel payment of the damages.

The facts are fully stated in the opinion.

J. H. Shanklin and *M. A. Low* for appellants; *S. H. Corn* and *Thomas E. Turney*, for respondent.

WAGNER, J., delivered the opinion of the court.

This was an action of ejectment to obtain possession of a part of a lot in the town of Cameron, upon which the Chicago and Southwestern Railway had constructed its road.

The defendant in its answer, alleged that during the years 1870 and 1871, the company located and constructed its road over the land described in the petition, and on the 23d day of February, 1871, commenced the necessary proceedings in the circuit court to obtain the right of way over said land; that commissioners were appointed to assess the damages sustained by the plaintiff, by reason of the appropriation of the land to the use of the company; that on the 4th day of March, 1871, the commissioners reported the damages to be the sum of seventy-five dollars, which

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sum of money the company paid the clerk of the court for the use of the plaintiff; that exceptions to the report were duly filed by the plaintiff, and the report was set aside, and other commissioners appointed to re-assess the damages, at the August term of court; that upon the 15th day of March, 1871, the railway company entered upon the land and proceeded to construct its road thereon, and did construct its road, and continued to occupy the same until October, 1871, when it leased its whole line to the defendants, who have had possession and been running regular trains thereon ever since.

The replication stated that the commissioners appointed to re-assess the damages, report the same at one hundred and seventy-five dollars, and the court at its August term thereof, for 1872, confirmed the report in favor of the plaintiff, and against the company for that sum, and made an order, conditioned upon the payment of the judgment, that the right of way over the land, for the use of the road, should vest in the company. It was admitted that the amount assessed by the last commissioners had never been paid. The court then declared the law to be for the plaintiff and gave judgment accordingly.

The charter of the company under which the proceedings for condemnation were had, provides, that the persons appointed to view and value the lands, shall file their report in the office of the clerk of the circuit court, of the county in which the land is situated, and if no valid objections are made to the report, the court shall enter judgment in favor of said owner, against such company, for the amount of the damages assessed, and shall make an order vesting in the company the title to the land; that objections to the report must be filed within ten days after filing the report, which objection the judge may examine and confirm, or set aside the report and appoint three other viewers, who shall proceed in the same manner until the report is confirmed; provided, in order that the progress of the work may not be impeded, after the viewers have filed their report as aforesaid, the company, after having made a tender of the amount of damages to the person entitled to the same, or made a deposit thereof with the clerk of the court in which the case is pending, shall be authorized to proceed in the construction of the work, as fully as if no disagreement had arisen.

The main ground insisted upon by the plaintiff's counsel in support of the judgment below, is that the law is unconstitutional, because it takes private property for public use, without providing the owner with adequate means of obtaining compensation.

In the case of Walther v. Warner (25 Mo. 277) it was held that legislative acts authorizing the taking of private property for public use, are unconstitutional, unless they provide the owner with a proper remedy to obtain a just compensation; and that the remedy must be an efficient one, a mere judgment against a private corporation not being sufficient. In that case the company instituted proceeding, to obtain title of land on which it had located its road. A judgment was rendered against the company for the damages assessed, and an order was made transferring the title to the land, to the company, and the court decided that actual payment of the damages was essential to the vesting of the title in the company. There can be no question of the justness or soundness of the rule above laid down. No man can be deprived of his property, even in the exercise of the right of eminent domain, unless he is compensated therefor, and a mere judgment which might turn out to be wholly uncollectable would not be a compensation. Before the title can be absolutely vested, by virtue of such proceedings, payment becomes indispensably necessary.

But it is a different question that we are here dealing with. There is no pretence here that the defendant has acquired a valid, legal title, but the point presented for consideration, is whether the circumstances connected with its taking possession of the property, and constructing its track, and operating its road, will preclude a remedy by the action of ejectment. Nearly all the American states have the same constitutional provision that we have, and many of them possess a similar statute to the one under which this proceeding was had. It is very clear from the record, that the plaintiff was cognizent of all the facts, and knew every step taken by the company in regard to the location, construction and operation of the road over his property. He made no objections whatever to anything that was done in that report, only objecting to the report of the commissioners, on account of the inadequacy of the assessment. He pursued the statutory course, by having new commissioners appointed, and his damages raised, but then his interference ceased.

The case of McAulay v. Western Vermont Railway (33 Vt. 311), is strikingly in point. There, the parties not agreeing as to the price of the land, the defendants procured the damages to be appraised by commissioners in the manner provided by law. After the construction of the road on the premises had commenced, the plaintiff appealed from the award of the commissioners, and a reappraisal took place by other commissioners appointed by the court. The road was completed and put in operation, but the money was not paid, and the plaintiff brought ejectment to recover the premises. In delivering the judgment of the court, Redfield, Ch. J., said: "It being admitted, as it seems to be, that the plaintiff had full knowledge of the proceedings of the company to locate and construct their road upon his land, before and during all the time of the construction, and that he did not interfere in any way to prevent the occupation of the land for the purpose of the road, otherwise than by forbidding the hands working on the road until his damages were paid, and that on a single occasion, it becomes an important enquiry, whether he can maintain ejectment for the land, by reason of the non-payment of his damages. * * It is undoubtedly true that according to our general railroad statutes, and the special charters in this state, the payment or deposit of the amount of the land damages assessed or agreed, is a condition precedent to the vesting of the title, or of any right in the company to construct their road, and that if they proceed in such construction without this, they are trespassers, and this has been repeatedly so held by this court. This may have led to the misapprehension in the present case. But it is certainly a very serious misapprehension. In these great public works the shortest period of clear acquiescence, so as to fairly lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance. The party does not, of course, loose his claim, or the right to enforce it, in all proper modes. He may possibly have some rights analagous to the vendor's lien in England and here, until the legislature cut it off. But it is certain, according to the English decisions, that he cannot stop the works, and especially the trains upon the road, if he has in any sense, for the shortest period, clearly given the company, either by his express assent, or by his silence, to understand that he did not intend to object to their proceeding with their construction and operation. * * * In the present case it is not precisely a parol license under which the company claim to have built the road. The record title to the land would be complete, with the addition of the fact of payment, or the deposit of the amount of the appraisal. That is a fact resting always *in pais*, and being so, although a condition precedent, it may be waived by the party—in whose favor it exists—and this by parol merely. The waiver may be by parol, as well as the performance, and the waiver may be partial as well as total. If these allow, then, a waiver in fact, either express or implied by acquiescence in the proceedings of the company, to the extent of not insisting upon prepayment as a condition precedent, but consenting to let the damages be and remain a mere debt, with or without a lien upon the road bed, as the law may turn out to be, then it is impossible to regard the defendants, in any sense, in the light of trespassers or liable in ejectment."

As bearing further on this point, see the case of Baker v. The

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Chicago, R. I. & P. Railway, decided at this term [*supra*, p——]. As the judgment of the court in the present case only provided that the title to the premises should vest in the company, on condition of the payment of the money assessed to the plaintiff, of course, till the payment is made, the strict legal title does not pass. But the plaintiff was present all the time and witnessed the progress of the work and made no objection.

The company commenced proceedings under the statute for condemnation, and an award of commissioners was only given for this; plaintiff appealed, or what is the same thing, filed his objections, and had the amount raised. But he did not attempt to obstruct or in any wise impede the progress of the work. The plain inference was that he waived his right for prepayment of his damages and only intended to follow his remedy on his judgment. His conduct surely led the company to believe such was his purpose, and induced them to pursue a course and expend large sums of money which otherwise they would not have done. If plaintiff intended to rely on his rights and make present payment a condition precedent, he should have objected and forbidden the company to interfere or do any work on his land, till the question of damages was settled. But this he did not do, he acquiesced in the proceedings of the company to the extent of not insisting upon prepayment as a condition precedent, and after having done so, we do not think that he can maintain ejectment.

If, from negotiation in regard to the price of the land or for any other reason, there is just ground of inference that the works have been constructed with the express or implied assent of the land-owner, it would seem wholly at variance with the expectation of the parties, and the reason of the case, that the land-owner should retain the right to enter upon the land or to maintain ejectment. There are other effective and sufficient remedies. A court of equity would unquestionably interfere, if necessary, and place the road in the hands of receivers, until the damages were paid from the earnings. 2 Redf. Am. Railw. Cas. 2d Ed. 253.

But the only question that we are called upon to decide, is, whether under all the facts and circumstances of this case, ejectment will lie, and we think it will not.

The judgment must therefore be reversed, and the cause remanded.

The other judges concur, except Judge Sherwood, who is absent.

JUDGMENT REVERSED.

Notes and Queries.

ELKO, NEVADA, Sept. 11, 1874.

EDITORS CENTRAL LAW JOURNAL:—Rather a novel question has arisen here, upon which I would like to have your opinion. A. sues B. for $200 — in justice's court, and under the evidence was undoubtedly entitled to that much, but the jury returned a verdict for but $100—upon which judgment was entered. A. immediately gave notice that he would appeal the case, and protested against an execution being issued, but against his wishes it was issued—the money collected, and satisfaction of the judgment entered by the justice. A. then appealed. Can the appeal be sustained, and what is A.'s remedy? The appeal is all correct, except that it is from a satisfied judgment.

B.

ANSWER.—We are not familiar with the local statutes of Nevada regulating appeals, and cannot say what power the superior court has on appeal. But either by appeal or certiorari the superior tribunal should give A. a remedy, and will doubtless do so on proper application.

We are much obliged for the following, and hope other readers of the JOURNAL will aid each other in the same way in like cases:

SPRINGFIELD, MISSOURI, Sept. 28, 1874.

EDITORS CENTRAL LAW JOURNAL:—In answer to W. F. (*ante*, p. 482), with regard to assigning a lease from month to month, I would cite as follows:

The lease itself is not within the statute of frauds. Wag. Stat. p. 655, § 1. The assignment of the lease probably is within the statute, though I find no decision in Mo. Reports. See Brown on Frauds, Chap. 4, § 45, § 46. The language of the statute is positive. W. S., p. 655, § 2. Though the argument that interests, permitted to arise by parol should not require writing for transfer, is strong. Wagner's Statutes, 879, §§ 10, 11, may have some bearing on this case.

But in this case there was a good executory contract (Moss v. Green, 41 Mo. 389, on mutal promises) which contract, according to W. F., has been entirely performed by the assignor, and as it would be a fraud on the assignor, for the assignee to refuse to carry out his agreement, equity will interfere notwithstanding the statute of frauds. Farrar v. Patton, 20 Mo. 81; Dickerson v Chrisman, 28 Mo. 134; Townsend v. Hawkins, 45 Mo., 286; Sugget v. Cason, 26 Mo. 221; Self v. Cordell, 45 Mo. 345.

Frauds, etc., are not in the statute. Groves v. Fulsome, 16 Mo. 543. Cason v Cason, 28 Mo. 47; Cloud v. Irie, 28 Mo. 578.

Consult also, 7 Mo. 569; 20 Mo. 81; 31 Mo. 535; 42 Mo. 351.

Respectfully, F. H. SHEPPARD.

Book Notices.

WEEKLY NOTES OF CASES Argued and Determined in the Supreme Court of Pennsylvania, the County Courts of Philadelphia, and the United States District and Circuit Courts for the Eastern District of Pennsylvania. ELIAS L. BOUDINOT, Philadelphia, General Editor. Philadelphia: Kay & Brother, Publishers.

This publication, of which the number on our table is a specimen number only, is modeled after the "Weekly Notes," published by the English "Incorated Council of Law Reporting." We have been confidently looking for such publications to spring up in some of the states where the reports are two or three years behind the decisions—for instance, in Illinois and Tennessee. We formerly (*ante*, p. 72) had occasion to speak approvingly of a similar undertaking by Mr. Chaney, being a quarterly digest of the decisions of the Supreme Court of Michigan. That publication, excellent as it was, we regret to say, did not pay the printer, and is now issued gratuitously by a publisher as an advertising medium. We hope the present venture will have better success; although we think there is less need of it in Pennsylvania than in some other states; since Pennsylvania has several enterprising law journals, which publish *in full* all the decisions of the courts of that state (we presume) that are worth publishing, and that very soon after they are pronounced.

The following from the publisher's prospectus will indicate the scope of this publication:

"The Weekly Notes of Cases is intended to meet the wants supposed to be felt by the profession in the following particulars: First, in regard to the cases determined in the supreme court of the state. It is intended to give notes which shall preserve the numerous cases that it is impossible to incorate into the full official reports, which shall give a succinct account of what is argued and determined in that court, in a compact form, and so serve as a guide to the full reports, and which shall give such account immediately upon the determination of the causes, as it is found impracticable to do in the more elaborate reports. Secondly, in regard to the rulings of our local courts, both state and federal. These are not at present systematically reported at all, nor is it possible to do so on the plan pursued by our present weekly law publications. It is intended to give notes of these which shall preserve the rulings of the courts in the numerous practice-cases, whether written opinions are filed or not; and shall give the practitioner information, from week to week, of the decisions of these tribunals, many of which may never be reported, because not appealed from, and many more of which it is important for him to know when they are made, many months before they reach the appellate courts. As to the mode of reporting: It is intended to give 'notes,' not full reports, of cases. To state what the court in each case *held*, not what the judge who delivered the opinion said. The cases cited will be given, as far as practicable, with the names of the counsel engaged. And the endeavor will be made to report all causes determined, down to the Saturday preceeding the day of publication."

LAW OF JUDGMENTS. By A. C. FREEMAN. Second Edition, Revised and Enlarged. San Francisco, A. L. Bancroft & Co. 1874.

The first edition of this work appeared in January, 1873, and already we have the second edition, whose value has been increased by the addition of a large number of cases. The word Judgment is used by the author as equivalent to the acts of judicial tribunals' finally determining the rights of parties in civil actions and proceedings at law and in equity. The author has demonstrated that he is an accomplished lawyer—for none but such could produce a work which displays, on almost every page, skill in treatment and good judgment in the selection and use of the materials at his disposal. The Law Reports, state and federal, show that the Pacific coast possesses in proportion to numbers, more able lawyers and judges, perhaps, than can be found in any other portion of the country, and Mr. Freeman's work is one in which the profession there have a good reason to feel a just pride. A writer on the subject of Judgments is constantly tempted to get into the field of executions or judicial sales, and if he once yields to the temptation, the character of his treatise will be changed. If this latter subject were exhaustively treated it

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would expand the volume into two; if defectively treated, it had better be untouched. Mr. Freeman, we are glad to observe, has rigorously confined himself to Judgments, and has thus been able to keep his work within manageable limits, and to have room to do well what he undertakes to do at all. We have no hesitation in recommending his work as one of great merit, and which will be found useful to every practising lawyer.

The decisions, down to the time when the work went to press, are very fully collected, although it is scarcely practicable—perhaps not desirable—to include them all. A judicious selection, criticism and comparison of cases is better, on a subject where the cases are legion, than to attempt to collect them all. Since Mr. Freeman's work was on the press the Supreme Court of the United States has pronounced some important judgments on the subject of which Mr. Freeman treats—notably, Thompson v. Whitman, 18 Wall. 457 (*ante*, p. 308), and Galpin v. Page, Ib. 350. In the case first cited, the constitutional provision, and the act of Congress of May 26, 1790 (1 Stats. at Large, 122), as to the faith and credit to be given to judgments of sister states, are examined in a well considered opinion by Mr, Justice Bradley, and the sound conclusion reached that such a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be successfully cantradicted, the judgment is a nullity, though the record of such judgment may *recite* that the requsite jurisdictional facts existed. Galpin v. Page, *supra*, reverses the same case cited by the author, sec. 131, reported, 1 Sawyer C. C. Rep. 318. After the reversal, the case was again tried in the circuit court, before Mr. Justice Field of the Supreme Court of the United States, and judgment was entered for the plaintiff, August 31, 1874. This able and learned judge accompanied the judgment with an elaborate opinion upon the subject of the presumptions of law in favor of the acts of courts of general jurisdiction, and considered with great care the extent and limitations of such presumptions. The case is one of unusual importance, and we present it to our readers in another place.

We welcome Freeman on Judgments, as a substantial addition to the law literature of the country.

THE LAW OF LIFE INSURANCE, WITH A CHAPTER ON ACCIDENT INSURANCE. BY GEORGE BLISS. Second Edition. New York: Baker, Voorhies & Co. 1874 pp. 793.

The subject of the Insurance upon lives, by reason of the peculiarities which distinguishes it in important respects from other Insurance, and of the vast magnitude of the interests involved in the business, deserves separate treatment. Life Insurance is the growth of the last twenty-five years, and in that time, both in this country and in Europe, it has attained an enormous development. The author, in his Preface, states that, while in 1858 there were in force less than 43,000 policies insuring about $116,000, there were at the close of 1870, nearly 740,000 policies in existence, insuring nearly $2,000,000,000,—a sum little less than the national debt.

In the important case of Anderson v. Fitzgerald, 4 House of Lords Cases, 483, 505, which involved the meaning of a provision in a life policy, Lord Leonards in delivering his opinion, very truthfully observed: "My Lords, I believe that a more important case than the present has not come before your lordships during this session. Because, although the point turns simply upon the proper construction of the instrument, yet it leads to such important consequences with regard to insurances for life, which are so common in this country, and upon which many persons entirely depend as their security for a provision for their families, that it becomes exceedingly important to consider maturely what is the true construction of an instrument of this sort."

The author was therefore well justified in devoting a work to this highly important branch of the law of insurance.

The practical judgment of the profession has anticipated our favorable opinion of this Treatise, by calling for a second edition within three years from the publication of the first.

Mr. Bliss is the district Attorney of the United States, for the Southern District of New York, and is well-known as an able lawyer who has been for years in full and active practice. This has been a fitting preparation for useful and successful legal authorship, for in no other way can the wants of the profession be so fully appreciated or so well supplied. His work is no doubt all the better for "having been completed," as the author informs us, "amid the pressure of an active practice, and chiefly in hours stolen from recreation and rest."

It is the design of the author to refer to every reported case on the subject, down to the time of his work going to press, and in this he has, no doubt, substantially succeeded, but it is quite unimpossible not to overlook a few cases. The omissions however, are signally few and unimportant. In conclusion, we can concientiously indorse Mr. Bliss' work as a good one, and cordially recommend it to the profession.

Summary of our Exchanges.

The Alabama Law Journal for October 3, has an article on Geographical Names as Trade-marks, in which it reviews the following cases: Brooklyn White Lead Co. v. Masury, 25 Barb. 416; Candee v. Deere, 54 Ill. 439; S. C. 5 Am. Rep. 125; Newman v. Alvord, 51 N. F. 89; See v. Haley, L. R. 5 Ch. Ap. 155; Wotherspoon v. Currie, L. R., 5 H. of L. 508; Radde v. Norman, L. R. 14 Eq. 348; Lea v. Wolff, 1 N. Y. S. C. Rep. 626; and finally, the late case of Delaware & Hudson Canal Co. v. Clark, Supreme Court of the United States.

It also has an article on the effect of mistakes in recording conveyances, in which the following New York cases are noticed: Frost v. Beekman, 1 Johns, Ch. 288; Ford v. James, 4 Keyes, 300; Peck v. Williams, 10 N. Y. 518, and N. Y. Life Ins. Co. v. White, 17 N. Y. 469.

It also has a curious and instructive article by C. H. T., on Salaries of Judges.

It publishes in full the important decision of Judge Blatchford in *re* Scull, which we have already noticed, *ante*, p. 399.

It publishes the report of Dr. J. B. Miles, the general secretary of the Association for the Reform and Codification of International Law, as to the past procedure and present position of the conference.

It reports a case determined in the English Queen's Bench—Taylor v. The Liverpool and Great Western Steam Company. In this case the plaintiffs shipped on board the defendants' ship at Liverpool for New York certain boxes of diamonds, under bills of lading, excepting amongst other things, "robbers, thieves, barratry of the masters and mariners," and containing a clause that "the ship owner is not liable for any damage to any goods which is capable of being covered by insurance." One of the boxes of diamonds was stolen when on board the ship either on the voyage or after her arrival in port, before the time for delivery arrived, but there was no evidence to show whether they were stolen by one of the crew, or by a passenger, or after her arrival, by some person from the shore. *Held* 1. That "damage to any goods" in the insurance clause did not apply to the case of a total abstraction of the goods; 2. That the word "thieves" applied, as in policies of insurance, only to thieves external to the ship, and not to a passenger or one of the crew; 3. That the onus of showing that the loss came within one of the exceptions lay upon the shipowners, and not the shipper; and that, as the defendants had failed in showing that, the plaintiffs were entitled to recover.

Our excellent contemporary, the Chicago Legal News, has had a strike among its printers, owing to a disagreement about paying full price of composition for blank pages in the printing of briefs. The proprietors refused to pay this, and hence a strike, 45 printers putting on their coats. In three hours the plucky and energetic president of the News Printing Company had their places supplied by non-union printers or "rats," and the journal comes out on time, looking as well as usual, and with four extra pages.

The present number of the Legal News (Oct 5) publishes *re* Perkins, which we also publish elsewhere.

In *re* Atkinson, Mr. District Judge Nelson, District of Minnesota, rules that an assignee in bankruptcy may settle an indebtedness of the partnership, by cancelling a debt due from the same person to the separate estate of one of the members, placing the proceeds to the proper account; that if the claim is disputed, and is one that has been returned in the schedules, assignee may retain in his possession, until the final decision, as much of the proceeds which would otherwise belong to the creditor of the partnership as is necessary to satisfy the debt due from the partnership creditor to the separate estate of one of the members.

In Brooke v. McCracken, Mr. District Judge Deady, District of Oregon, holds that the action given to the assignee by Sec. 35 of the bankrupt act to recover property or the value thereof, transferred contrary to such section, is within the jurisdiction conferred upon the Circuit Court by Sec. 2 of said act prior to the amendment of June 22, 1874; and that the amendments of june 22, 1874, to Sec. 35 of the bankrupt act are not retroactive. This opinion affirms Hamlin v. Pittibone, *ante*, p. 404.

The case of the Northwestern Fertilizing Co. v. Village of Hyde Park, Supreme Court of Illinois (Walker, J.) is an able opinion on the power of courts to abate a nuisance, although the nuisance is committed in carrying on business authorized by the charter of a corporation. The court hold that the charter of a corporation cannot confer the right to commit a crime.

In Michigan State Insurance Co. v. Lewis, the Supreme Court of Michigan, (Mr. Justice Cooley) rule an interesting point in fire insurance. The plaintiff made application for insurance and told the agent of the company that the incumbrance on the property was a mortgage of near $5,300 and said nothing about the accrued interest, and the mortgage was for $325 more, and the agent filled out the application stating the mortgage to be for that amount; *held*, that this was not such a misrepresentation as would make the policy void; nor was the policy annulled by the commencement of foreclosure proceedings.

Voris v. Sloan, Supreme Court of Illinois, is a case where land was settled upon trustees for the benefit of a female and the heirs of her body. She married and had two children. The husband having died, she and her children

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were reduced to extreme poverty. The property could not be rented, by reason of the uncertainty of the tenure. They could not pay the taxes, nor could the trustees, who had already advanced some $900 for this purpose, advance any more. *Held*, that this was a case where a court of equity would break in upon the terms of the trust and sell the land.

Gage v. Lewis is an interesting decision of the same court, involving the law in regard to fraudulent representatjons.

The Western Jurist, for September, (Mills & Co., Des Moines, Iowa), has an able article on Monopolies—Railroads—National Banks. It has two articles on the subject of an elective judiciary. Another article, Elements of Success in a Lawyer, is an extract from an address of Professor Washburn before the Harvard Law School.

It reports three decisions of the Supreme Court of Iowa:

The Iowa Railroad Land Co. v. Carroll county, holding that a tax levied to pay interest upon county bonds issued in satisfaction of judgments rendered against the county, is legal and cannot be enjoined; and that under chapter 87 of the Iowa laws of 1872, (page 92) a county, (or any other municipal corporation), has power to issue bonds in payment of judgments rendered against such county whenever the same are demanded by the creditor and the parties can agree as to their character.

Also McLaughlin v. Bascom, holding that where in an action of slander, the words spoken are ambiguous, they are to be construed in the sense in which the hearers understood them; and that in such case it is the province of the jury to determine the sense in which the words were understood.

Also State v. Laffer, holding that under, the provisions of sections 3636, 4426, and 4556, of the Code, a defendant, indicted for a public offense, is not a competent witness in his own behalf. And that the following instruction was correct: "If you find that the defendant sold any of the intoxicating liquors named in the indictment, at the time and places named therein, notwithstanding they may have put into it roots and tinctures, unless it changed the nature or character of the liquors, so that it was no longer whisky or brandy, or whatever it may have been originally at the time of the sale, it was a violation of the law. If its distinctive character as an intoxicating liquor was so destroyed that it could not be used as a beverage, and it became in fact a medicine to be used for diseases, and of such a character that it could not, in reason, be styled or used as an intoxicating drink, its sale was not a violation of law." And that courts will take judicial notice that the county seat where the court is being held is within the limits of the county, and may so inform the jury.

The Westurn Jurist also contains a large amount of other interesting and readable matter, mostly selected.

The Legal Intelligencer, for October 2, publishes Piper v. Baldy, U. S. Circuit Court Western District of Pennsylvania, Mr. Chief Justice Strong, of which the syllabus is as follows: Judgment notes given *bona fide*, and for an amount actually received, will not be set aside merely because they were entered a month before a petition in bankruptcy was filed against the defendant. Some of the notes were dated three and four years before the petition was filed.

Also the following decisions of the Supreme Court of Pennsylvania: Glenn v. Township of Ayr: When an act of assembly is in furtherance of the very spirit and intent of the contract, it is not an attempt to change the contract. Parol evidence should, therefore, have been admitted, under the act of March 24th, 1865, to show that the plaintiff was virtually a volunteer and entitled to the bounty.

Watson's Executors v. Stern: Where a daughter proves an express promise by her father to pay for her services, and also an acknowledgement within six years of this, she is entitled to recover against his estate.

The Blair Iron and Coal Co. v. Lloyd *et al.*: Liability for and measure of vtndictive damages are questions for the jury.

The Legal Intelligencer also publsshes the opinion of Mr. Justice Field, in the Supreme Court of the United States in Weber v. Harbor Comissioners, with the following syllabus, which is kindly taken from the Chicago Legal News (Vol. 6, p, 408) without credit:

That a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to consruct a wharf projecting into the stream for his own use, or the use of others, subject to such general rules and regulations as the legisiature may prescribe for the protection of the public.

In the absence of legislation the common law would govern in states which have adopted it. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tide-waters is, in England, in the king, and in this country in the state, and any erection thereon without license is an encroachment upon the property of the sovereign, which he may remove at pleasure.

That the complainant is not the proprietor of any land bordering the shore of the sea. His land is situated nearly half a mile from what was the shore of the bay of San Francisco, at the time California was admitted into the Union, over it the water at the lowest tide then flowed at a depth sufficient to float vessels of ordinary size. That although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state, and when California was admitted into the Union upon equal terms with the original states, absolute property in, and dominion and sovereignty over all soil under the tide-waters within her limits passed to the state, with the right to dispose of the title to any part of said soils, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states.

Legal News and Notes.

—THE Supreme Court of California has pronounced the local option law of that state unconstitutional.

THE governor of Missori nas appointed Edward A. Lewis, Esq., a judge of the supreme court, in place of Judge Adams resigned.

—IN the United States Circuit Court at Providence the jury in the case of Hon. E. R. Hoar v. George Washington Bowen, being an action to recover counsel fees in the Jumel cases, returned a verdict for the defendant.

—THE Supreme Court of Illinois has decided that mandamus will not lie compelling the Illinois Central Railroad Company to sell the lands donated them by the general government.

—ALL the Judges of the Supreme Court of the United States, will be in attendance at the opening of the court, October 12, and will commence on the docket, preparations for which are now being made by the officers of the court.

—THE Attorney General decides that under the act of June 20, 1874, providing for a redistribution of currency, the Comptroller of the Currency must rely upon requisitions upon States having an excess of circulating notes to make up the deficiencies to the States having less than their due proportion of currency, and that circulation is to be issued to the deficient States as applications are made, and to supply the amount so issued. Requisitions are then to be made upon the States having an excess.

—HON. ANDREW G. MILLER Formerly United States District Judge for the District of Wisconsin, died recently in Milwaukee. Judge Miller occupied a seat on the federal judicial bench with marked ability for thirty-five years. As an admiralty judge he had but few superiors. Judge Miller was born in Pennsylvania, where his youth and early manhood were passed. He went to Milwaukee in 1838 as a territorial judge, under appointment of President Van Buren. In 1845 President Polk appointed him district judge of Wisconsin, and that position he held until January last, when he resigned under the new law of Coneress.

—JOSEPH H. BRADLEY, Esq., who was suspended from the roll of the Supreme Court of the District of Columbia, in 1867, has been readmitted. It will be recollected that a difficulty sprung up between Mr. Bradley and Judge Fisher, when the latter was presiding in the Criminal Court in 1867, and Mr. Bradley was defending John H. Surratt on a charge of conspiracy against the United States at the time Mr. Lincoln was assassinated, and that Mr. Bradley challenged Judge Fisher to fight a duel, and that it was for this act Mr. Bradley's name was stricken from the roll of attorneys. Mr. Durant having moved for Mr. Bradley's readmission, Chief Justice Cartter said he saw no reason why what had passed between Messrs. Bradley and Fisher should not be forgotten. He thought there was no good reason to believe that an enmity still existed, and he would say that Mr. Bradley's name would be restored to the roll.

—HON. JOHN GANSON, an eminent lawyer of Buffalo, New York, died recently in that city, in the 57th year of his age. He was born at Le Roy, Genesee county, New York; received a good education, graduated at Harvard in 1839, studied law and was admitted to the bar. About 30 years ago he removed to Buffalo, and soon acquired and maintained an extensive and lucrative practice. He and his late partner, James M. Smith (now Judge Smith) were solicitors for the New York Central Railroad Company, aud retained that lucrative position when Mr. Vanderbilt acquired control. Although he avoided politics and preferred the labors of his profession, yet he was twice elected by the democratic party to the state senate, and once (in 1862) to Congress. A writer in the New York Tribune says: "Mr. Ganson's ability as a lawyer was very great. He held numerous briefs in cases before the court of appeals, and was intrusted with the managemant of the most important suits. In politics he exercised a just influence in the councils of his party, but never used it to aid corruption or to shield incompetency. In person he was tall and well proportioned. His complextion was light and his features were expressive of intelligence and discernment."

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
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ST. LOUIS, FRIDAY, OCTOBER 16 1874.

SUBSCRIPTION:
$8 PER ANNUM, in Advance.

In order to include in each number of the JOURNAL a summary of our legal exchanges published the preceeding week, we are obliged to change our day of publication from Thursday to Friday.

GOVERNMENT POLICE ON RAILWAY TRAINS.—The frequent and wholesale robberies which are committed on passenger trains on our great railway lines, are sufficient to direct public attention to the question whether the power does not reside in the general government of establishing a system of national police on inter-state railroads, and whether, if it exists, it ought not to be exerted. If such power does not exist, it is worthy of consideration whether the constitution ought not to be amended so as to confer it. If railroads and telegraphs had existed at the time the constitution was established, there can scarcely be any doubt that the jurisdiction of the federal government would have been extended expressly and fully over these great means of inter-state communication. Shall a citizen of New York or Virginia be liable to be insulted and robbed with impunity while crossing the state of Missouri on a railway train, because the latter state is afflicted with a timid and imbecile state government? The robbery of an entire passenger train on the Iron Mountain Railroad, in Missouri, during the past summer, and recent repetitions of the same thing on passenger trains on the Central Pacific Railroad, in Nevada, information of which the management of that road have endeavored to suppress, call up this question in a forcible manner. The hight point to be insisted upon is, that the citizen *must* have protection against such outrages at the hands of his government, and if the local governments cannot or will not grant it, the general government must.

The Supreme Court of the United States.

This court met on Monday last. All the justices were present, except Mr. Justice Davis and Mr. Justice Bradley. The former remained in Illinois to attend the dedication of the Lincoln monument, and the latter is detained in New York on account of sickness in his family. It is understood that several cases of great importance will come before the court at the present term. Among these are the so-called Granger cases, involving the constitutionality of the Wisconsin railroad law. The opinion of the Supreme Court of Wisconsin in these cases has not yet been published in full, so far as we know. It is of such unusual length that it would occupy thirty-two pages of this journal, set in the smallest type we use. Next, if not superior in importance to these, is the Louisiana Grant Parish case. It will be recollected that several convictions were had last summer, in the United States Circuit Court for the District of Louisiana, under the Kuklux law, of persons implicated in the Grant Parish riots. A motion was made in arrest of judgment, which was argued before Mr. Justice Bradley and Mr. Circuit Judge Woods. These judges differed in opinion, Mr. Justice Bradley delivering a very able and elaborate opinion in favor of arresting the judgment, and Judge Woods dissenting. The case is therefore before the Supreme Court of the United States, on a certificate of division of opinion. Mr. Justice Bradley's opinion will be found in full in the American Law Register, for October, with a commendatory note by Judge Redfield. Another case, scarcely less important than either of the foregoing, is the case of Ah Fong and others, involving the right of a state to prohibit the immigration of lewd and debauched woman, brought over from China for purposes of prostitution. We publish elsewhere an opinion of the Supreme Court of California affirming this right, and an able opinion of Mr. Justice Field, in the Circuit Court of the United States for the District of California, denying it. In view of the fact that large numbers of Asiatics are immigrating to our shores, this case assumes great importance, and interests the people of the inland, as well as those of the seaboard states. A telegram from Washington states that this case will come before the supreme court at the present term.

Naturalization of Aliens—A New Ground of Rejection.

Mr. Chief Justice McKean, of the Supreme Court of Utah Territory, performed an act the other day for which he deserves the thanks of the country. American courts of justice, so far as we know, have never thrown any captious or illegal objections in the way of aliens seeking naturalization as citizens. On the contrary, the duty which the act of Congress imposes upon them of *satisfying themselves* that the applicant "has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well-disposed to the good order and happiness of the same," has never been performed other than in the most formal manner, and generally not at all. But we have at last found a judge who has felt it his duty to exercise this high function more faithfully; and therefore, when Chief Justice McKean rejected a Norwegian named Sandra Sanders, for having the insolence to tell him, in answer to an interrogation, that he (Sanders) knew of no *constitutional* law against polygamy, he performed an act as to which all the people (except the Saints of Utah) will say amen. Whilst we admit to our shores and to the privileges of American citizenship, all well disposed foreigners who may come hither from the continent of Europe and from the British Islands,—not grudgingly and suspiciously, and hampered with degrading conditions, as the Emperor Valens received the Goths into the Roman Empire, but with a free and cordial welcome, yet we can dispense with the votes of such as assume to pass upon the constitutionality of our laws in advance of the courts of justice which we have established for that purpose. The opinion of Chief Justice McKean in this case (which we find in the Chicago Legal News) is as follows:

McKean, Ch. J.—The petitioner, a native of Norway, applied to be admitted to citizenship. The constitution (art. 6, sec. 2) provides that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." The statute requires that it shall appear "*to the satisfaction of the court*," that the applicant for citizenship "has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well-disposed to the good order and happiness of the same." 2 Stat. at Large,

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153-4. In this territory, therefore, where disobedience to federal authority is taught as a, so-called, religious duty, this court deems it an imperative duty to subject applicants for naturalization to a more rigid examination than would be necessary under other circumstances. The petitioner, Sanders, was therefore interrogated touching his obedience to the law against polygamy, and, with a manner bordering upon insolence, he replied: "I don't know any constitutional law against polygamy!" Here is an alien who comes from a country where polygamists are summarily and severely punished, who asks for the high privilege of American citizenship, and has the effrontery to deny, in the same breath, the constitutionality of one of the fundamental laws of all Christian civilization. He should be but to happy too be permitted to go at large in this country. His petition is rejected.

Lawyers' Assurance Associations.

The Nashville Commercial Reporter, in its department devoted to legal matters, has an editorial under the above caption, which contains the following sugestions:

Why it is the legal profession in the United States do not organize an assurance association as a means of protection to their families, in case of death, we cannot understand. Certainly no class of men need such an institution more than lawyers.

Generally they are poor, and when they die, leave their families in indigent circumstances, and by such an association they could be assured that their families would be protected against absolute want. As a rule, lawyers are extravagant; they live high, and spend all their income on their families. Their wives and daughters move in the best circles of society, and to enable them to do so, it requires all the money a lucrative practice will provide. There is too little care for the future. "Let every day provide for itself," is the adage; and so while health, strength and life lasts, the wife and family are well-fed, well-clothed, and well provided for; the sons and daughters are educated generally at the best schools the country affords; but there is not a cent laid away for a rainy day or hard times, and when death comes and he is torn from his family, and no provision has been made, they are truly distressed. Accustomed to have every want gratified, and thus suddenly penniless, not only mortifies pride, but it brings absolute want and distress.

There ought to be some remedy provided against such a state of things, and we have long thought a remedy would be provided. Suppose an association composed exclusively of lawyers was formed with 1,000 members, and each member was required to pay three or five dollars into the treasury every time a member died; would not this leave a sum sufficient to protect the family from immediate want, and, indeed, be sufficient, with such help as they could give themselves in ordinary cases, to make them comfortable. Such associations have been formed and successfully carried out by various classes, as locomotive engineers and railway conductors, and it has proven a blessing to many a poor man's family.

Of course the officers should get no salaries, and should hold their offices for a term, and then be exempt from the duties of the office ever afterwards. The expenses of the association would be small, only sufficient money would be required to get books to keep a record of the association, and stationery and postage to enable the secretary to keep in communication with all the members.

No man ought to be received into the association who is under twenty-one or over sixty years of age, and who is not in good standing with the profession and in good health; if any member failed to pay his dues after thirty to sixty day's notice, he should forfeit his membership, and he should not be reinstated, except in case he paid all his dues unpaid at the time of his application to be re-instated, and then only by the consent of a majority of the members of the association.

We earnestly second the foregoing suggestions. Whilst nearly every other avocation, trade or guild has its protective or benevolent union, the members of that profession which leads all others in its importance, seem to have entirely neglected such an arrangement, for what reason we cannot understand. The necessity for it is apparent everywhere. In every large city there are widows of able lawers and judges who have lived in affluence and in the highest circles of society, and who have been reduced by the death of their husbands to extreme want. Some of them are keeping boarding-houses, and some are pursuing even more onerous means of obtaining a livelihood. Their children in the meantime receive the cold shoulder from their former associates, and feel in this way the hand of poverty laid on them with cruel weight. Again, there are among us broken-down lawyers and judges who subsist in part, at least, by the precarious alms which they may be able to levy here and there upon their more fortunate brethern. The existence of these things is a standing reproach to the profession.

It may be said that a provident attorney may, like any other person, provide against the recurrence of these evils by keeping in force a policy in a safe life insurance company. But this is only a partial preventive, and besides it has serious disadvantages. In the first place, these associations pay such large commissions to agents, such large salaries to officers, expend so much in advertising, and, as there is reason to believe, in many cases *steal* so much, that life insurance in ordinary companies costs vastly more than as it is actually worth. Besides, lawyers are, it is believed, as a general rule, a long lived class; their lives are singularly free from the accidents which attend many other occupations; and this affords a conclusive reason why they should not pay the high rates of insurance, necessary in an association whose risks cover all classes and occupations. Furthermore, the schemes of life assurance associations do not embrace all the objects of such an association as we have in view. A lawyers' assurance society should not only pay over to the family of each member a round sum on the happening of his death, but it should (if need be) support him in sickness, and pension him in old age. We earnestly ask the attention of our readers to this subject.

Power of a State to Exclude Foreigners From its Limits, and to Prevent Their Landing, on Account of the Immorality of their Past Lives.

I. IN THE MATTER OF AH FOOK *et al.*

Supreme Court of California, September 7, 1874.

Present, Hon. WILLIAM T. WALLACE, Chief Justice.
" JOSEPH B. CROCKETT, } Judges.
" ADDISON C. NILES, }
" E. W. MCKINSTRY, }

Police Power of the States over Chinese Immigration—Burlingame Treaty—Fourteenth Amendment.—A state has power by law to exclude from its shores immigrants who fall within the designation of lewd, debauched or abandoned women. Such a law is not repugnant to the treaty of July 28, 1868, between the United States and China, by which the United States guarantee to "Chinese subjects visiting or residing in the United States," "the same privileges, immunities and exemptions, in respect to travel or residence, as may be enjoyed by the citizens or subjects of the most favored nation;" nor is it in conflict with that provision of the 14th amendment of the federal constitution, which provides that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." [*Contra*, next case.]

Opinion by MCKINSTRY, J.—WALLACE, C. J., CROCKETT, and NILES, JJ., concurring.

In response to the writ to him directed, the master of the steamship Japan returns that, on the arrival of the ship in the harbor of San Francisco, she was boarded by the commissioner of immigration, who examined the persons named in the writ—who are Chinese women and were passengers—and, on such examination, declared them to be lewd, debauched and abandoned women, and thereupon refused to permit them to land.

The commissioner justifies by reference to section seventy of amendments to the political code.

Whatever the grammatical errors found in the section, we think the meaning of the legislature is made sufficiently apparent by the language employed.

It is made the duty of the commissioner to satisfy himself that passengers are or are not included in any of the classes specified

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in the statute, and to prevent from landing those by him determined to belong to such classes, unless the master, owner or consignee of the vessel shall give the bond mentioned.

On the argument it was admitted that the statute—thus construed—is valid and effective, unless— 1. It contravenes the stipulations of the treaty between the United States and the empire of China, concluded at Washington on the 28th of July, 1868, and commonly cited as the "Burlingame Treaty;" or unless—2. It is in conflict with that portion of the fourteenth amendment of the constitution of the United States which provides that no state "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

1. The only portion of the treaty which can be supposed to limit the power of state legislation upon the subject, is the sixth article. This article (in language similar to that which will be found perhaps in every original treaty between the United States and a foreign power), provides: "Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions, in respect to travel or residence, as may be enjoyed by the citizens or subjects of the *most favored nation*."

If, in the exercise of its power, the state can exclude the persons mentioned in the statute, or require on their behalf security that they will not become a public charge, the treaty is not violated; since the act of the legislature, by its terms, applies to all passengers arriving from foreign ports, and is not made applicable to Chinese subjects alone. Whether the power to exclude resides in the federal or state government, the treaty is not contravened unless a discrimination is made against the subjects of the Ta-Tsing Empire.

The language of the treaty does not compel us to hold that such legislation as that complained of was intended to be prohibited; assuming, for the purposes of this case, that it could be prohibited by treaty. The subjects of China "visiting or residing in the United States," or those traveling for instruction, or from curiosity, or engaging in some legitimate avocation, and whose ingress may not lawfully be prohibited by reason of some objection *personal to themselves*, and not dependent upon their nationality. Otherwise, we should be prohibited from excluding criminals or paupers—a power recognized by all the writers as existing in every independent state. We can but think, that to give to the general language of the treaty a construction which would deprive both the state and the United States government of this power of self-protection, would be a departure from the evident meaning and purpose of the high contracting parties.

2. The question of the power of the legislature to authorize the commissioner of immigration to determine whether particular individuals come within the prohibitions of the statute, is not essentially affected by the fourteenth amendment. A clause, substantially the same as that contained in the amendment, is found in the constitution of California, and in the constitutions of all of the several states. It is a distinct provision from that which protects the right of trial by jury, and is usually declared as an alternative, as in *Magna Charta*—"*Nisi per legale judicium parium, suorum, vel per legem terrae.*" It would be difficult, perhaps impossible, to find in the reports a definition of the terms "law of the land," or "due process of law," which is accurate, complete and appropriate under all circumstances. The peculiar necessities which call for the action of an officer, and whether a power was exercised in the same manner prior to the adoption of the constitution, without being regarded a violation of the principles of *Magna Charta*, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person who is subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit—the case being one in which the end sought to be attained is lawful—a statute cannot be said to deprive a party of the benefits of due process of law.

Mr. Justice Cooley (Cons. Lim. 356), says: "Due process of law in each particular case means such an exertion of the powers of governments as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

It is obvious that, to render effectual an enquiry which has for its purpose the carrying into operation of quarantine or health laws, must be prompt and summary, and we are not aware that any reasonable provisions of a statute clothing such officers or boards with the enlarged powers often exercised by them, has ever been held unconstitutional.

If the power to exclude such persons as are named in the seventieth section of the amendments to the political code exists at all, it is of the same nature as the power which isolates those ill of contagious diseases, or those who have been in contact with such, or the power to prohibit the introduction of criminals or paupers. These powers are employed, not to punish for offences committed within our borders, but to prevent the entrance of elements dangerous to the health and moral well-being of the community. If the power is to be exercised so as to accomplish the object sought to be attained, those coming here must be met at the threshhold by some official authorized to determine whether any of them belong to the classes who are not entitled to enter unconditionally. The law appoints the commissioner of immigration to that duty, and we cannot see why his judgment should not be decisive.

But whether his determination of the question of fact is or is not conclusive, the evidence satisfies us that in the present cases it was correct.

These persons must be remanded. Counsel will prepare their proper order. PETITIONERS REMANDED.

II. IN THE MATTER OF AH FONG.

In the United States Circuit Court, District of California, September 27, 1874.

Before Hon STEPHEN J. FIELD, one of the Justices of the Supreme Court of the United States; Hon. LORENZO SAWYER, Circuit Judge, and Hon. OGDEN HOFFMAN, District Judge.

1. **Regulation of Immigration— Police Power of State.**—The police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries. The state may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots and lunatics and others, who from physical causes are likely to become a charge upon the public, until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone.

2. ——. **Limitation of Power.**—The extent of the power of the state to exclude a foreigner from its territory is limited by the right of self-defense. Whatever, outside of the legitimate exercise of this right, affects the intercourse of foreigners with our people, their immigration to this country and residence therein is exclusively within the jurisdiction of the general government and is not subject to state control or interference.

3. ——. **Chinese Immigration—Burlingame Treaty.**—The 6th article of the treaty between the United States and China, adopted on the 28th of July, 1868, provides that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation; and as the general government has not seen fit to attach any limitation to the ingress into the United States of subjects of those nations, none can be applied to the subjects of China. [Contra, preceding case.]

4. ——. **Fourteenth Amendment—Right of Aliens to Equal Protection of the Laws.**—The fourteenth ammendment to the constitution declares that no state shall deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* the equal protection of the laws; *Held*, that this equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class, from all charges and burdens of every kind. Within these limits the power of the state exists, as it did previously to the adoption of the amendment, over all matters of internal police [Contra, preceding case.]

5. ——. ——. ——. **Construction of § 16 of Enforcement Act.**—On the 31st of May, 1870, Congress passed an act declaring that "no tax or charge shall be imposed or enforced by any state upon any person immigrating thereto from a foreign

country, which is not equally imposed or enforced upon every person immigrating to such state from any other foreign country, and any law of any state in conflict with this provision is hereby declared null and void." *Held*—

1st. That the term *charge*, as here used, means any onerous condition, and includes a condition which makes the right of an immigrant, arriving in the ports of the state, to land within the state, depend upon the execution of a bond by the third party, not under its control, and whom he cannot constrain by any legal proceedings; and,

2d. That the statute of California, which prohibits foreign immigrants of certain classes arriving in the State of California by vessel, from landing until a bond shall have been given by the master, owner or consignee of the vessel that they will not become a public charge, and imposes no condition upon immigrants of the same class entering the state in any other way, is in conflict with the act of Congress.

Opinion of Mr. Justice FIELD.—The petitioner alleges that she is illegally restrained of her liberty by the coroner of the city and county of San Francisco, and asks to be discharged from such restraint. The facts of the case, as detailed in the proceedings before us, are briefly as follows: The petitioner is a subject of the empire of China, and came to the port of San Francisco as a passenger on board of the American steamship Japan, owned by the Pacific Mail Steamship Company, and under the command as master, of J. H. Freeman. On the arrival of the steamship at this port, which was on the 24th of August last, she was boarded by the commissioner of immigration of California, who proceeded under the provisions of a statute of the state, to examine into the character of the petitioner and other alien passengers. Upon such examination, the commissioner found, and so declared, that the petitioner and twenty-one other persons, also subjects of the empire of China, arriving as passengers by the same steamship, were lewd and debauched women. He thereupon prohibited the master of the steamship from landing the women, unless he or the owner or consignee of the vessel gave the bonds required by the statute. Neither of the parties designated would consent to give the required bonds, and the women were consequently detained by the master on board of the steamship. They thereupon applied for a writ of *habeas corpus* to a district court of the state to enquire into the cause of their detention, alleging in their petition its illegality, on the ground that the statute, under which they were held, was in contravention of the treaty between the United States and the empire of China, and in conflict with the constitution of the United States, and denying, also, that they were either lewd or debauched women. The district court granted the application and heard the petitioners, and after the hearing, remanded them back to the charge of the master of the steamship, holding that the statute of California was neither in violation of the treaty nor the constitution, and that the evidence presented justified the finding of the commissioner, that the petitioners were lewd and debauched women. The petitioners thereupon applied to the chief justice of the state for another writ of *habeas corpus*, alleging the illegality of their restraint, on grounds similar to those taken in the petition to the district court, and also alleging that they were, since the order of the district court remanding them to the custody of the master of the steamship, about to be forcibly returned to China against their will and consent. They therefore prayed that, with the writ of *habeas corpus*, a warrant might issue to the sheriff of the city and county of San Francisco to take them into his custody. The chief justice granted the writ, returnable before the supreme court of the state, and at the same time issued a warrant commanding the coroner of the city and county to take the parties into his custody, and bring them before the court.

Under this warrant the parties were taken into the custody of the coroner, and in his custody they still remain. The supreme court sustained the ruling of the district court, and denied the application of the parties to be discharged, holding that the statute of the state, under which they were detained, was valid and binding under the treaty between the United States and China, and the constitution of the United States, and that the evidence justified the finding of the commissioner of immigration as to the character of the women. It therefore made an order directing that the coroner return the parties to the master, or owner or consignee of the steamship Japan, on board of the steamship, and requiring such master, owner or consignee to retain the parties on board of the steamship until she should leave this port, and then to carry them beyond the state.

The order further provided, that in case the steamship Japan was not in the port of San Francisco, the coroner should retain the parties in his possession until the arrival in port of the steamship, and then enforce the order returning the parties to the vessel, or retain the parties until the further direction of the court.

The petitioner is one of the women thus held by the coroner, and she now invokes the aid of this court to be released from her restraint, alleging, as in the other applications, that the restraint is illegal, that the statute which is supposed to authorize it is in contravention of the treaty with China and the constitution of the United States, and averring that she is not within either of the classes designated in the statute. It further appears, from the special traverse to the return of the coroner, and it is admitted by counsel, that since the judgment of the supreme court, the steamship Japan has sailed from the port of San Francisco, and will not probably return under three months, and that Freeman has been discharged from the service of the steamship company, and is no longer master of the Japan.

The decision of the district court, and of the supreme court of the state, although entitled to great respect and consideration from the acknowledged ability and learning of their judges, is not binding upon this court. The petitioner being an alien, and a subject of a country having treaty relations with the government of the United States, has a right to invoke the aid of the federal tribunals for her protection, when her rights, guaranteed by the treaty, or the constitution, or any law of Congress, are in any respect invaded; and is, of course, entitled to a hearing upon any allegation, in proper form, that her rights are thus invaded.

I proceed, therefore, to the consideration of the questions presented, notwithstanding the adjudications of the state tribunals.

The statute of the state, under which the petitioner was restrained of her liberty on board of the steamship, is found in the provisions of chapter one, title seven of the political code, as amended by the last legislature. These provisions require the master of a vessel arriving at any port of this state, bringing passengers from any place out of the state, within twenty-four hours after its arrival, to make a written report, under oath, to the commissioner of immigration at such port, stating, among other things, the name, place of birth, last residence, age and occupation of all passengers who are not citizens, and whether any of the passengers thus reported are "lunatic, idiotic, deaf, dumb, blind, crippled or infirm, and not accompanied by any relatives able to support them, or are lewd or abandoned women." Then follow the special provisions which have given rise to the present proceeding. They are contained in section 2952 of the code as amended. They require the commissioner of immigration "to satisfy himself whether or not any passenger who shall arrive in this state by vessels from any foreign port or place (who is not a citizen of the United States), is lunatic, idiotic, deaf, dumb, blind, crippled or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become permanently a public charge, or has been a pauper in any other country, or is, from sickness or disease, existing either at the time of sailing from the port of departure, or at the time of his arrival in this state, a public charge, or likely to become so, or is a convicted criminal, or a lewd or debauched woman;" and then declare that "no person who shall belong to either class, or who possesses any of the infirmities or vices specified herein, shall be permitted to land in this state, unless the master, owner or consignee of said vessel shall give a joint and several bond to the people of the state of California, in the penal sum of five hundred dollars in gold coin of the United States, conditioned to indemnify and save harmless every county, city and county, town and city of this state, against all costs and ex-

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penses which may be by them necessarily incurred for the relief, support, medical care, or any expense whatever, resulting from the infirmities or vices herein referred to, of the persons named in said bonds, within two years from the date of said bonds; * * and if the master, owner or consignee of said vessel shall fail or refuse to execute the bond herein required to be executed, they are required to retain such persons on board of said vessel until said vessel shall leave the port, and then convey said passengers from this state; and if said master, owner or consignee shall fail or refuse to perform the duty and service last herein enjoined, or shall permit said passengers to escape from said vessel and land in this state, they shall forfeit to the state the sum of five hundred dollars in gold coin of the United States, for each passenger so escaped, to be recovered by suit at law."

The provisions of this section are of a very extraordinary character. They make no distinction between the deaf, the dumb, the blind, the crippled and the infirm, who are poor and dependent, and those who are able to support themselves and are in possession of wealth and all its appliances. If they are not accompanied by relatives, both able and willing to support them, they are prohibited from landing within the state, unless a specified bond is given, not by them or such competent sureties as they may obtain, but by the owner, master or consignee of the vessel. Neither do the provisions of the statute make any distinction between a present pauper and one who has been a pauper, but has ceased to be such. If the emigrant has ever been within that unfortunate class, notwithstanding he may have at the time ample means at his command, he must obtain the designated bond or be excluded from the state. They subject also to the same condition, and possible exclusion, the passenger whose sickness or disease has been contracted on the passage, as well as the passenger who was sick or diseased on his departure from the foreign port. It matters not that the sickness may have been produced by exertions for the safety of the ship or passengers, or by attentions to their wants or health. If he is likely on his arrival to become a public charge, he must obtain the bond designated, or be denied a landing within the state. Nor does the statute make any distinction between the criminal convicted for a misdemeanor, or a felony, or for an offense *malum in se*, or one political in its character. The condemned patriot, escaping from his prison and fleeing to our shores, stands under the law upon the same footing with the common felon who is a fugitive from justice. Nor is there any difference made between the woman whose lewdness consists in private unlawful indulgence, and the woman who publicly prostitutes her person for hire, or between the woman debauched by intemperance in food or drink, or debauched by the loss of her chastity.

A statute thus sweeping in its terms, confounding by general designation persons widely variant in character, is not entitled to any very high consideration. If it can be sustained as the exercise of the police power of the state as to any persons brought within any of the classes designated, it must be sustained as to all the persons of such class. That is to say, if it can be sustained when applied to the infirm, who is poor and dependent, when unaccompanied by his relatives, able and willing to support him, it must be sustained when applied to the infirm who is surrounded by wealth and its attendants, if he is thus unaccompanied. If it can be sustained when applied to a woman whose debauchery consists in the prostitution of her person, it must be sustained when applied to a woman whose debauchery consists in her intemperance in food and drink; and even when applied to the repentant Magdalen, who has once yielded to temptation and lost her virtue. The commissioner of immigration is not empowered to make any distinction between persons of the same class; and there is nothing on the face of the act which indicates that the legislature intended that any distinction should be made.

It is undoubtedly true that the police power of the state extends to all matters relating to the internal government of the state, and the administration of its laws, which have not been surrendered to the general government, and embraces regulations affecting the health, good order, morals, peace and safety of society. Under this power all sorts of restrictions and burdens may be imposed, having for their object the advancement of the welfare of the people of the state, and when these are not in conflict with established principles, or any constitutional probibition, their validity cannot be questioned.

It is equally true that the police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries; that the state may entirely exclude convicts, lepers and persons afflicted with incurable disease; may refuse admission to paupers, idiots, lunatics and others, who, from physical causes are likely to become a charge upon the public, until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. The legality of precautionary measures of this kind has never been doubted. The right of the state in this respect has its foundation, as observed by Mr. Justice Grier in the Passenger Cases, in the sacred law of self-defence, which no power granted to Congress can restrain or annul.

But the extent of the power of the state to exclude a foreigner from its territory is limited by the right in which it has its origin, the right of self-defense. Whatever, outside of the legitimate exercise of this right, affects the intercourse of foreigners with our people, their immigration to this country and residence therein is exclusively within the jurisdiction of the general government, and is not subject to state control or interference. To that government the treaty-making power is confided; also, the power to regulate commerce with foreign nations, which includes intercourse with them as well as traffic; also the power to prescribe the conditions of migration or importation of persons, and rules of naturalization; whilst the states are forbidden to enter into any treaty, alliance or confederation with other nations.

I am aware that the right of the state to exclude from its limits any persons whom it may deem dangerous or injurious to the interests and welfare of its citizens, has been asserted by eminent judges of the Supreme Court of the United States. Mr. Chief Justice Taney maintained the existence of this right in his dissenting opinion in the Passenger Cases, and asserted that the power had been recognized in previous decisions of the court. The language of the opinion in the case of the city of New York v. Miln (11 Peters, 141), would seem to sustain this doctrine, But neither in the Passenger Cases, nor in the case of the city of New York v. Miln, did the decision of the court require any consideration of the power of exclusion, which the state possessed; and all that was said by the eminent judges in those cases upon that subject, was argumentative and not necessary and authoritative.*

*The only point involved and decided in the case of the City of New York v. Miln (11 Pet. 102), was the constitutional power of the State of New York to compel the master of a vessel, with passengers, arriving at her ports, from any country out of the United States, or from any other state of the United States, to report in writing, on oath, to the state authorities, under a prescribed penalty, the name, place of birth, and the last legal settlement, age and occupation of every person brought as a passenger in the vessel. This the supreme court held that the state, in virtue of her general police powers, had the constitutional right to do. In the course of the opinions of Mr. Justice Barbour and Mr. Justice Thompson, general language is used indicating a power in the state to exclude persons from her limits whom she might deem dangerous to the material or moral welfare of the state, but the language was wholly unnecessary to the decision of the only point then in judgment before the court.

The facts of the two cases known as the Passenger Cases (7 How. 283), were briefly these: One of the cases (Smith v. Turner) went to the supreme court, on a writ of error from the Court of Errors of New York. The other case (Morris v. The City of Boston), went to the Supreme Court of the United States from the Supreme Court of Massachusetts. The New York case arose substantially upon these facts:

A statute of that state authorized the health commissioner to demand and

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But independent of this consideration, we cannot shut our eyes to the fact that much which was formerly said upon the power of the state in this respect, grew out of the necessity which the Southern states, in which the institution of slavery existed, felt, of excluding free negroes from their limits. As in some states negroes were citizens, the right to exclude them from the slave states could only be maintained by the assertion of a power to exclude all persons whom they might deem dangerous or injurious to their interests. But at this day no such power would be asserted, or if asserted, allowed in any federal court. And the most serious consequences affecting the relations of the nation with other countries, might and undoubtedly would, follow from any attempt at its exercise. Its maintenance would enable any state to involve the nation in war, however disposed to peace the people at large might be.

Where the evil apprehended by the state from the ingress of foreigners is that such foreigners will disregard the laws of the state, and thus be injurious to its peace, the remedy lies in the more vigorous enforcement of the laws, not in the exclusion of the parties. Gambling is considered by most states to be injurious to the morals of their people, and is made a public offence. It would hardly be considered as a legitimate exercise of the police power of the state to prevent a foreigner, who had been a gambler in his own country, from landing in ours. If, after landing, he pursues his former occupation, fine him, and if he persists in it, imprison him, and the evil will be remedied. In some states the manufacture and sale of spirituous and intoxicating liquors are forbidden and punished as a misdemeanor. If the foreigner coming to our shores is a manufacturer or dealer in such liquors, it would be deemed an illegitimate exercise of the police power to exclude him, on account of his calling, from the state. The remedy against any apprehended manufacture and sale would lie in such case in the enforcement of the penal laws of the state. So, if lewd women, or lewd men, even if the latter be of that baser sort, who, when Paul preached at Thessalonica, set all the city in an uproar (Acts xvii, verse 5), land on our shores, the remedy must be found in good laws, or good municipal regulations and a vigorous police.

It is evident that if the possible violation of the laws of the state by an emigrant, or the supposed immorality of his past life or profession, where that immorality has not already resulted in a conviction for a felony, is to determine his right to land and to reside in the state, or to pass through into other and interior states, a door will be opened to all sorts of oppression. The doctrine now asserted by counsel for the commissioner of immigration, if maintained, would certainly be invoked, and at no distant day, when other parties, besides low and despised Chinese women, are the subjects of its application, and would then be seen to be a grievous departure from principle.

I am aware of the very general feeling prevailing in this state against the Chinese, and in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people. Admitting that there is ground for this feeling, it does not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith. If their further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies. The state cannot exclude them arbitrarily, nor accomplish the same end by attributing to them a possible violation of its municipal laws. It is certainly desirable that all lewdness, especially when it takes the form of prostitution, should be suppressed, and that the most stringent measures to accomplish that end should be adopted. But I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation and without censure.

By the 5th article of the treaty between the United States and China, adopted on the 28th of July, 1868, the United States and the Emperor of China recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to another, for purposes of curiosity, of trade, or as permanent residents. The 6th article declares that citizens of the United States, visiting or residing in China, shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation. And, reciprocally, that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.

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receive, and in case of neglect or rufusal to pay, to sue for and recover from master of every vessel arriving in the port of New York from a foreign port, for himself and each cabin passenger, one dollar and fifty cents, and from the master of each coasting vessel for each person on board, twenty-five cents; but coasting vessels from New Jersey, Connecticut and Rhode Island, were only required to pay for one voyage in each month.

The moneys thus collected were denominated in the statute, hospital moneys, and the master was authorized to sue and recover from each passenger the amount paid on his account. To the failure on the part of the master to pay within twenty-four hours after arrival of the vessel, was attached a penalty of one hundred dollars. All moneys collected from this source, in excess of the amount necessary to defray the hospital expenses, were to be paid over to the treasurer of the Society for the Reformation of Juvenile Delinquents, in the City of New York.

Upon this statute, Smith, the master of the British ship Henry Bliss, was sued for $295. He demurred to the complaint, on the ground that so much of the statute as authorized a recovery, was rupugnant to the constitution of the United States. The demurrer was overruled in the state courts, and electing to stand upon the demurrer, the case was taken to the Supreme Court of the United States, where the point was thus sharply presented to the court for decision. That tribunal, after the most exhaustive and elaborate arguments upon the question, decided that the act of the legislature of New York, in the particular case under consideration, was repugnant to the constitution of the United States, and void, and accordingly reversed the judgment of the Court of Errors of New York.

In the case of Norris v. The City of Boston, the facts were substantially as follows: Norris, an inhabitant of St. John's, in the Province of New Brunswick, Kingdom of Great Britain, was master of a vessel belonging to the port of St. John's; he arrived with nineteen alien passengers at the port of Boston. Prior to landing, he was compelled to pay, under a law of Massachsetts, to the city of Boston, two dollars for each passenger.

The statute of Massachusetts authorized the municipal authorities to appoint examiners, whose duty it was to examine the condition of all passengers on board of any vessel arriving in port. If, upon such examination, there were found among said passengers "any lunatic, idiot, maimed, aged or infirm person," incompetent, in the opinion of the examining officer, to maintain himself, or who had been a pauper in another country, the passenger was not permitted to land until the master, owner, consignee or agent of the vessel gave to the city a bond in the sum of one thousand dollars, with sufficient sureties, that such lunatic, or indigent passenger would not become a city, town or state charge within ten years from the date of the bond; and for all alien passengers, other than those already specified. the master was required to pay two dollars for each passenger before they could land. Appropriate penalties were contained in the statute to secure compliance with its terms. Norris paid the two dollars for each passenger, as prescribed by the statute, under protest, landed his passengers, and thereupon instituted suit for the recovery of the money he had thus been compelled to pay. In the state courts judgment passed in favor of the defendant, when the case was taken to the Supreme Court of the United States, upon a writ of error, where the judgment was reversed; that court holding that the statute of Massachussetts, under which payment of the money was compelled, was unconstitutional and void.

In the opinions of the justices in these celebrated cases, language is also used as in the case in 11th Peters, expressive of the right of the state in exercise of its police power, to exclude persons from her limits, but from the statement of he cases, it is obvious that no such question was before the court. *See note at end of this opinion.*

The only limitation upon the free ingress into the United States, and egress from them of subjects of China, is the limitation which is applied to citizens or subjects of the most favored nation; and as the general government has not seen fit to attach any limitation to the ingress of subjects of those nations, none can be applied to the subjects of China. And the power of exclusion by the state, as we have already said, extends only to convicts, lepers and persons incurably diseased, and to paupers and persons who, from physical causes, are likely to become a public charge. The detention of the petitioner is therefore unlawful under the treaty.

But there is another view of this case equally conclusive for the discharge of the petitioner, which is founded upon the legislation of Congress since the adoption of the fourteenth amendment. That amendment, in its first section, designates who are citizens of the United States, and then declares that no state shall make or enforce any law which abridges their privileges and immunities. It also enacts that no state shall deprive *any person* (dropping the distinctive designation of citizens) of life, liberty, or property, without due process of law; nor deny to *any person* the equal protection of the laws. The great fundamental rights of all citizens are thus secured against any state deprivation, and all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the laws. Discriminating and partial legislation, favoring particular persons, or against particular persons of the same class, is now prohibited. Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. *And equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs, and the enforcement of rights, but equal exemption with others of the same class, from all charges and burdens of every kind.* Within these limits the power of the state exists, as it did previously to the adoption of the amendment, over all matters of internal police. And within these limits the act of Congress of May 31st, 1870, restricts the action of the state with respect to foreigners immigating to our country. "No tax or charge," says the act, "shall be imposed or enforced by any state upon any person immigrating thereto from a foreign country, which is not equally imposed or enforced upon every person immigrating to such state from any other foreign country, and any law of any state in conflict with this provision is hereby declared null and void." 16 Statutes at Large, 144.

By the term *charge*, as here used, is meant any onerous condition, it being the evident intention of the act to prevent any such condition from being imposed upon any person immigrating to the country, which is not equally imposed upon all other immigrants, at least upon all others of the same class. It was passed under and accords with the spirit of the fourteenth amendment. A condition which makes the right of the immigrant to land depend upon the execution of a bond by a third party, not under his control and whom he cannot constrain by any legal proceedings, and whose execution of the bond can only be obtained upon such terms as he may exact, is as onerous as any charge which can well be imposed, and must, if valid, generally lead, as in the present case, to the exclusion of the immigrant.

The statute of California, which we have been considering, imposes this onerous condition upon persons of particular classes on their arrival in the ports of the state by vessel, but leaves all other foreigners of the same classes entering the state in any other way, by land from the British possessions or Mexico, or over the plains by railway, exempt from any charge. The statute is therefore in direct conflict with the act of Congress.

It follows, from views thus expressed, that the petitioner must be discharged from further restraint of her liberty; and it is so ordered.

PETITIONER DISCHARGED.

NOTE.—Mr. Justice Wayne, one of the judges composing the majority of the court which decided the Passenger Cases, sums up the conclusions of the court, as follows (7 How. 412):

1. That the acts of New York and Massachussetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports of those states, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce, contrary to the grant in the constitution to Congress of the power to regulate commerce with foreign nations and among the several states.

2. That the states of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

3. That the acts of Massachusetts and New York in question in these cases conflict with treaty stipulations existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject, always, to the laws and statutes of the two countries, respectively;" and that said laws are therefore unconstitutional and void.

4. That the Congress of the United States, having by sundry acts passed at different times, admitted foreigners into the United States, with their personal luggage and tools of trade, free from all duty or imposts, the acts of Massachusetts and New York imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vesel is in *transitu* to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the states of Massachusetts or New York, and before the passengers have been landed, are in violation of said acts of Congress, and therefore unconstitutional and void.

5. That the acts of Massachussetts and New York, so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels, or freighters of the same, arriving in the ports of the United States within the said states, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States or coming from a port in the United States, are unconstitutional and void; being contrary to the constitutional grant to Congress of the power to regulate commerce with foreign nations, and among the several states, and to the legislation of Congeess under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subjects of importation and commerce.

6. That the fifth clause of the ninth section of the first article of the constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another state; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another," is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the states to destroy such equality by any legislation prescribing a condition upon which vessels bound from one state shall enter the ports of another state.

7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, becausc each of them so far conflicts with the first clause of the eighth section of the first article of the constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the states, in the absence of all legislation by Congress, as if the uniformity had been made by the legislation of Congress; and that such constitutional uniformity is interfered with and destroyed by any state imposing any tax upon the intercourse of persons from state to state, or from foreign countries to the United States.

8. That the power in Congress to regulate commerce with foreign nations and among the several states, includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and that any tax by a state in any way affecting the right of navigation,

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or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

9. That the states of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound, and that the states may, in the exercise of such police power, without any violation of the power in Congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the state the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

Street Railroad Companies — Their Organization under General Railroad Laws — Nature and Extent of their Franchises.

THE ST. LOUIS RAILROAD COMPANY v. THE NORTHWESTERN ST. LOUIS RAILROAD COMPANY.

Circuit Court of St. Louis County, Mo., September, 1874.

Before Hon. GEORGE A. MADILL, Circuit Judge.

1. **Street-Railroads—Missouri Law of 1855.**—The general railroad law of Missouri of December 13, 1855, authorized the formation of an association for the purpose of constructing and operating a street railroad wholly located within the limits of a municipal corporation; and after its organization vested it with power to construct its railroad upon the public streets of the city, upon obtaining the assent of the municipal authorities.

2. ——. **St. Louis Ordinance of 1859.**—The charter of the city of St, Louis in force in 1859, gave that city power "to open, alter, abolish, widen, extend, establish, grade, repair, or otherwise improve, clean and keep in repair streets, avenues, lanes and alleys;" *held*, that no authority was thereby granted to permit the construction of a horse-railroad upon the streets of the city.

3. ——. **General Law of 1855—Assent of Municipal Corporation.**—But it was held further that the general railroad law of December 13, 1855, requiring the assent of municipal corporations to the construction of a railroad upon the public streets, must be regarded as impliedly giving every such municipal corporation power to give such assent.

4. ——. **Charter—Granting Exclusive Privileges — Amendment of.** — A street railroad was nearly, if not quite, completed by a company formed under the general railroad laws; subsequently an act was passed whereby it was provided that "no street railroad should thereafter be constructed in the city of St. Louis nearer to a parallel road than third parallel street from any road now constructed, or that may hereafter be constructed, except the roads hereinbefore mentioned." *Held*, that this law was an amendment of the charter of said company, and granted a franchise exclusive in its nature, and that it was a contract with the company, the obligation of which could not be impaired.

5. ——. ——. **Quære.**—As to whether any new consideration was necessary to support such an additional grant by way of amendment.

6. **Legislative Grant—Consideration.**—Held further, that the right granted to the city of St. Louis by said act, to make such municipal regulations concerning said railroad as the public interests might require, was a present consideration for such additional grant.

7. **Charters—Construction of.**—Grants of franchises from the state to a corporation are to be strictly construed, and most favorably to the state; nothing passes except what is expressly named or necessarily implied in the language used in such grants.

8. ——. ——. **Parallel Roads.**—*Held*, that two street-railroads, to be *parallel* in the meaning of the act above quoted, must have substantially the same general direction throughout their entire routes.

Bill in equity to enjoin defendant. The plaintiff was organized in February, 1859, under the general railroad law of Missouri ("an act to authorize the formation of railroad associations, and to regulate the same," approved Dec. 13, 1855, 1 Rev. Stat. Mo., 1855, p. 404), for the purpose of "constructing, maintaining and operating a railroad for the conveyance of persons and property, to be worked by horse-power only," from Bellefontaine Cemetery to the southern boundary of the city of St. Louis, over and along certain streets of said city. Subsequently, by ordinance No. 4371, approved March 10, 1859, and by an amendatory ordinance, No. 4467, approved June 30, 1859, the plaintiff was authorized to construct its road upon the streets at present occupied with its tracks. Its road was at once built, and nearly, if not wholly, completed in the year 1859. By an act of the general assembly, approved January 16, 1860, entitled "an act concerning street-railroads in the city of St. Louis," § 1, the plaintiff (and certain other named companies), as organized under the general railroad law of Dec. 13, 1855, was ratified and confirmed in its rights under said law: its road was built and guage of track was sanctioned; and it was exempted from carrying freight and making a report to the secretary of state, but, in all other respects, was to conform to, and be governed by said law. By § 2 all railroad tracks were forever prohibited from Clark avenue, Chesnut, Pine and Locust streets and Washington avenue; and by § 3 it was declared that "no street-railroad shall hereafter be constructed in the city of St. Louis nearer to a parallel road than third parallel street from any road now constructed, or which may hereafter be constructed, except the roads hereinbefore mentioned; and in consideration of the privileges herein granted, the city of St. Louis is hereby expressly empowered to impose and levy such tax and license upon said roads, now constructed, or that may hereafter be constructed, as the common council of said city may determine to be just and proper; and the said city may make such municipal regulations, concerning said street-railroads, as the public interest and convenience may require, except to reduce the rate of fare," as fixed by city ordinance. In June, 1874, the defendant was organized under the general laws of Missouri, relating to manufacturing and business companies (1 Wagn. Stat. Mo., p. 332, § 1), for the purpose of constructing, maintaining and operating a railway to be worked by horse-power only, for public use in carrying persons and property within the corporate limits of the city of St. Louis, upon such streets in said city as should be designated for that purpose by the municipal authorities. By an ordinance, No. 8982, approved June 30, 1874, the defendant was authorized by said authorities to construct its road from the corner of Sixth, on Locust, to Ninth street, on Ninth street northwardly to North Spring street, on North Spring street and St. Louis avenue westwardly to Jefferson avenue, thence returning eastwardly on another track on said avenue to Fourteenth street, and southwardly on that street to Christy avenue, thence to Twelfth and Locust streets and eastwardly to the place of beginning. The plaintiff's road extends from the northern limits of the city along Broadway, Fifth streets and Carondelet avenue, all continuous streets, to the southern limits of the city proper, its cars running both north and south on Broadway on separate tracks. Ninth street, between Hempstead and North Spring streets, a distance of about nine blocks, is the first street west of Broadway, "and it is this relative position of these roads, between Hempstead and North Spring streets, which gives rise to this controversy: the plaintiff's claiming that the defendant's road, if allowed to be built on Ninth street, between these two streets, will be an invasion of an exclusive privilege granted the plaintiff by the state in the act of 1860, before referred to, and attended with serious damage and loss to its business."

It is necessary also to mention that, by the charter in force in 1859, the city of St. Louis had power "to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve, clean and keep in repair streets, avenues, lanes and alleys" (Session Acts 1851, p. 158, § 2, cl. 8), and that said city had no other authority over the streets, until by the act of February 15, 1864 (Sess. Acts 1863-4, p. 446), full power was vested in the city council, "with the approval of the mayor, to determine all questions arising with reference to street railroads in the corporate limits of said city, whether such questions may involve the incorporation of companies to construct such street railroads, granting the right of way or regulating or controlling such railroads after their completion." In each of the city charters, since that time, the city council, with the approval of the mayor, has "sole power and authority to grant to persons or corporations the exclusive right to construct street-railways in the streets of the city, or any of them,

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and to regulate and control the same." Sess. Acts 1874, p. 365, cl. 16.

The plaintiff brings this action to restrain the defendant from constructing and operating its road on Ninth street, between Hempstead and North Spring streets. The defendant, by its answer, raised the following issues:

First. That the plaintiff's organization, under the general railroad law of December 13, 1855, was authorized by, and its object beyond the purview of that act.

Second. That the ordinances No. 4371, and No. 4467, by which plaintiff claimed to have been authorized by the city of St. Louis to construct and operate its road, were *ultra vires*, and therefore void.

Third. That the act of January 16, 1860, was ineffectual to ratify or confirm the plaintiff's organization, and in so far as it attempted this, was retrospective, unconstitutional and void.

Fourth. That said act of January 16, 1860, was not a contract with the plaintiff, nor a grant; that no consideration passed to the state; that the act was a general law concerning street-railroads in St. Louis, and was intended for the benefit of the public, and not of the plaintiff and the other designated roads, and that it was consequently repealable.

Fifth. That the act of January 16, 1860, did not grant any *exclusive* franchise to the plaintiff, and if it intended so to do, was a breach of public trust on the part of the general assembly, in attempting to grant to a private corporation for a long period a permanent and exclusive right in five parallel and adjacent streets or public highways, in which the whole community had an absolute right.

Sixth. That the law of January 16, 1860, was repealed by that of February 15, 1864, and the various city charters since that time, vesting in the city council exclusive control of street-railroad matters in St. Louis, in favor of the defendant, upon the approval of ordinance 8982; and also by various other acts of the general assembly granting rights of way to other parties necessarily conflicting with the alleged exclusive right of the plaintiff.

Seventh. That defendant's road was not a parallel road within the meaning and purview of the act of January 16, 1860, to the plaintiff's road.

Eighth. That by the contemporaneous construction placed on the act by the legislature and the city council, and acquiesced in by plaintiff, it was interpreted to be a law concerning, and not for, the benefit of street-railroads.

The case was submitted on the pleadings, and an agreed state of facts.

Messrs. *Glover & Shepley*, for plaintiff; *Jacob Klein* and *Geo. W. Lubke*, with whom were *Samuel Knox* and *Irwin Z. Smith*, for defendants.

Opinion by MADILL, J., the main points of which are stated below.

The questions involved are considered in the order in which they were presented and discussed by counsel.

"When the act of 1855 was approved, there were no *street-railroads*, as now known and understood in this state; in fact, they were comparatively little known in any section of the country. And it may be conceded that the legislature, in framing the provisions of this statute, did not have definitely in mind railroads to be built, equipped and operated for the exclusive purposes in the restricted localities, and with the sole motive power which distinguish the present street-railroad. But the intention of the legislature was to provide a way, which, while it was simple and convenient, should also be general, comprehensive and permanent. * * * Hence the act is found to anticipate and provide for almost every possible contingency, adapting its provisions to the wants of companies organized under it, whether their projected roads were long or short, whether built wholly, chiefly or partially within the limits of municipal corporations, or entirely removed from them, and whether steam or horses were to be the motive power." The state may authorize the construction of a railroad upon the streets of a city. If the "use of them by the company amounts to a destruction of the public easement in them, then compensation must be made to the owner of the land to whom the private use of the land results when the public use as a street ceases. If, however, the use of a street by the company for the uses of its road is consistent with the reasonable use of it also by the public, though it may be in a diminished degree from that originally enjoyed, then there is no appropriation of property in the sense which requires compensation to be made to any one." * * * Moreover, the act of January 16, 1860, "expressly recognizes this company and its enterprise as authorized by the act of 1855, and ratifies and confirms its asserted corporate rights as having been regularly acquired under the statute, and the act of 1860 must be taken as a legislative construction of the act of 1855, which, though never conclusive on courts in controlling their action on questions of this character, is nevertheless entitled to consideration and weight. It follows that plaintiff's incorporation was warranted by the statute of 1855, and that it is vested with the powers and subjected to the conditions therein enumerated.

One of these conditions required the plaintiff to obtain permission from the city authorities to the construction of its road upon the public streets. It is a settled rule that municipal corporations, in the absence of authority either express or necessarily implied, have no power to grant the use of their streets for railroad purposes. The only provision in the city charter which could have been supposed to give validity to the ordinances 4371 and 4467, is set forth above in the statement of facts. A moment's consideration of this language renders it manifest that no power is here delegated to the city authorities which can be invoked to sustain these ordinances. They take the form of grants, prescribing conditions, conveying rights, imposing duties, exempting from obligations, reserving powers, determining regulations, and contracting as to time, which are insignia only of the most plenary legislative powers. Clearly the legislature never intended, by the use of the language above quoted from the charter of the city, to invest the city council with such sweeping right to deal with the public streets.

But for the purposes of this case it is not necessary that all the provisions of these ordinances should be sustained. It is only necessary that the portion giving the consent of the city for the use of the streets, which plaintiff by its charter was required to obtain, shall be found authorized by the legislature; the balance may be treated as *ultra vires*, and therefore void.

By § 29 of the act of December 13, 1855, power is given to every association, formed under the act to construct its road upon the public streets of any city, upon its first obtaining the assent of the corporate authorities of said city. This provision, it must be held, gave said authorities the power to assent to plaintiff's use of the streets for the construction of its road. In addition to this, by § 1 of the act of 1860, the plaintiff's road, as located in the streets, was sanctioned. Hence, whether the "assent" of the city authorities was legally given the year before or not, such assent for the future was unnecessary.

The defendant, however, insists that the act of 1860, in this particular, as well as others, is retrospective and therefore void. But, applying the proper test, and recalling the subject-matter and the relative position of the parties interested, it becomes apparent that the act is not liable to that objection.

Upon the fourth question presented, the learned judge, after defining the nature of a franchise, and the rights and duties arising out of a grant, says: Such are the rights and obligations which the law has assigned to the respective parties of a contract of this character, and to which adverse opinion, whether individual or public, and however plausible, must yield until the rule is changed by the federal supreme court, the only tribunal in the country which is competent to do it. * * *

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It is conceded that, prior to the act of 1860, the plaintiff possessed no such exclusive privilege as at present claimed. The third section of this act, upon its passage, became an amendment of the plaintiff's charter, and having been accepted by plaintiff, it was from that time forward as much a part of the charter as any one of the provisions of the original act. All the provisions of a charter, whether inserted originally or afterwards by amendment with the consent of both contracting parties, constitute the contract. And no rule of law prohibits such a modification of a contract by the parties, or requires any consideration distinct from that originally agreed upon, to render the contract valid, as modified. But even if the test insisted on by defendant's counsel, that the act to be a contract must import or express a present consideration, it will be found, on examination, that it does. By it the city might make such municipal regulations concerning plaintiff's road as public interest or convenience might require, except to reduce the rate of fare. By the act of 1855, the plaintiff had power "to regulate the time and manner in which persons and property should be transported and the compensation to be made therefor." This was a vested right which could not be abridged or impaired. The city ordinances before referred to, assumed to make a very extensive and substantial impairment of this corporate power, but as before stated, they were in this respect *ultra vires* and void.

This right or power, so possessed by plaintiff and guarded by its charter, the plaintiff, by its acceptance of the amendment of 1860, and in consideration of the exclusive privilege therein granted, in an important and substantial measure, relinquished and consented, might be transferred to the city council of St. Louis. * * * I think the proposition clear that the act of 1860 constituted a contract between the state and the plaintiff, and that there is expressed in it, if that were necessary, a consideration for the privilege claimed by the plaintiff, which the legislature deemed sufficient, and which the law deems valuable.

Having reached the conclusion that the act of January 16, 1860, was a contract with plaintiff, and granted the exclusive privilege claimed in express terms, the judge declined to express any opinion as to whether the act of February 15, 1864, or any of the subsequent city charters, operated as a repeal of the act of 1860. For though no repeal has been accomplished, still on this ground alone, the plaintiff is not entitled to the relief asked. To entitle it to an injunction upon such ground, the plaintiff must show that defendant's road is or will be a public nuisance, and that some special damage results or is threatened therefrom to plaintiff, as distinguished from the public generally. But no such case is presented by this record.

The remaining and final question in the case, is whether the defendant's proposed road, on the streets contemplated, will invade or impair the privilege which we have found the plaintiff possesses under its charter; for, if it will, then the remedy by injuuction is the appropriate one. It is therefore necessary to ascertain with precision the extent of this exclusive privilege.

The settled rule of construction applied to all grants of franchises or privileges from the state to individuals or private corporations, is, that nothing passes by the grant except what is expressly named or necessarily implied in the terms and language used in the instrument or act evidencing the grant. Such grants cannot be enlarged or extended by implication, but are to be construed strictly and most favorably to the grantor, the state; and, with this rule as a guide, this point must be determined.

After examining the respective routes of the plaintiff's and defendant's roads, the judge proceeds:

Are these respective roads, then, parallel within the meaning of the plaintiff's charter? That charter, as we have seen, declares that no street railroad shall thereafter be constructed in the city of St. Louis, nearer a parallel road than the third parallel street. In other words, unless these roads are parallel roads in the sense in which the word "parallel" is here employed, the plaintiff's complaint of the defendants' proposed action is without foundation. If we are to be governed by the primary and more restricted meaning of the word "parallel," then the charter requires that these roads, to be parallel, must be equally distant at every point throughout their entire length. If, however, we accept the meaning attached to the word as generally applied to the ordinary business affairs of men, and which, as these roads were to be built upon streets of cities, which are rarely, if ever, found strictly parallel, it must be presumed that was the sense it was used in by the legislature, then we understand that these roads must have substantially the same general direction. And this interpretation of the word is as liberal in favor of the plaintiff as the rule of construction before announced will allow. Can it be said, then, that these roads have substantially the same general course or direction?

The distance traveled by the plaintiff's cars in making the round trip within the city limits (for, so far as this question is concerned, we have nothing to do with such portion as lies beyond these limits), is about fourteen miles. When one of plaintiff's cars is at the southern end of its route, it is three miles and a half from the car at the southern terminus of defendant's road, and when it reaches the northern end of its route, it is more than one mile north and east of the west and northern terminus of the defendant's road. Cars running south on these roads are never nearer each other than six blocks, and for the greater part of the way, seven and eight blocks. In running north, however, they are for nine blocks within one block of each other, and to this extent are parallel. But the test is not whether while running one way they are for a given distance parallel; but whether this general course, taking into consideration the relative positions of their respective termini, and the relative positions of the different sections of the city traversed by them, is substantially the same. Otherwise, a road deflecting but one block from an east and west line, and built for the distance of that block on the north and south road, within three blocks of plaintiff's, would encroach upon the exclusive privilege of the plaintiff. Doubtless it was the intention of the legislature to ncrease the value of plaintiff's franchise by preventing the construction of roads which would create substantial and hurtful competition to plaintiff's business throughout the sections of the city traversed by its road; but it was not designed by this to create a monopoly which would suspend the power of the legislature for a period of twenty-five years, the duration of plaintiff's charter, to authorize street-railroad facilities to portions of the city entirely beyond the reach of plaintiff's road, and for that purpose permit railroads to be built nearer plaintiff's road than three blocks, and for such distance as would answer the end sought, and yet avoid the prohibited character of the parallel road. The effect of the defendant's road may, and probably will be, to diminish to a limited extent the receipts of the plaintiff on a comparatively short section of its road, from passengers going one way, but it is not a diminution of its receipts by diverting its through travel along the whole or a great portion of its road, as would be the result of a road parallel to it within the meaning of the plaintiff's charter.

The conclusion reached, therefore, is that the grant to the defendant of the franchise of its proposed road does not impair the obligation of the contract between the state and the plaintiff, evidenced by the act of January 16, 1860. The injunction is accordingly refused, and the plaintiff's bill is dismissed.

A motion for a new trial has been overruled, and the case has been affirmed in general term, *pro forma*. It will go to the October term of the supreme court of the state.

[Communicated.]

Insanity as an Excuse for Crime — The Ohio Statute.

TOLEDO, OHIO, Sept. 28, 1874.

EDITORS CENTRAL LAW JOURNAL:—I notice in the CENTRAL, of the date of Sept. 24, p. 474, you quote from the Daily Register an article on the 7th Edition of Dr. Wharton's book on Criminal Law, in which reference is made

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to a bill recently pending in the Ohio Legislature, in reference to cases where a defendant is charged with crime and expects to plead insanity, etc. That bill became a law, a copy of which I herewith inclose. So far as I am aware, there has been but one case disposed of under this law in Ohio, it having become a law of Ohio on the 31st of March last. The case I refer to is that of the State v. Blackburn, who was tried for murder in the first degree, in the Common Pleas Court of Ross County, and convicted of murder in the second degree. The case was taken on error to the supreme court and reversed. 23 Ohio State 146. The case having been remanded, the above law having, in the meantime become a statute of the state, the defendant invoked its aid, and under its provisions was adjudged insane, and is now confined in one of the insane asylums of the state. Very truly yours, A. H. McVEY.

The following is the statute above referred to:

AN ACT

To amend sections fifty-two and fifty-three of an act entitled "An act to provide for the uniform government and better regulation of the lunatic asylums of the state, and the care of idiots and the insane," passed and took effect April 7, 1856. S. & C. 849.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That said section fifty-two of the said act be amended so as to read as follows:

Section 52. (If any person in prison, charged with an offence, whether in needy circumstances or not, shall at any time before indictment is found against him, at the request of any citizen, be brought before an examining court, in the manner provided by the forty-eighth section of the code of criminal procedure, and if it shall be found by the court that such person was an idiot, or was insane when he committed the offence, the said court, at its discretion, shall proceed, and the prisoner shall be dealt with in like manner as other idiots and lunatics are required to be after inquest held.)

SEC. 2. That said section fifty-three of said act be amended so as to read as follows:

Section 53. (If any person in prison shall, after the commission of an offence, and before conviction, become insane, whether he be in needy circumstances or not, and whether indicted or not, an examining court may be called in the manner provided by the forty-eighth section of the code of criminal procedure, and if such court shall find that such person became insane after the commission of the offence of which he stands charged or indicted, and is still insane, the said court shall proceed, and the prisoner shall, for the time being, and until restored to reason, be dealt with in like manner as other lunatics are required to be after inquest had. And in all cases where any person has been indicted for an offense, and his attorney shall suggest to the court in which the indictment is pending, either before or after the plea thereto, that such person is not then sane, and a certificate of a respectable physician to that effect be presented to the court, it shall be the duty of the court to order a jury to be impanneled to try whether the defendant is sane at the time of such impanneling; and thereupon a time for the trial of said question shall be fixed, and a jury shall be drawn from the jury-box to try the same, unless the prosecuting attorney or the defendant's attorney shall demand a struck jury for the trial thereof; the jury shall be sworn or affirmed to well and truly try the question whether the defendant is sane, and a true verdict give according to the law and the evidence. On the trial, the defendant shall hold the affirmative; if the jury agree upon a verdict, or three-fourths of them concur in opinion, their finding shall be returned as the verdict of the jury. A new trial may be granted on the application of the defendant's attorney, for either of the causes for which a new trial may be granted, when there has been a verdict of conviction. If the jury shall find the defendant to be sane, and their verdict be not set aside, a trial shall be had upon the indictment as if the said question had not been tried; if the jury shall find him to be not sane, he shall, for the time being, and until restored to reason, be dealt with in like manner as other lunatics are required to be after inquest held; if the jury, or three-fourths of them, do not agree, or their verdict be set aside, another jury shall be impanneled to try the question; and all statutory provisions and rules of practice relating to criminal causes, which are in their nature applicable to the proceedings and trial by jury herein provided for, as well as to a review thereof on error, shall apply to such proceedings, trial and review; provided, however, that if such lunatic be discharged, the bond given for his support and safe keeping shall also be conditioned that said lunatic shall, when restored to reason, answer to said offence, and abide the order of the court in the premises; and any such lunatic may, when restored to reason, be prosecuted for any offence committed by him previous to such insanity.)

Summary of our Exchanges.

The Albany Law Journal, for October 10, contains an article entitled The Fear of Courts, in which it pays attention to the dread expressed by Miss Catharine Beecher, that her brother would not get justice in the New York courts. Another on the Nature of Property in Trees, examining the following decisions: Warren v. Leland, 2 Barb. 619; Wintermute v. Light, 46 Barb. 278; Foote v. Calvin, 3 Johns. 216; Austin v. Sawyer, 9 Cow. 39; Vorebeck v. Roe, 50 Barb. 302; Goodyear v. Vosburg, 57 Barb. 243. Also another curious article by C. H. T., on the salaries of judges. It reprints from the Solicitor's Journal an article on the Power of a Master of a Ship to Bind the Owner by a Contract for Necessaries; and contains other interesting matter.

The American Law Times and Reports comes to us with several important cases published in full. Among these are Campbell v. Campbell, to appear in 63 Ill., holding that a court of chancery in that state has no jurisdiction over an infant in a proceeding for partition, without service of process upon the infant. Without such service the proceeding is a divestiture of title without due process of law. See upon the same point, Galpin v. Page, *ante*, p. 491.

Tome v. Parkersburg Branch R. R. Co., is an elaborate decision of the Supreme Court of Maryland, opinion by Bowie, J., on the responsibility of a principal for the fraudulent acts of his agent; evidence touching the genuineness of signatures, and the admissions of photograph copies, with explantions by the photographer.

Starr v. Stark, is an important opinion of Mr. Circuit Judge Sawyer, in the United States Circuit Court, District of Oregon, on the doctrine of *res judicata*. We have already noticed this case (*ante*, pp. 446, 447).

The Supervisors of Knox County v. Davis (to appear in 63 Ill.), is an important case in the Supreme Court of Illinois, where a citizen filed a bill in chancery to contest an election which resulted in favor of removing the county seat.

The American Law Register, for October, comes to us with an article by Henry Reed, entitled "Studies in the Law of the Statute of Frauds," in which a great many cases are examined. In addition to its usual abstract of recent decisions, it reports in full the following American cases:

Supreme Court of Errors of Connecticut.—Weed v. Dayton—Debtor and Creditor—Exemption of personal property from execution—Household furniture on storage in anticipation of future use in housekeeping—Boarding house keeper. Opinion by Seymour, C. J. (with note).

City Court of Baltimore, Maryland.—Strasburger v. Burk—Contracts void as against public policy—Furnishing liquors, etc., to voters to procure nomination to public office—Contracts tending to corruption of such nomination equally void as if applied to elections held under authority of law. Opinion by Brown C. J. (with note).

Supreme Court of Ohio.—Union Mutual Ins., Co. v. McMillen—Life insurance policy—Failure of company to comply with insurance laws does not render policy void—Alteration of policy by agent—Unauthorized receipt of premium after policy had become void by failure to pay in proper time—Company not bound unless by ratification with knowledge of the facts. Opinion by White, J.

Court of Appeals of Kentucky.—Graves v. Lebanon Nat. Bank—Cashier's bond—Bank not bound to make formal acceptance of—Sureties liable for default after execution of their bond—Published statements by bank directors—Exoneration of cashier's sureties by reason of false statements published before they executed bonds. Opinion by Lindsay J.

United States Circuit Court, Eastern District of Virginia.—In *re* Deckert—Bankruptcy—Constitutional requirement of uniformity—Amended act of 1873, exempting property void for want of uniformity—Constitution of Virginia—Reconstruction acts. Opinion by Waite, C. J.

United States Circuit Court, District of Louisiana.—United States v. Cruikshank—Constitutional law—Protection of individual rights by the Federal constitution—Power of Congress to make positive laws concerning such rights depends on the nature of the rights—13th, 14th and 15th amendments—Jurisdiction of United States Courts over offences against the colored race—To give such jurisdiction, the offence must be based on a motive of race, color, or condition of servitude, and such motive must be alleged in the indictment—Enforcement act unconstitutional so far as it assumes to regulate the right of voting. Opinion by Bradley, J. (with note).

The Western Insurance Review, for October, contains an editorial by the legal editor, on Avoiding Life Policies on Account of Injurious Habits. It publishes without a syllabus, Howard v. Continental Life Ins. Co., Supreme Court of California, construing the terms of an endowment policy, with regard to the time when the premiums must be paid. It also publishes several abstracts of Insurance cases.

In Samuel A. Coombs, Washington Law Reporter for September 9, the following points are ruled by the Supreme Court of the District of Columbia: A power to sell real estate for the payment of debts and the education of children contained in a will, may be executed by a surviving executor, without reciting such power in the executing deed of conveyance; provided that the intent to execute the power is shown by the circumstances of the case.

By the omission of the usual recitals in a deed that the grantor is a surviving executor, and that it was executed in pursuance of a power, such deed,

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though not in an approved form, is not for that reason void.

A tax deed is void where the advertisement of notice of sale contains no dollar-mark at the head of the column of figures.

This last point has been ruled in several other cases.

In Gould's appeal, same court, a crazy fellow endeavored to get an invention patented by which to advertise by captive balloons suspended (if we may use this word) over cities. Imagine a great city like Saint Louis, not only oppressed with its own dirt and smoke, but overshadowed by clouds of tethered balloons, bearing such inscriptions in enormous characters as "S. T 1860. X;" "Children Cry for Pritcher's Castoria;" "The Burgtown Life Insurance Company—Assets $100,000,000." Imagine the balloons of rival sewing machine companies contending for precedence in the sky as their agents contend for precedence on the earth. Why, it would result in transporting to earth that scene in Milton's hell, where "armies rush to battle in the clouds." The court thought the device not patentable. It lacked only one thing—a "fixed and definite organism."

In the case of Kimbro v. First National Bank, same court, same journal for October 6, the following is the syllabus:

Where a draft was issued from the United States Treasury upon the First National Bank of W., which was a depository and financial agent of the government, payable to the order of K., who was a married woman then living in Tennessee, with her husband, and the draft was delivered by the government to the agents of the payee who had been employed to prosecute the claim against the United States, and the draft was cashed by a bank in Nashville, on a forged indorsement of the payee's name, and by it sent for collection to a bank in New York, by whom it was forwarded to the drawee in W., who paid it: *Held*, that such drawee was liable to the payee, although payment had not been demanded on her behalf until after said drawee had paid it, relying upon the indorsement as genuine. *Held*, also, that the liability of the drawee was not released by the circumstance that, on paying the draft, it was transmitted to the treasurer of the United States, who acted upon the indorsement as genuine, and gave full credit for the amount of such draft in the account of the bank. *Held*, further, that the action would lie, notwithstanding the fact that the payee never had possession of the draft, and that it was on file in the treasury department when the demand of payment was made on behalf of said payee, and notwithstanding the fact that defendant, in paying said draft, upon such payee's indorsement, acted as the agent of the United States government.

Where evidence is introduced impeaching the genuineness of the supposed indorsement, it is competent to submit the paper to the jury, to show that it had been issued by the treasury department; and to determine if the endorsement was a forgery.

The acknowledgement of a power of attorney before the clerk of a county court, with the seal of the court affixed, does not raise a presumption of law that the instrument was executed by the person mentioned in the certificate of said clerk. Where there is evidence tending to prove and disprove a valid execution, the question to must be submitted to the jury upon all the facts.

If there is a valid execution of a power of attorney it is a sufficient authority to the attorney to place the name of the payee on the back of the draft, and to receive the money thereon. Or, if the power of attorney was left in the hands of the attorney to be used by him and he filled the blanks therein, and by that means placed the endorsement on the draft, it would be a good and valid utterance of the draft as against the payee, or those claiming under her.

If the husband, during his life time never reduced the draft to his possession, then, upon his death it became absolutely the wife's property by survivorship; and if she has not waived her right thereto, the representative of the husband's estate has no interest in the cause of action.

Where several instructions are refused, but the same points are fully given in other prayers that are allowed, there is no ground for exceptions.

The Supreme Court of the District of Columbia is a good court, and its decisions appear to be reported in this journal with great fullness and fidelity.

The Daily Register, for October 3, publishes an interesting opinion of the New York Court of Appeals, Folger, J. holding, applying and illustrating the familiar principle that a partnership, *quoad* the creditors, exists wherever a person is interested in the profits of a concern specifically, in contradistinction to a stipulated portion of the profits as a compensation for services. The same case is republished in the Albany Law Journal for October 10.

Legal News and Notes.

—AN exchange suggests that if Brigham Young dies the scramble for widows' thirds will drive every judge of probate in Utah to the nearest mad-house

—MR. SNELL, a Washington police justice, has imposed a fine of $100 upon a restaurant keeper of that city, for refusing to serve two colored men, Mr. Langston and Mr. Purvis.

—LETTERS containing mutilated currency addressed to the "Treasurer of the United States, Washington, D. C.," can be registered free of charge, but the postage must be paid in full by stamps.

—MR. DISTRICT JUDGE SHIPMAN has recently decided, that in determining the dutiable value of importations, the franc is to be estimated at 18 6-10 cents. Richard v. Arthur, 20 Int. Rev. Rec. 104.

—ONE of our Missouri correspondents conludes his letter as follows: "The Psalmist said, 'I will meditate in thy statutes; thy law do I love;' and he had not Wagner and the common law. Therefore, with how much reason should we of modern times cleave affectionately to our profession."

—M. D. LEGGETT, commissioner of patents, has resigned. He designs to practice patent law before the United States Circuit and Supreme courts, and in contested cases before the Patent Office. He will establish his office in Cleveland, Ohio. J. M. Thacher, Assistant Commissioner, has been promoted to the vacancy.

—THE value of extradition laws has been again forcibly illustrated by the arrest of two Italians in New York, charged with committing murder eighteen months ago in Sicily. "Flight is almost useless," says one of our exchanges, commenting on this case, "when the whole civilized world becomes the pursurer of the fugitives."

—THE new Ohio Digest, which has been edited by A. H. McVey, Esq., of the Toledo bar, is nearly through the press. It consists of two volumes. Its plan is highly spoken of by Chief Justice Waite, Mr. Justice Cooley, Benj. Vaughn Abbott, and others. Ingraham, Clark & Co., of Cleveland, are the publishers.

—GENERAL BAKER, commissioner of pensions, has issued in pamphlet form all the laws relating to pensions revised and consolidated by the act to revise and consolidate the statutes of the United States in force December 1, 1873. This publication embraces all acts relating to pensions except three minor amendatory acts passed at the last session of Congress.

—THE commissioner of pensions has just published the following important regulation: "In all claims for bounty-land, and for pension on account of service in the war of 1812, the service of the company or organization of which it is alleged the soldier was a member, must appear by record evidence before parol evidence can be accepted to prove the service of an individual member of said company."

—THE attorney-general has decided that under section 2593 of the revised statutes, the secretary of the treasury has power to remit fines, penalties and forfeitures arising under any revenue law when the amount does not exceed $1,000, and when there has been no summons, inquiry, and statement by a judge; and also to remit fines, penalties, and forfeitures arising under laws relating to the negotiating, recording, enrolling, or licensing of vessels when the amount does not exceed $50.

—HON. SYLVANUS WILCOX, judge of the Fourth Judicial Circuit of Illinois has reslsgned, by reason of ill health, brought on by the arduous labors of his office. Judge Wilcox commenced the practice of law at Elgin, in 1846, and continued in the practice up to June, 1867, at which time he was elected circuit judge. He was re-eleeted in June, 1873. His circuit comprised the counties of Dupage, Kane and Kendall, made a large circuit, and required almost his entire time to dispose of the business.

—A FELLOW by the name of Murdock, undertook to levy blackmail upon Hon. Fernando Wood, and has been convicted in a criminal court in Washington City, and will probably have an oportunity to learn an honest trade. His offense consisted in sending the following letter: "Sir: I am satisfied of your guilt. I have one reason for not shooting you. I will settle for $50,000, you to take the woman and keep her. The alternative — I will empty seven chambers of a Colt's revolver into you on the first opportunity. Answer immediately in writing to messenger. S. B. M.

"If you do not comply with these terms I will publish you in all the New York papers and write to your wife. S. B. M."

Mr. Wood deserves the thanks of the country.

—AND now, a man by the name of Case, whose conscience has smitten him for keeping so important a matter a secret so long, has written a letter to some newspaper claiming that when he, Case, was major of the 7th Illinois Cavalry, and Wm. Pitt Kellogg, the present governor of Louisiana, was colonel of the same regiment, Kellogg exhibited to him a check for $500, received from the proper accounting officer of the government, as his, Kellogg's, quarterly salary as chief justice of Nebraska territory, and confessed to him, Case, that he was in the habit of drawing his salary as colonel and chief justice at the same time. We are prepared to believe almost anything of Kellogg, but this story bears, in the language in which it is constructed, indubitable marks of being the invention of a weak brother. It reads too much like Mrs. Tilton's testimony before the Beecher Committee, to be credited by men of sense.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, OCTOBER 23, 1874.

SUBSCRIPTION:
$8 PER ANNUM, in Advance.

THE SELECTION OF JURIES.—We take pleasure in publishing in this number an interesting letter from Hon. Robert A. Hill, United States District Judge for the Districts of Mississippi, detailing a plan adopted by Mr. Circuit Judge Woods and himself, for the selection of intelligent and properly qalified jurors in the federal courts of that state. Where jurors are selected in a manner so fair and judicious, the administration of justice cannot fail to command the confidence of the people and to conduce to the repose of society. As the subject, so far as the federal courts are concerned, is likely to come before the coming session of Congress, we should be glad to hear from other judges, and also from members of the bar on this important question.

THE AMENDE HONORABLE.—We take pleasure in giving the following a prominent place in our columns. If General Case had been more prompt in exposing the rascality of Kellogg, in drawing a salary as colonel of an Illinois regiment and chief justice of Nebraska Territory at the same time, and if his *expose* of the matter had not been burdened with so many circumstantial explanations, we should not have been drawn into the error of doing him the injustice we did. Governor Kellogg owes it to himself to deny General Case's statements, if he can—unless he thinks a denial would injure his popularity with his party in Louisiana.

WINCHESTER, ILL., October 17, 1874.

EDITORS CENTRAL LAW JOURNAL:—By the last item, under the head of "Legal News and Notes," in your invaluable paper of yesterday, you have done injustice to General Henry Case. He has, for nearly twenty years, been a member of the Winchester (Ill.) bar, and is a gentleman, whose "reputation for truth and veracity," has never been questioned "in the neighborhood where he resides." His article in relation to Wm. Pitt Kellogg, was first published in one of the papers of this place; it has been read and talked about by many persons here—by those who have known General Case longest and best, and I do not believe there is a single person here who doubts the substantial truthfulness of his statements. Very truly, JAS. W. RIGGS.

FEDERAL COURT REPORTS.—We learn that Mr. Circuit Judge Woods, whose circuit embraces the Gulf States, has in press a volume of circuit court decisions, which is expected to be ready in January next. We also learn that Hon. Robert A. Hill, judge of the federal district courts for the two districts into which the State of Mississippi is divided, has consented to prepare for publication a volume of his decisions, provided a sufficient number of subscribers can be obtained to justify the expense. These decisions comprise cases both in the district and circuit court, most of which are final. We hope a sufficient uumber of the members of the bar in Mississippi will subscribe to this undertaking to warrant its prosecution. A volume of cases selected from the great number of written judgments which Judge Hill has rendered, will be of great use to practitioners in the federal courts in Mississippi, and of undoubted value to the bar elsewhere. We also learn that the promised volume of federal district court reports in preparation by Hon. H. B. Johnson of Jefferson City, is being postponed to enable the editor to get together a better selection of cases. These will be culled from all the district courts in the eighth circuit.

A New Solution of the Railroad Question.

The Western Jurist, for September, has an able article on Monopolies, in which it confines itself to what it considers the two great monopolies of the country, the railroads and the national banks. After showing conclusively that railroads, under the present system, are monopolies, and from the nature of the case cannot be otherwise, and after pointing out the insuperable difficulties in the way of regulating railway tariffs by legislative interference, state or federal, the able editor suggests a remedy in the following language. It is worth the attention of the country:

But is there any remedy for the evils of our railroad monopolies? We think there is, and to our mind it seems very practical, although we confess that experience may demonstrate it to be pregnant with difficulties and possible failure. It is the exercise of the power of eminent domain, *upon*, as it is exercised *in favor of* railroad companies. That is, railroad companies are allowed to call into exercise the power of eminent domain to take from the owners of real estate the right of way for their railroads—this right of way is the right to use the real estate for the purpose of laying the track and running their trains over it for a series of years or perpetually. After the track is laid, the whole, that is the land or right of way, the ties, rails, spikes, etc., become real estate, and itself subject to the power of eminent domain. Now let any person who desires to run an engine or a car or a train of cars, call into exercise this power of eminent domain against or upon the railroad company, and by the assessment of a jury, subject to revision by the courts, condemn the *right of way* over the railroad for his engine, car or train—the assessment would fix the rate per mile, for an engine, a passenger car, a loaded car, an empty car, and perhaps grade the price for an engine according to its weight. This condemnation or assessment might be in the nature of a general or public proceeding, so that when once fixed at the instance of any one, it should be equally open and available to all who should choose to run an engine, car or train on the railroad track,—upon the payment in advance for such right of way. The payment could be made at the station where the train starts to the next station, or to the remotest station it will reach. Under this regulation any individual or company owning an engine could haul the cars of any merchant or freighter at such price as they might agree, and the multiplication of such individuals and companies would afford competition and thereby destroy the monopoly. These individuals and companies might also own their cars and become carriers of freight as well as haulers of cars, and thereby accommodate the general public, as do the railroad companies now. In other words, this plan would open the railroads as the highways, to everybody, and they would become the avenues whereon competition in the carrying business would be as sure to exist as in any other business open to all, and thereby the monopoly would be destroyed, and reasonable and low charges for carrying freight will certainly follow.

We would not exclude the railroad company owning the track from the right to operate their own engines, cars and trains; but they should do so upon terms of *exact equality* with all others. The assessment of damages for the right of way for an engine, car or train, would in effect, be a toll to be paid for each mile any engine, passenger car, loaded car or empty car should be run upon the track, and for every day it should be still and occupy the side track. The probable ultimate effect of this plan would be that the railroad companies would case to operate their railroads themselves and rely upon the tolls for their revenues; leaving the carrying business wholly to individuals and to individual enterprise, and this would doubtless result in the earlier delivery of freights, the increase of care and the reduction of accidents; and in all probability the companies owning railroads would find a larger margin of profits from the tolls, than they now find from the freights, and the plan would become popular with the owners of the stock, if it did not with officers of the companies and managers of the railroads.

But, it will be said, that these railroads, under such a plan, will become, by the multiplication of accidents coming from the indiscriminate use of the track by everybody, the very grave-yards of the whole people. Will this be so? To our mind the answer is, upon principle, a direct negative. In the first place it will be remembered, that even now (except those run in exact conformity with the time table), all trains are run by telegraph—that is, no train leaves one depot or station for another until the conductor is notified by telegraph that

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the track is clear and he must run on such time to the next station. Under the plan proposed, trains could be run in the same way. The accidents would be reduced, instead of increased, because of the increase of care which would come naturally from the fact that the operators of the trains under the plan proposed would often be personally interested in the earnings of the train itself, and would always have an individual responsibility beyond that which they feel while in the employment of the large corporations under the present plan. But further than this, the plan proposed would soon result in the construction of double tracks upon all roads where the business is sufficient to render the doing of it difficult or dangerous upon a single track. To stimulate the early construction of a double track a higher rate of toll or assessment might be allowed upon a double track than upon a single one.

We have for some time thought that the plan embodied in the above extract (which we have seen broached elsewhere) offers the only possible way out of the difficulty. It would simply result in placing railroad transportation on the same footing as that by ocean and river, *open to all*, on payment of the lawful tolls to the owner, and subject only to the right of the government to adopt and enforce such regulations as shall be found necessary to prevent collisions, and preserve life and property. We say the right of government; for manifestly the principal practical difficulty in the way of this plan is, that the running of numerous trains owned by private individuals on a single (or even a double) railroad track, might result in frequent collisions; and this could only be prevented, and justice done between so many competitors, by government supervision. A parallel case of government supervision may be instanced in the regulations enacted by Congress concerning pilotage, and for preventing collisions at sea. This supervision should be conducted through the instrumentality of sworn and bonded officials, skillful in railway management, and who should be both civilly and criminally liable for misfeasance and negligence. Severe penalties should be imposed on them to prevent extortion, bribe-taking, or the giving of preference to one competing train-owner over another; and speedy and summary remedies should be given against them. With such a system in practical operation, it would be as impossible to see a monopoly in a great railroad, as it is now to see it in the Atlantic ocean or the Mississippi river.

The Louisiana Question.

We hope our readers will pardon us for again alluding to this question; but it is one which, in our judgment, the American bar cannot put aside for mere money-getting, without violating a high and patriotic duty. In our last issue we took occasion to dissent from the view taken by Hon. Reverdy Johnson, who holds that the President's recognition of the Kellogg government is irrevocable and binding upon himself, as well as upon all other persons. We have since been fortified in the view there taken, by a very clear and convincing letter of Mr. Charles O'Conor, in the New York Herald, for September 30. We recommend a perusal of this letter to every person who desires to read a clear argument upon the law of this vitally important question.

Mr. O'Conor proceeds to ask the question: "Was the original error of the President in recognizing Kellogg as governor a conclusive judgment which, subject only to a review by Congress, was absolutely binding upon the persons, including the President himself, and also irrevocable by him even, though he should have subsequently discovered his mistake? This question Mr. O'Conor answers emphatically in the negative. In the course of his letter, he says:

When one of these [meaning state governments or pretended state governments] appeals to the federal government for protection against the "domestic violence" of the other, Congress, or in its default the President, must of course determine the question, and the state government recognized by his determination, must be protected accordingly against its rival by the federal executive. Be it in reason, justice and truth ever so erroneous, such a decision must, nevertheless, be regarded valid so long as it remains in force. And it is binding on all persons and in all courts and places. Against the moral or political wrong, if there be one, there is no remedy but revolution, and with revolutions juridical science has little or no concern.

All this I think must be conceded by every sound lawyer, and from these premises some persons who believe that Kellogg was not duly elected, still maintain that the President's original error in recognizing him is of such potency, in law or policy, that the President is bound to persist in it and to reinstate Kellogg by the military forces of the union as often as he may be displaced. In my opinion the premises do not warrant the conclusion thus drawn from them.

A decision by competent official authority binds, it is true, without reference to the question of its justice or propriety; but this rule obtains only so long as the decision remains in force; and the cases are rare indeed, if there be any, in which a decision, by any tribunal or official authority, is absolutely irreversible. Courts of the highest authority, or, as it is sometimes expressed, courts of the last resort, occasionally recall their own judgments and hold for naught their own previous solemn adjudications. This was lately done by the Supreme Court of the United States, in the familiar controversy concerning the constitutionality of the legal tender acts. It is true that a court of last resort will generally refuse to reconsider a question which it has once directly adjudicated. But no proposition is better established than that it is the duty of every court to recall any decision of its own which is has become convinced was erroneous.

In this Louisiana case the paramount authority was Congress. A recognition of the Kellogg government by that body, would have bound the President and all others until Congress should itself have again acted on the subject and revoked its former conclusion. Congress not having acted in this case, President Grant's recognition had a similar effect, and bound all parties; but as Congress might have revoked its determination, so might President Grant have reconsidered his opinion, and when called upon a second time by Kellogg, he might have refused his aid. And unless, when such second application was made, General Grant still labored under his original and erroneous opinion that Kellogg was duly elected, he ought to have so refused.

To this letter Mr. Johnson publishes in the New York Herald, for October 5, a reply in which he adheres to his first position; and to this Mr. O'Conor again replies in the same journal, for October 8. Mr. Johnson, in his reply to Mr. O'Conor, supports his first view by the following forcible reasoning:

If the President, under the constitution, is bound, in such an exigency as is supposed, to determine who is the legitimate governor of a state, it seems to me to follow that when he does so decide his decision should be final. If not final, he is at liberty to change it afterwards, as often as he may deem proper. How, then, would stand the acts of the government originally recognized in the interval between such recognition and the President's subsequent change of opinion? Are such acts to be deemed nullities? Can the people of a state who may have been aggrieved by the course of the governor, call him to account for any injury they may have sustained, upon the ground that the President's subsequent recognition of some one else conclusively determines that he was not the legitimate governor?

And these suggestions are equally applicable to the President's recognition of the legislature of a state when a call is made upon him under the constitution by that department. He changes his opinion afterwards, on becoming convinced that the body was not legitimate, and recognizes some other body as the legislature. If he has a right to do this one week or one month after his first decision, he has the right to do it after any lapse of time. Are all the laws passed by the legislature in the interval between his first decision and his subsequent reversal of it to be declared void? Are the rights which have grown out of such legislation to be annulled? Are all the debts contracted by the legislature or under its authority to be repudiated? I think all will admit that this cannot be sound doctrine. And if it is not, I see no reason for imputing error to it, except by supposing that the first decision of the President, on a call of a governor or a legislature, is as conclusive upon him as Mr. O'Conor admits it to be upon everyone else. Should the President, who recognizes a governor, cease to be President, could his successor, when called upon to suppress violence, refuse to recognize the same officer and determine that some other person was governor? Suppose the President refuses to recognize the person first making the call, and subsequently recognizes another as governor, can be

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alter his last decision and reinstate, the first man in office? It is, in my opinion, obvious that such changes were never contemplated by the constitution.

This reasoning Mr. O'Conor combats in the following language, in which he scarcely treats his opponent with that deference which becomes the age and distinguished abilities of both:

The other set of imagined evils is, indeed, a pretty formidable raw head and bloody bones, and well calculated to affright the lovers of peace and order. It is suggested that everything done under the rule of a usurper would be set aside by his expulsion, and "confusion worse confounded" would ensue. The terrible nature of such consequences are not to be desired. But the law repudiates the assumed premises. No such consequences would follow a change of opinion by the President, and his consequent refusal to recognize a displaced usurper, whom in the honest and conscientious exercise of his constitutional power, but under mistaken impressions as to the facts or the law, he had seated in the chair of state a year or two previously. When recognized by the President, and thenceforth as long as he held in his possession the insignia of office and exercised the duties of state executive, the usurper would be governor *de facto*. All his acts as such, would be perfectly valid and binding as it respects all persons except himself. If he were displaced in any manner, legal or illegal, his official acts while in possession would still remain valid to all intents and purposes, notwithstanding his removal and notwithstanding any express or implied sanction of such removal by the President. The acts of a usurping *interim* legislature would be subject to the same rule. So far, indeed, as they were not carried into execution by the actual vesting of rights under them, they might, and doubtless would, cease to operate from the moment of the change which should bring into power the rightful authorities. Thus it will be seen that the general unwritten common law has provided a means of preserving the interests of individuals and of the commonwealth from the immaginary confusion and disorder which might be supposed to result from the overthrow of an intrusive government. This doctrine is as familiar as it is necessary. The "Law Student's Primer" mentions a striking illustration of it. "Treasons committed against Henry VI. (of Lancaster) were punished under Edward IV. (of York), though all the line of Lancaster had previously been declared uusurpers by act of Parliament." 4 Blackstone's Commentaries, p. 77. This conservative principle is deeply seated in the common law, and occasions for its application are constantly arising. Let a single and familiar instance suffice:—a usurper once held the register's office in this city for a long period. He held it and exercised its functions until ousted by a judgment of the court of appeals. He remained in the office a considerable time after the supreme court had decided against him. He was adjudged to be a usurper from the beginning, without any title to the office. People v. Coutant, 11 Wendell's R., 132 and 511. Many titles to valuable property may, and doubtless do, depend on the validity of this man's acts. Mr. Johnson would find no difficulty in sustaining them. It is true that in such cases the usurper cannot plead his unrighteous possession of the office in bar of a prosecution against himself for injuries resulting from his unjust acts; nor could he recover the salary allowed for lawfully exercising the office. In these consequences there is not any great mischief. I submit that the arguments *ab inconvenienti* fail utterly, and Mr. Johnson has advanced no others.

Mr. Johnson alludes to Mr. O'Conor's reference to the right of courts to change their opinions, and asserts that "it is not true that a court which has pronounced a judgment has a right to reverse it and pronounce another when the time has passed within which a review may be had." To this, Mr. O'Conor replies:

It is quite true that on a claim by A. B. against C. D., a judgment actually recovered, if unappealable or not appealable from in season, settles the right to the particular sum or thing in controversy between these two private persons, so that the defeated defendant cannot, in general, recover it back in another action. Even this is only the general rule. It is not without exceptions, for if fraud and falsehood be practised in obtaining an unjust judgment, there is a remedy. Byers v. Surget, 19 Howard's U. S. R., 308; Bowen v. Evans, 2 House of Lords Cases, 281; Michigan v. Phœnix Bank, 33 N. Y. Reports, p. 30. But the general rule of the judicial department, which I thus admit, has not the remotest application to the proceedings before General Grant on the rival claims of McEnery and Kellogg to the governorship.

Both Mr. Johnson and Mr. O'Conor seem to agree that the analogies drawn from judicial decisions should be applied with extreme caution. Thus, Mr. Johnson, referring to this precise point, says: "An analogical reasoning as often tends to erroneous as to correct conclusions. The facts are very seldom precisely the same, and when they are not, the legal results are seldom the same." And Mr. O'Conor asserts that "there is extremely little resemblance between judicial decisions and executive resolutions." Nevertheless, Mr. Johnson proceeds to enquire how the matter stands upon authority, and cites in support of his position, Knox County v. Aspinwall, 21 How. 539, and Virginia v. West Virginia, 11 Wall. 39. We confess that the first of these cases does not direct our minds to the conclusion reached by Mr. Johnson. The case of Knox County v. Aspinwall, and many other decisions which have followed it, simply hold that when the legislature of a state has authorized a county or other municipal corporation to issue its bonds in aid of a railroad or other public enterprise, in case the people of the municipality shall, upon an election held for that purpose, authorize such bonds to be issued, and such bonds are issued and pass into the hands of *bona fide* holders, a court of justice will not, in a suit upon such bonds by innocent holders, go behind the certificate of the county commissioners, or other executive board of the municipality, and investigate whether such election was held on the proper notice, or otherwise, in accordance with law. These cases rest on the undisputed principle to which we called attention in our first article on the Louisiana question (*ante*, pp. 475, 476), that when the tribunal, officer or board of officers which has jurisdiction *finally* to declare the result of an election, or to act in pursuance thereof, exercises such jurisdiction, all other persons, officers and tribunals, are bound by the determination so made; and no *other* officers, or tribunal can re-examine such decision in a collateral proceeding, especially in a case which involves the rights of innocent third parties, which have been acquired upon the faith of it. But these decisions, as we understand them, do not touch the power of the municipal board to reconsider its own decision before innocent persons have acquired rights on the faith of it, or otherwise, so as not to divest rights already vested.

The case of Virginia v. West Virginia, does, we confess, support Mr. Johnson's position by a remote analogy. The legislature of Virginia passed an act authorizing the counties of Berkeley and Jefferson to determine by a vote of the people whether they would remain in Virginia or be annexed to West Virginia. The returns of the elections were to be certified *to the governor* of Virginia, who, on being satisfied that the elections were fair and in all respects legal, was to certify the result to West Virginia. He did so, and advised West Virginia that the two counties had decided to become parts of that state. Afterwards, Virginia filed a bill in the Supreme Court of the United States to recover possession of this territory, alleging that the elections were fraudulently conducted, and that the governor decided as he did because he was deceived as to that fact. The supreme court dismissed the bill on the ground that the governor's decision was conclusive of the vote. The grounds on which this decision rests are to be found in the following vigorous language of Mr. Justice Miller, who delivered the opinion of the court:

We are of opinion that the action of the governor is conclusive of the vote as between the states of Virginia and West Virginia. He was in legal effect the state of Virginia in this matter. In addition to his position as executive head of the state, the legislature delegated to him all its own power in the premises. It vested him with large control as to the time of taking the vote, and it made his *opinion* of the result the condition of action final. It

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rested, of its own accord, the whole on his judgment, and in his hands. In a matter where that action was to be the foundation on which another sovereign state was to act—a matter which involved the delicate question of permanent boundary between the states and jurisdiction over a large population—a matter in which she took into her own hands the ascertainment of the fact on which these important propositions were by contract made to depend, she must be bound in what she has done. She can have no right, years after all this had been settled, to come into a court of chancery to charge that her own conduct has been a wrong and a fraud; that her own subordinate agents have misled her governor, and that her solemn act transferring these counties shall be set aside, against the will of the state of West Virginia, and without consulting the wishes of the people of those counties.

Three members of the court, Davis, Clifford and Field, JJ., dissented.

But this decision is only in some slight degree *analogous;* it is not in point. The question in dispute between Mr. Johnson and Mr. O'Conor is without precedent, and manifestly ought not to be suffered to turn on any analogy drawn from cases like the above. To our mind, the only substantial argument in favor of the doctrine that the President's recognition of Kellogg is conclusive upon himself, is to be found in the inconveniences which would result from his being declared a usurper. But it is believed that these inconveniences are more fanciful than real. If Kellogg is a usurper, not as much suffering would result from setting him aside now as would result from permitting him to continue his usurpation, and from his being declared an usurper by a subsequent rightful state government. But it is believed that in either event no substantial injustice could result, if the courts do their duty and decide according to law questions growing out of rights acquired under his government. For while he continues supported by the highest political power of the nation, he is the *de facto* governor, and his is the *de facto* government of the state. It follows that rights acquired on the faith of his government (except those acquired by the usurpers themselves, for they can acquire no rights by virtue of their own wrong) are as valid and meritorious as they would have been if acquired under the legitimate government. As the President's action in the premises concludes all persons until it is revised by Congress, so all persons are obliged to give the usurping government the same faith and credit as though it were the government *de jure*. Its bonds, and other obligations emitted under its authority, or under authority of acts passed by its legislature, are, except when in the hands of the usurpers themselves and those who have colluded with them, of the same validity as though it had been issued under the authority of a government *de jure;* and any court of justice which would countenance their repudiation, would not be deserving of the name. Assuming that the President's original decision in recognizing Kellogg was erroneous, and that he has become convinced of his error, the mischief of his not undoing it consists in the fact that important rights will be acquired on the faith of it, both in this country and in Europe, which may be overthrown by the intemperance of a subsequent state government.

Since the foregoing was written we have seen a letter of Mr. George Ticknor Curtis, in the New York Herald, for the 17th instant, in which he reaches the same result as Mr. O'Conor, though by a different process of reasoning.

—THE Virginia "oyster law," which we presume prohibits citizens of other states from taking oysters in the waters of Virginia, has been declared unconstitutional by Judge Bond of the federal circuit court.

Accommodation Indorsement by One Partner—Notice.

J. B. S. LEMOINE, ASSIGNEE IN BANKRUPTCY OF EARICKSON & BOYD, v. BANK OF NORTH AMERICA.

United States Circuit Court, Eastern District of Missouri, September Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **Accommodation Indorsement—Notice.**—If the maker of an indorsed note carries it to a bank for discount on his own account, this is notice to the bank that the indorsement thereon is an accommodation indorsement. Such is the presumption of law, if there is nothing in the transaction to repel it.

2. ——. ——. **Indorsement by Firm.**—If such indorsement be that of a firm, the bank discounting the note, under such circumstances, must, at its peril, ascertain whether there was any special authority, express or implied, for one partner to sign the partnership name as an accommodation indorser.

This is a contest between the Bank of North America and th assignee of Earickson and Boyd, bankrupts, respecting the liability of the firm on the indorsement of the name of the firm upon two promissory notes. A copy of one of the notes is as follows:

"ST. LOUIS, June 11, 1873.

"Sixty days after date we promise to pay to the order of Earickson and Boyd thirty-five hundred dollars, etc., at the Bank of North America, St. Louis, Mo.

"[Signed.] WHITE BROS.

"Indorsed: EARICKSON & BOYD."

The other note is for $2,500, dated June 17, 1873, at sixty days, with the same names as makers as the one above copied.

From the evidence before it, the district court found that the bank was entitled to have the amount of the two notes ($6,000 in all), allowed against the firm assets. The assignee appealed the case, and new pleadings were filed in the United States Circuit Court, as in action at law by the bank upon the indorsement. The facts in the case were found by the district court to be, that John K. Earickson and J. Will. Boyd formed a partnership on the 1st of January, 1873. By articles of copartnership both partners were prohibited from signing the firm name for the security or accommodation of third parties, and it was further stipulated that Earickson should have exclusive charge of the tobacco factory of the firm, and Boyd of the office and finances. The firm did not need any accommodation or borrow any money, except on drafts against their sales of tobacco, which they sometimes discounted at the bank. The Bank of North America had no knowledge of any of the above facts. The firm failed, owing about $60,000, of which amount only about $3,500 was legitimate indebtedness, the residue of the indebtedness having been created by Earickson, without Boyd's knowledge or consent, by using the firm name on commercial paper, for his, Earickson's, private benefit, or by indorsing for White Bros. The latter firm were also indorsers on accommodation paper drawn in the name of Earickson and Boyd, by Earickson, and the firm received no benefit therefrom. On the contrary, this was done without Boyd's knowledge or consent. The only instance to arouse Boyd's suspicions occurred in March, 1873, when he charged Earickson with using the firm name for private purposes. Earickson admitted the fact, but said it was only in one instance, and that he had the means to take up that paper. Boyd threatened to dissolve the firm if the act was repeated. Earickson took up that paper and Boyd knew of no other paper having been given, until after the failure of White Bros. Of these facts the bank had no knowledge. The notes upon which this claim is founded were made by White Bros., payable to the order of Earickson and Boyd, and indorsed with the firm names of Earickson and Boyd, but without the knowledge of Boyd. White handed the note to a director of the bank in the street; the director laid the note before the board of directors and it was discounted. The other note was handled in the same manner through a different director. The proceeds were placed to the credit of Earickson

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and Boyd, and the money was drawn on their checks, signed in the handwriting of Earickson, which checks were drawn to the order of White Bros. and indorsed by them. The notes were protested, and Boyd was ignorant of all these transactions. It does not appear that the bank had any knowledge of the connection or relations of the two firms, except what appeared in the papers in question. The case was submitted to the court on the statement of facts substantially as above.

J. G. Chandler, for the assignee; *John R. Shepley*, for the bank.

DILLON, Circuit Judge.—On the facts found by the district court, upon which, by stipulation, the cause is submitted to this court, it is to be taken as true that the notes in the question were indorsed with the firm name of Earickson and Boyd, solely for the accommodation of White Bros., the makers, without any consideration to the endorsers therefor. It is to be taken as true that this indorsement of the firm name was made by Earickson without the consent of Boyd, and against the express stipulation on this subject in their articles of copartnership, and that the notes, when thus indorsed, were returned to the possession of the makers, from whom the bank received them, and at whose instance it discounted them, and who, through the checks of Earickson drawn in the firm name, received the proceeds of the transaction.

There is no finding or agreement that the indorsement of the firm name was made in accordance with any habit of dealing of the firm known to Boyd, or that there was, with Boyd's knowledge, such a course of dealing as respects accommodation indorsements in the firm name, as to justify an inference of Earickson's authority to bind the firm in this manner.

I concede, that in favor of third persons acting in good faith, it is a presumption of law that notes indorsed in the name of the firm were indorsed on the partnership account, and hence the indorsement on the notes in question will bind the firm unless it appear that the bank had notice that the indorsement was made outside the partnership affairs. Story on Notes, sec. 72; Byles on Bills, 47; Austin v. Vandermark, 4 Hill (N. Y.), 259–262: per Nelson, C. J. But inasmuch as the settled rule of law is, that it is not within the general scope of one partner to bind the firm by contract of suretyship, or to issue accommodation paper in the name of the firm for third persons, if the bank had notice that this was an accommodation indorsement, the burden of proof is upon it to show the assent of the other partners (either expressly, or from the firm's course of dealing in this respect), or their subsequent ratification. Byles on Bills, 47, and cases cited in the notes.

If, therefore, the bank discounted these notes without notice of the fact that the name of the firm had been indorsed upon them by one of the partners without the consent of the other, and for the accommodation of the makers, it is entitled to hold the firm upon the indorsement, although, in point of fact, it was placed there by one of the partners in fraud of the rights of his copartner, or without authority from him.

And the question on which the case turns is, whether the bank had such notice, for it is not attempted to show that Earickson had authority from Boyd, express or implied, to make the indorsement.

The bank is sought to be affected with such notice, by virtue of the fact that, after the notes bore the indorsement of the firm, they were in the hands of the makers, who met one of the directors of the bank when on his way to a meeting of the board of directors, and giving him the notes, asked him to have them discounted for the makers. It does not appear that the director informed the board of whom he had received the notes; but this is not material, for the learned counsel for the bank conceded in the argument that he supposed the law to be that the board or the bank would be chargeable with the knowledge of the director thus obtained.

Thus viewed, the real question in the case is reduced to this: Does the fact that the maker is in possession of a note before maturity, indorsed by another, affect the bank that receives it from the maker and discounts for him, with notice that it was indorsed for the maker's accommodation?

At the bar, counsel stated that they had been unable to find any adjudged cases upon the exact point, and they argued it on general principles. In view of the nature of the notice required to defeat the rights of the holder for value of commercial paper, as settled by the Supreme Court of the United States in Goodman v. Simmonds (20 How. 343), I was at first impressed in favor of the bank; but subsequent reflection has brought me to an opposite conclusion. To make accommodation paper is so entirely extra the business of a copartnership and the legitimate authority of a partner, that the presumption is properly against the power of one partner thus to bind his copartner. Therefore, when a bank has knowledge that an indorsement of the name of a firm is an accommodation indorsement, it is bound, at its peril, to ascertain whether the members of the firm, on whom it intends to rely, assented to the use of their name. This it can easily do. While on the other hand, if the bank were entitled to presume that the other members of the firm assented, the presumption would, in many instances, as in the case before us, be contrary to the fact and highly disastrous to innocent partners, who would be without the means of guarding against the fraudulent use of the copartnership name in unauthorized transactions.

If the facts of the case, as found by the district court, be considered, there can be little doubt that the bank knew the discount was for the benefit of White Bros., and consequently that the endorsement of Earickson and Boyd was presumptively, as it was in fact, for the accommodation of the makers.

On examination I find several cases distinctly asserting this to be the law, and I have not met with any holding a different view.

When a note not due is taken by the makers to a bank for disunt for their account, with an indorsement thereon, the presumption, unless there is something in the transaction to repel it, is, that the indorsers are sureties for the makers, and that they did indorse it in the ordinary course of business. Upon this subject, Mr. Chancellor Walworth, in Stall v. Catskill Bank, 18 Wend. 478, holds this language: "If, therefore, it appears from the face of the paper that the partnership name is signed as surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of partnership business. He must, therefore, at his peril make the necessary enquiries and ascertain that there is some special authority for one partner to sign the partnership name as such surety, express or implied. So, if the drawer of a note carries it to the bank to get it discounted on his own account, or transfers it to a third person, with the name of the firm endorsed thereon, the transaction on its face shows that it is a mere accommodation endorsement, or the note would not be in the hands of the endorser, and the bank or person who thus receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm, who have been made sureties without their consent, are not liable to such holder of the note."

This language was quoted and approved by Mr. Chief Justice Sawyer in giving the judgment of the Supreme Court of California in Hendrie v. Berkowitz, 37 Cal. 113, 1869, and in which the court distinctly held, in a case precisely like the one now before the court, that the presumption was that the indorsement was an accommodation indorsement, and that the burden of proving the consent of the member who did not write the indorsement, is upon the holder. So, in Overton v. Hardin, 6 Coldw. 375, 1869, the Supreme Court of Tennessee said: "There can be no doubt that the possession of an indorsed note by the maker is presumptive evidence that it was indorsed for his accommodation." Edwards on Bills, 103, 105; Brown v. Taber, 5 Wend. 566; Erwin v. Shaffer, 9, Ohio St. 43.

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In this last case, Brinckerhoff, J., says: "That although an indorsed note in the hands of the maker, after due, is presumed to have performed its office, and to have been paid off and taken up by the maker, yet no such presumption arises in the case of such a note before due; but that, on the contrary, in such case it is a matter of legal presumption that the note is unsatisfied, and is indorsed and placed in the hands of the maker for his accommodation. Wallace v. The Branch Bank, 1 Ala., 565; Mauldin v. Branch Bank, 2 Ala., 502; Stall v. Catskill Bank, 18 Wend. 478." See also language of Mr. Justice Nelson, in Bank of Rochester v. Bowen, 7 Wend, 159; Byles on Bills, 47 and note.

The amount of the notes, less the discount, was, in accordance with a usage of the bank, placed to the credit of the last indorsers —in this case Earickson & Boyd—and was drawn out on the two checks of Earickson & Boyd, signed by Earickson without the knowledge of Boyd, in favor of White Brothers. One of these checks showed on its face that it was for the proceeds of the note discounted, and amount of both showed that it was for the note transactions. It is insisted that this makes the indorsement binding on both. This view rests upon the ground of ratification by Boyd; but the essential elément of knowledge on his part, both of the fact of the indorsement and of the check being drawn, is wanting. The checks do not, therefore, change the rights of Boyd, or make binding upon him his partner's act in indorsing the firm's name to the note in question. The district court erred in holding that the two notes were a claim upon the firm assets. The indorsement is alone binding upon Earickson.

JUDGMENT ACCORDINGLY.

Bankruptcy—Composition with Creditors.

I. *In re* HASKELL.

United States District Court for the District of Massachusetts.

Hon. JOHN LOWELL, District Judge.

1. **Bankruptcy—Composition.**—Under the amended bankrupt act, the mere fact that the bankrupt, if opposed, would be unable to obtain his discharge in bankruptcy, will not necessarily prevent the court from allowing a resolution of composition.

The creditors need not be informed beforehand of the exact proposition to be submitted by the bankrupt at a meeting called to consider a composition.

The schedules filed in the bankruptcy case are ordinarily a sufficient statement of the bankrupt's assets and liabilities.

LOWELL, J.—Several objections are taken to the acceptance of the resolutions of creditors to accept a composition of twenty-five cents on the dollar.

Section seventeenth of the amended bankrupt act introduces a new feature into the system, by enabling a certain amount and proportion of the creditors to accept a composition which shall be binding on all the rest. Full power is given to the supreme court to make rules, but until the next session of that court, the law, being in full operation, must be worked out as well as may be. Three points have been argued:

1. That there should be a written proposition from the bankrupt, preceding the notice to creditors, to lay the foundation for their action, and to inform them what they were to be asked to accept.

There is much force in this objection, abstractly considered, and it may be that the rules will prescribe something on the subject, but the statute does not, I think, require it. The course of proceeding pointed out by the law seems to be for the creditors to meet and discuss, the debtor being present and answering all questions, and then they may not only accept or reject a proposition which was made and filed ten days before, but the debtor may make and they may accept quite a different proposition from that which he came prepared to offer.

The creditors are to be notified of the time, place and purpose of the meeting, but not necessarily of the precise proposition to be made; unless the matter should be carefully regulated, there might be danger of introducing too much precision, by requiring that there should be a written point of departure for these proceedings. We have taken this section from the English act of 1869, 32 and 33 Vic. chapter 71, section 126. Under that act, very many and careful rules have been made and forms have been prescribed. Nos. 106 to 108.

These forms do not contain, either in the application by the debtor or in the notice to his creditors, any intimation of what the proposition is likely to be. This shows that the judges construe that section in the way I have suggested: there seems to be no reason to say that the debtor must have made up his own mind what he will offer before he meets his creditors. He may be investigating his affairs and may need their advice and assistance.

2. A somewhat similar course of reasoning applies to the second objection, which is, that the statement of assets produced at the meeting was insufficient. This was the schedule of assets already filed in bankruptcy. There is nothing in the mere words of the statute to require any other or different statement than is required in bankruptcy, and the most obvious course would be to make it as much like that schedule as might be, which is the rule prescribed by the court in England.

It is true that such a schedule cannot inform creditors of such particulars as will enable them to decide understandingly upon an offer of composition. But what written statement will do this? The law requires the debtor to be present and to answer all enquiries, and the creditors are not bound to act until all such enquiries have been answered, including those by a majority or by a single creditor, and including a due inspection and explanation of the books.

All this had been done some weeks before by a committee of creditors who had reported to the others; so that there was no real lack of information in this case, and I do not think I could lay down any better general rule for the written statement, than that in cases in which the sworn schedules have already been filed, they shall be used.

To consider the third objection in all its possible bearings, would be tedious. The objecting creditor offered evidence which he insists proves that a preference to a considerable amount was made to one creditor in June, after the debtor was insolvent.

It is said that this fact would prevent the debtor's discharge, and therefore ought to prevent the acceptance of the resolution which, if recorded, is intended to work a discharge.

As I said at the hearing, I do not believe the statute intends that no debtor can compound with his creditors under this section, who would not be able to obtain his discharge.

The law seems to leave it very much to the requisite number and amount of creditors, who, if all the facts are before them, may decide the whole matter. This thing had been known for weeks to all the creditors, and had been the subject of a report by a committee. The court has a discretion to accept or reject, as may be for "the best interests of all concerned." This means the best interests at the time being, all things considered.

In passing upon the acceptance of the resolution, I think the court ought to take into view all the circumstances, including, perhaps, the probability of a discharge in bankruptcy, and certainly the conduct of the several parties in its bearing on the composition. I have found nothing in this case which requires me to reject this resolution.

RESOLUTION TO BE RECORDED.

II. *In re* WALD & AEHLE.

United States District Court, Western District of Missouri.

Hon. ARNOLD KREKEL, District Judge.

1. **Bankruptcy—Composition—Number of Creditors.**—In estimating the number of creditors who are to be counted in passing a resolution in favor of a composition with the bankrupt, and also the number of names which are to be attached to the confirmatory statement, creditors whose debts are less than fifty dollars are to be excluded.

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KREKEL, J.—Under the 43d section of the amended bankrupt act of June 22d, 1874, providing for composition with creditors, the court made an order directing a meeting of creditors to be held to act upon a composition proposed by the bankrupts.

The meeting was held, and the resolution passed, as well as the confirmatory signatures of creditors, are now before the court for its action. From the number of creditors who were present and represented at the meeting which passed the resolution, as well as the number signing the confirmatory statement, it becomes necessary to determine what is meant by language employed in the following part of the section referred to:

"And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor assembled at such meeting, either in person or in proxy, and shall be confirmed by the signature thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor.

"And in calculating a majority for the purpose of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars, shall be reckoned in the majority in value, but not in the majority in number." The question is, what creditors shall be counted in order to ascertain the majority spoken of, and are creditors, whose claims do not exceed fifty dollars to be disregarded in computing the majority who must pass the resolution, as well as in ascertaining the number of those who are required to sign the confirmatory statement. The court holds that all creditors whose claims do not exceed fifty dollars must be disregarded in arriving at the majorities required in both cases, that is to say, in passing the resolution there must be a majority of the creditors assembled at such meeting, either in person or by proxy, excluding all whose claims do not exceed fifty dollars, to make the resolution operative, and in the confirmatory statement the number of signers required, must be two-thirds, after excluding from the whole number of creditors all whose claims do not exceed fifty dollars. It may be admitted that this construction will, in some cases, cause hardships, as it increases the trouble or difficulty on the part of bankrupts to obtain the requisite number. It must be remembered, however, that the whole of the requirements of the bankrupt act in some sense may be called a forced proceeding, so far as the creditor is concerned; for the failing circumstances of the debtor largely interfered with his freedom of action.

A creditor may, under compulsion, as it were, attend the meeting of creditors provided for, but suppose he does not on account of the expense he must incur, which, though small, may be large when compared with the amount offered in composition, or he fails from any other cause to attend, the law should not, on that account, be construed against him, and favorable to the debtor who makes the offer. Throughout the whole section from which the quotation is made, greater regard is had to amounts than number. To illustrate; in providing for the taking of bankrupt estate out of the hands of the courts, and placing them in the hands of trustees selected by the creditors, *amounts* are exclusively regarded by providing that three-fourths in value of the creditors whose claims shall have been proven, shall pass the resolution.

The bankrupts will be required to bring themselves within the views of the court here expressed, in order to have their cases passed upon favorably.

[Correspondence.]

A Point in the Law of Homesteads—Partition.

OFFICE OF THE STATE REPORTER,
ANDOVER, N. H., October 9, 1874.

EDITORS CENTRAL LAW JOURNAL:—I learn that one of your corps is preparing a monograph upon that marvel of intricacy, the law of homesteads. I herewith enclose you the head-notes in Barney v. Leeds, one of the latest contributions on that subject. It is the same case reported in 51 N. H. 281. It was decided at the August term, 1874, Foster, J., delivering the opinion. These head-notes were prepared by him, at my request. The statute refered to in the last head-note, is as follows:

"When any estate is so situated that it cannot be divided so as to give to each owner his equal share therein without great prejudice or inconvenience, the same or part thereof may be assigned to one of the owners, he paying to the other persons interested, who shall have less than their shares, such sums of money as the committee shall award, or giving bond, with sufficient sureties, to pay the same, with interest, within such time as the court shall order."

The significance of the opinion arises from the fact, that the court is understood to have denied, in substance, though not in form, the power of the legislature to authorize a court of law to compel one person to buy another's land, for which he never contracted, which he does not want, and for which he has not the money to pay.

Apropos of your article on "Juries," our last legislature practically abolished trial by jury, in civil causes, by making it the duty of the court to send them all to referees, unless satisfied by some party that such a course would be inexpedient. I will endeavor to send you in a future note, the result of this experiment so far as developed. Very truly yours.

JOHN M. SHIRLEY.

BARNEY V. LEEDS.

The appraisal of a committee, setting off a dedtor's homestead, upon the levy of an execution, is conclusive upon the question of its value, until invalidated by some proceeding brought for the purpose of vacating or revising the record thereof. It cannot be called in question upon a subsequent proceeding for partition between the debtor and his creditor, to whom the residue of the estate has been assigned.

Whenever the estate of tenants in common is practically incapable of division, by assigning to each owner thereof, his equal portion in severalty, he cannot be compelled, under the provisions of § 25, Ch. 228, Gen. Stats., either to sell his own share, or purchase that of his co-tenant; but in such a case resort may be had to a court of equity, which has power to compel a sale of the entire estate, and a distribution of its proceeds upon equitable principles.

[Correspondence.]

Jury Service in the South—A New Plan for Getting Good Juries.

OXFORD, MISS., October 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—I have read with interest an article on the jury system, in a recent number of your journal (*ante*, p. 487). It is manifest to all who have considered the subject, that some reformation on this subject is necessary in most of the states, and especially in this state, where, under a law of the state, which has been in force for many years, the petit juries are drawn from a box containing the names of all males who are householders, between the ages of twenty-one and sixty, irrespective of their intellectual or moral qualifications. The system was bad enough before the addition of the newly enfranchised class, but few of whom, comparatively, have had such opportunities as are necessary to qualify a man for this important service.

The act of Congress requires that jurors in the United States courts, shall have the same qualifications, and be selected in the same mode required by the laws of the state in which the court is held, for juries in the courts of the state, *as far as practicable*, leaving it to the court or judge to determine the practicability of the state law. If the names in the jury boxes were such as desired, the United States authorities would have no right to go into them; to avoid this, the practice was for many years to make an order directing the marshal to summon from certain designated counties the required number, who were qualified jurors under the laws of the state. To those selected by the marshals themselves, no just objection could be made; but as the law allows as good as no compensation for the service, it was natural (and I do not know that they could much be blamed for it) for the marshal to adopt the most inexpensive mode of getting jurors, which has generally been by sending a special deputation to the sheriffs of the counties, assuming that the sheriffs knew the proper persons to summon. But the sheriffs, who are generally looking to a re-election, desire to please all parties, and, feeling no special interest in the court, excuse intelligent business men when requested, and often select those who request it, and who have no other business, and who are poorly qualified for this service. Besides this evil, it subjects the marshal to the reproach of partiality in his selections, to favor particular interests.

This system did not conform either to the form or spirit of the state law. To avoid these objections and to conform to the spirit of the state law in selecting the juries by ballot, and at the same time to procure such as were in every way qualified, I have in the courts in which I am the sole judge, and

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Judge Woods, the circuit judge, and myself, have in the circuit court, adopted the following rules: The commissioners of the court in their respective localities select some three hundred names of gentlemen of well known intelligence, integrity, impartiality and fair mindedness, irrespective of race, or party affiliations. These names are forwarded to the clerk without any knowledge being given as to who they are, and are placed on slips of paper or ballots and placed in a box, which is kept locked except when the drawing is had, which is done by the marshal and clerk in the presence of the judge or a commissioner specially appointed to superintend it. The names drawn constitute the venire, and are summoned by the marshal or his deputy; both grand and petit juries are drawn in the same way.

The experiment has proved a success. The jurors obtained under it would do credit to any court. It relieves the marshal from any blame, avoids any possibility of a packed jury for any party; since in the first place the names in this jury box are unknown to any one but the commissioner and clerk, until drawn, and if they were known, it would not be known whose name would be drawn. The drawing is continued until the names are exhausted, when the box is refilled. The attorney-general has recommended to Congress to adopt a similar rule for all the United States courts, which I am satisfied is the best rule that can be adopted. Some of the states, I learn, have something like the same plan. Some plan should be adopted by which to secure the very best men for this important service.

I submit our rule for your consideration, and for any use you may see proper to make of it. Yours, etc., R. A. HILL.

Notes and Queries.

I. JUDGMENTS OF JUSTICES OF THE PEACE.

BLOOMINGTON, ILL., Oct. 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. instituted a suit before a justice of the peace, against B. A trial was had, the jury returning a verdict in the following form:

"We, the jury, fine for the plaintiff fifteen dollars and costs."

No further proceedings were had before the magistrate, and the magistrate failed to render a judgment on the verdict. From this verdict the defendant appealed the cause to the circuit court.

Would a motion to dismiss the appeal, on the ground that the justice rendered no judgment from which the defendant was authorized by law to appeal, be sustained? Would like a reply, with authorities, through the columns of the JOURNAL. C. D. M.

ANSWER.—We find that the precise case to which the above query has reference, has recently been adjudicated by Tipton, J., of the Circuit Court of McLean County, Illinois, in Merrit v. Tarman, 1 Monthly Western Jurist, 264, the learned judge declining to dismiss the appeal. In support of his position he cites the following cases: Lynch v. Kelly, 41 Cal. 232; Tilton v. Mulliner, 2 Johns. 181; Gaines v. Betts, 2 Douglass (Mich.) 99; Iverall v. Pero, 7 Mich. 316. With this view, we entirely agree. As was said by the court in Gaines v. Betts, *supra*, "the verdict is itself the judgment of the law in the case, and the justice is simply required to make the entry on his docket. If he neglects to do so, still the verdict must be considered the final determination of the cause." We agree with the reasoning of Judge Tipton: "The failure of the justice of the peace to formally enter the judgment on the verdict, amounted simply to an irregularity that might be waived; and the defendant having regarded the same as a valid judgment and appealed from the same, thereby waived any right to complain on his part." The question may, however, be controlled in eaeh state by local statutes.

II. STATUTE OF FRAUDS—ANOTHER ANSWER TO W. F. (ANTE, P. 482).

We thank S. W. W. for the following, and are sorry that want of space has compelled us to delay it so long:

LITTLE ROCK, ARK., Sept. 30, 1874.

EDITORS CENTRAL LAW JOURNAL:—A correspondent presents to you the following question, which you request your readers to answer, to wit: "A is renting a store by the month from C., at $40 per month. B. offers him $200 to move out and give him possession; A. accepts the offer with the proviso that he be allowed to remain until he can get another house; in two week's time he moves out and tenders the key to B., which B. refuses to accept. The contract was not in writing. Was it within the statute of frauds? Is it an interest in land?" Will you allow me to dash off a few thoughts on the subject.

First, presuming that it is very doubtful about its being an interest in real estate, but whether it be or not, if there was no part payment, delivery or earnest given to bind the bargain, the case falls within another section of the statute of frauds, as the contract price exceeds the sum which requires payment, delivery or earnest in sales of personal property. And lastly, if the cosideration for the promise was neither real nor personal, then it was nothing, and the contract was *nude pact*.

But to the law as applied to this case. The case is a little obscurely put, but if I understand it rightly, it presents a case either of a fixed term, one month, or a common law tenancy at will.

It is in either event an interest in real estate, as now construed by the courts. Let us see what the law applicable to it is, viewed as a fixed term.

Uunder the statute of frauds, 29 Chas. II. C. 3, Sec. 4, which has been adopted in most of the states, a written agreement signed by the parties or his agent is generally necessary to the validity of any contract for the sale or purchase of lands, tenements or hereditaments, or any estate or *interest* in or concerning them, whether such estate or interest be subsisting or be proposed to be created *de novo*. Dart on Vendor and Purchaser, Chap. 2, p. 91; Sug. 135; Atty-Gen. v. Day, 1 Vesey, Sr. 218, and 12 Vesey Jun. 472; *ex parte* Cutts, 3 Deacon, 267, by Lord Cottenham.

Although an actual demise by parol for any term not exceeding three years at a rent not less than two-thirds of the improved value, was valid under the second section of the statute of 29 Chas. II, an executory agreement for such a demise is void unless in writing; so, a parol agreement by a lessee, for an assignment of the residue of his term, being less than three years, is void, and cannot, it would seem, operate as an underlease. Sug. 95; Barret v. Rolph, 14 Mees. and W. 348; Dart on Vendors, p. 92. New York and most of the American states have adopted the English statute with some modifications. For instance, there it is applied not only to every estate and interest in lands, but to every trust or power concerning the same, and the exception in favor of leases is confined to leases for a term not exceeding one year. (Such is the limit in Arkansas). See Trear v. Hardenburgh, 5 Johns. Rep. 272; 7 Cowan Rep. 263.

By the English statute, a lease for three years might be made by parol, provided the rent reserved did not exceed two-thirds of the improved value of the property.

In most of the states the period for which a parol lease may be made is limited to one year. In the case stated by your question, it is either a bargain for the transfer of an unexpired term, with possible right of renewal, or it was the transfer of a tenancy at will, which the courts construed by judicial legislation to be from year to year—as to which more anon—or else it was nothing and the contract was void for want of consideration. If it involved the transfer of a term, being an interest in real estate, the case is on all fours with the case of Barrett v. Rolph, 14; Meeson v. Welsby, decided in the Exchequer Chamber of England in June 1845. See also the case of Mollett v. Brayne, 2 Campbell 103; Thomas v. Cook, 2 B. & Ald. 119; Graham v. Whichelo, 1 C. & M. 188, and Lyon v. Reed, 13 M. & W. 285. In the case of Barrett v. Rolpb, although the 2d section of the act of 29 Chas. II, made prarol cases for less than three years valid, yet as the 4th section of that act required the contract, which transferred any interest in real estate, to be in writing, and a leasehold being such interest, could not be transferred by parol, although an underlease might be so made, the court refused in that case to recognize this transfer as an underlease. I have been unable to find any English decision changing this ruling. If we follow it, it is inevitable that in all cases, where one party holding an interest in real estate attempts to transfer it, although that interest be one which, by the statute of frauds, may be created by parol, being for less than three years in England, or less than one year in those states where the limits are shortened, he must do so in writing, or the case falls within the statute, and is void.

There has been another question in those states, wherein the statute of 29 Chas. II has not been literally adopted: As to whether or not a tenancy at will, as construed by the courts, is such an interest in real estate as will bring it within that provision of the statute; for the English statute expressly prohibited the parol assignment of a lease in this language: "And that no lease or estate, either of freehold or term of years should be assigned, granted, or surrendered, unless in writing." See 4 Kent Commentaries, pages 95–6; see also, 7 Barb. (S. C.) Rep. 191. We think, however, in these states, which have left out the specific provision of the English statute as to assignment of lease, there can be no doubt but that such assignments come within this general provision regulating sales of real estate or *any interest therein*. The following American cases bear strongly upon this question: McDowell v. Delap, 2 A. K. Marshall, 33, which involved a lease. Possession is an interest in land within the meaning of the statute. Howard v. Easotn, 7 Johnson, 205; Hesseltine, v. Seavey, 4 Shep. 212.

The sale of timber on land growing, with an agreement that the purchaser shall have a certain time within which to take it off, and right of entry therefor, is a sale of an interest in land. Olmstead v. Niles, 7 New Hamp. 523. Many cases conflict with this. An agreement for future conditional sale is within the statute. Folsom v. Great Falls Co., 9 New Hamp. 355. A right to enter upon the land of another to repair a dam and embankment necessary to the working of a mill originally erected with the consent of the owner of the soil, is an interest in land, within the statute. Cook v. Sterns, 11 Mass. 533. See also, Scott v. McFarland, 13 Mass. 309; Stone v. Crocker, 19 Pickering, 292. A parol contract, to make a lease, is void, even where the con-

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sideration of the deed which conveyed the land was such parol promise made by the grantee, with the further promise to support the grantor for life. Townsend v. Townsend, 6 Met. (Mass.) 319. An agreement, concerning leasing real estate not to be performed within a year, is not within the statute of frauds. Janes v. Finney, 1 Root, 549. An agreement to surrender a lease is within the statute. Lammot v. Gist, 2 Har. & Gill, 433. Also see, on the subject of assignment of leases and prescription rights, etc., Schmitz v. Lauferty, 29 Ind. 400; Lester v. White's heirs, 44 Ill. 464; Hogsett v. Ellis, 17 Mich. 351; Greton v. Smith, 33 N. Y. 245. This citation of American authorities, which has been taken mostly from the United States Digests, gives a fair specimen of the drift of American decisions.

At the page above cited from 4 Kent. Comm. will be found a note which contains a list of all the states which have adopted the English statute, with those which, like New York, have modified it, and the nature and extent of the change in each; by the use of this note and examination of the authorities of the several states, it will be found that there is no diversity of opinion as to the fact that a leasehold interest or possessory right, is an interest in real estate, within the meaning of the statute, as adopted by all of them, and being such interest the assignment of it is not a lease for less than one year under New York's modification, or less than three under 29 Chas. II, but is the transfer of an interest in real estate within the meaning of the 4th section.

Let us now examine the case, viewing it as a common law tenancy at will.

Originally an estate at will was not bounded by limits with respect to time. 2 Bl. Com. Ch. 9, page 145, to the end; Littleton, p. 1 Ch. 8, and comments; Preston Estates, Ch. Will; Com. Dig. Estate, 258; 1 Inst. 57; Watkins on Conv. 1–9.

As such estates depended upon the will of both parties, the dissent of either determined the estate, and the conveyance by the tenant determined the will, and ended the estate. But latter judges beginning with Mansfield, who was a great innovator, have given something of a term to this class of tenants, and this kind of tenancy has, under the effect of judicial legislation become nearly extinct practically. In the case of Timmons v. Rowlinson, 3 I, Burrow, page, 1603, Lord Mansfield, said, "and as it is notorious that an infinite quantity of land is holden in this kingdom without lease, therefore, it is an extensive case and proper to be remedied. In the 4th George II, the provision was for those cases where the landlord gave the tenant notice to quit. This the 11th of George II, provides for the case of the tenant giving his landlord notice of his intention to quit, and not delivering up possession according to it."

These tenancies, so numerous in England, in Lord Mansfield's day were all in a technical sense estates at will. But says Chancellor Kent, "such estates are said to exist only notionally, and when no certain term is agreed on, they are construed to be *tenancies from year to year*, and each party is bound to give reasonable notice of an intention to terminate the estate." 4 Kent Com. 111, 112 (Margin). Although judicial decisions have construed technical tenancies at will as being from year to year, yet there are cases like Doe v. Wood, 14 Messon & Welsby, 682, wherein it is held that a simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year; but that is not the case now before me, as I understand it, although we are left in the dark, as to A's exact relations with his landlord.

Though the tenant of a house is equally under the protection of notice as the tenant of a farm, which requires six months, or at least reasonable notice of the determination of the will, yet if lodgings be hired by the month, the time of notice must be proportionately reduced. 4 Kent Com. 114. While it is true that an actual tenant at will, if there be any such, has no assignable interest, though it is sufficient to admit of enlargment by release, yet these estates above indicated are constructive tenancies, from year to year, and may be assigned. 4 Kent, 114.

I therefore answer the question, that the case put to your correspondent is within the statute. On the other hand, if the possessory right, or tenancy at will, or whatever else it is, be not an interest in real estate, then it is nothing, and the contract is void for want of consideration; for it is certainly will not be contended that it is personal property. But if the thing sold be personal, no earnest to bind the bargain being given, and being over the value of thirty dollars, is it not still in the statute of frauds? S. W. W.

III. EXAMINATION OF BANKRUPTS—LEADING QUESTIONS.

SAVANNAH, GA., September 24, 1874.

EDITORS CENTRAL LAW JOURNAL:—An asignee brings suit to recover a certain sum of money for the bankrupt's estate, which suit involves a fraudulent settlement between the bankrupt and the defendant. The bankrupt's testimony being necessary on trial, and he having removed from the district in which the bankruptcy was committed, the assignee sues out interrogatories. Can the assignee put leading questions in such a case, treating the bankrupt not as an ordinary witness, but as one who is bound by the bankrupt act (section 26) to give any and all information which will enable the assignee to receive, demand and recover debts or property due to his trust estate? Or, does such a mode of eliciting testimony for the assignee in this case refer more to the rules of the common law or to examinations of a bankrupt before a register, under section 26 of the bankrupt law?

If the common law rule as to leading questions in interrogatories should be sustained in such a case, then could not the assignee still put such questions, on the ground that the bankrupt is to be considered an unwilling witness, having been a party to the fraud? GUION.

ANSWER.—In an action of this kind the general rules of evidence would apply, and leading questions would not be proper, unless in the discretion of the court. If it appeared that the bankrupt was a hostile witness, or if the fraud was a fraud in fact, leading questions would be allowed.

IV. HOMESTEAD EXEMPTIONS.

CORVALLIS, OREGON, Sept. 21, 1874.

EDITORS CENTRAL LAW JOURNAL:—By the act of Congress, commonly known as the "Homestead Law," approved May 20, 1862, 12 Stat. 392, it is provided: "No lands acquired under the provisions of this act, shall, in an any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor." Before the expiration of the five years from date of settlement, the party pays the minimum price as allowed by section 8 of said act, and acquires a right to the title.

1. Are said lands liable to be taken in satisfaction of debts contracted prior to the issuing of patent therefor?

2. Are lands thus obtained "acquired under the provisions of this act," within the meaning of the clause above quoted? Truly, S.

ANSWER.—In view of the settled rule of liberal construction of such exemptions for the benefit of the family, it is probable the court would answer the first question in the negative and the second in the affirmative. We know of no decision on the question.

Summary of our Exchanges.

The Legal Intelligencer, for October 9, contains a long, and we should judge, important opinion of Mr. Justice Strong, in the Circuit Court of the United States for the Western District of Pennsylvania, in the Locomotive Engine Safety Truck Co. v. The Pennsylvania Railroad Co., ruling the following points:

1. The patent of the Locomotive Engine Safety Truck Company is not invalid for want of novelty in the invention, for. when in combination with a locomotive engine, it is substantially a different truck from any other in use. This combination is a patentable invention.

2. The mere forbearance to apply for a patent during the progress of experiments, and until the party had perfected his invention and tested its value by actual practice, affords no just ground for presuming an abandonment.

Also several interesting decisions of the Supreme Court of Pennsylvania, from which we take the following points:

Ernst v. Wagoner. Defective acknowledgment of a married woman's deed does not entitle her husband's creditor to recover the property from her purchaser.

Pusey, executor, v. Dusenberry. A special partner cannot be made liable as a general partner on account of some acts done after the dissolution of the partnership.

Miller & Reist v. Kreiter. The right of set-off dates from the time that defendant had notice. One defendant may set-off his individual claim against a joint claim against him and another.

Rodgers v. the Riddlesburg Coal and Iron Company. 1. The admission of copies of field notes of a person who was not even the deputy-surveyor, cannot be admitted. 2. An ancient paper is not only one of great age, but it must come from the proper authority to be admitted,

The Legal Gazette, for October 9, reports with full statement and argument of counsel the case of the Wenona, Supreme Court of the United States, opinion by Mr. Justice Clifford. In this case the steamer Wenona was condemned for a collision with a sailing vessel, the wheelsman, mate, captain and other witnesses on the sailing vessel swearing positively to courses, and distances and times immediately prior to the collision, and these showing that the steamer was in fault; while though there was strong evidence on the steamer's side to show that these courses, distances, and times could not have been truly stated by the witnesses in behalf of the sailing vessel, this evidence was inferential chiefly, consisting of conclusions or arguments drawn from other facts sworn to, as *ex gr.*, the lights which the steamer saw and the lights which she did not see on the sailing vessel, and the effect of giving credence to this infe ential or argumentative testimony being to convict, as of necessity, the witnesses for the sailing vessel of perjury.

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Also Stevenson v, Williams, same court, opinion by Mr, Justice Field, with the following syllabus:

1. The act of Congress of March 2, 1867, under which a removal may be had of causes from a State to a Federal court, only authorizes a removal where an application is made before final judgment in the court of original jurisdiction, where the suit is brought, It does not authorize a removal after an appeal has been taken from such judgment of the court of original jurisdiction to the Supreme Court of the state

2. Where the judgment of a state court was annulled by the decree of a court of the same state, on the ground that the notes on which the judgment was rendered were given for a loan of confederate money, and that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the President forbidding commercial intercourse with the enemy, this court cannot review the ruling in these particulars. It conflicts with no part of the constitution, laws, or treaties of the United States, and presents no federal question.

It also publishes Locomotive Engine Safety Truck Co. v. Pennsylvania Railroad Co., *supra;* and also gives condensed notes of several other cases, which have been elsewhere published.

The Pacific Law Reporter, for October 6, publishes Swain v. Duane, Supreme Court of California, which was a suit by a creditor of the husband to subject property claimed by the wife as her separate estate. It also publishes an opinion of Mr. Justice Field in the Circuit Court of the United States, for the District of California, in Patterson v. Tatum, an important land case. It also publishes several other short opinions delivered in the Supereme Court of California. In one of these, People v. Frese, the court below instructed the jury as follows:

"You will also observe that the difference between murder and manslaughter is, there is no intention whatever either to kill or to do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection." "This, said the supreme court, is clearly erroneous. Whether the homicide amounts to murder or to manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case, there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forebearance for the weakness of human nature, will disregard the actual intent and will reduce the offence to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder."

The American Law Review, for October, publishes valuable papers on The Law of Literature and Art in England and America; The Trial of William E. Udderzook; The Wisconsin Railroad Acts, and The Law of Adoption. The rest of its contents comprises a Digest of the English Law Reports for May, June and July, 1874; A Selected Digest of State Reports; Book Notices; List of Law Books published in England and America, since July, 1874; Summary of Events.

The Southern Law Review, for October, contains a long paper on Homicide, and the Defence of Insanity, by James Wyatt Oates, Esq., of Abbeville, Alabama; and another on Railroad Laws, or Legislative Control of Railroads, by S. S. Wallace, Esq., of Denver, Colorado. The remaining portion of its contents comprises a Digest of the English Law Reports; a Selected Digest of State Reports; and several Recent Decisions, among which we notice Memphis Dry Dock Co. v. Waggoner, in which the Supreme Court of Tennessee decides that the proceeding by attachment against boats to enforce liens is not a proceeding *in rem*, nor an admiralty proceeding, and does not conflict with the jurisdiction of the federal courts in admiralty.

It also publishes Atkieson v. Murfree, recently decided by Mr. Chancellor Cooper, of the Nashville Chancery Court. This case will be read with interest by Tennessee practitioners, as it relates to the vexed question of "Opening the Biddings" after chancery sales, where an advance has been offered. It will be remembered that the July number of the Southern Law Review, contained a caustic and searching paper on this question, by E. S. Hammond, Esq., of Memphis, reviewing the recent decisions of the Supreme Court of Tennessee, in Click v. Burris, in which a rule is laid down that the biddings may be opened upon a mere increased bid, and that an advance of ten per cent. on the previous offer is sufficient for this purpose. This decision Chancellor Cooper had not heard of at the time he decided Atkieson v. Murfree. The learned chancellor takes the view that the biddings should be reopened in proper cases, and that it should be done in the present case, an advance of 18 per cent. having been offered. The following is the syllabus:

1. A sale of land, made by the master, is not complete and binding upon the purchaser until confirmation: Owen v. Owen, 5 Hum. 352; Graves v. Keaton, 3 Cold., 8; Wood v. Morgan, 4 Hum. 372; Jones v, Walkup, 5 Sneed, 135; Moore, *ex parte*, 3 Head, 171; Rogers v. Clark, 1 Sneed, 665; Armstrong v. McClure, 4 Heisk. 80.

2. And it is the duty of the court, while securing the rights of the successful litigants, to see that the property be sold for the best price that can be had: Childress v. Hurt, 2 Swan, 487; Johnson v. Quarles, 4 Cold. 615.

3. It is allowable, therefore, to open the biddings alone upon the offer of a higher price, if the advance be so considerable as to furnish a sufficient inducement, under all the circumstances, to a resale of the property: Coffin v. Corruth, 1 Cold. 194; Newland v. Gaines, 1 Heisk. 723; Aubrey v. Denny, 2 Moll. 508; 2 Dan. Ch. Pr. 1285.

4. The advance which ought to be deemed sufficient to require the biddings to be opened, must be left to depend in some measure on the circumstances of the given case. An advance of sixteen hundred dollars is clearly sufficient.

5. The better practice, upon opening the biddings, is to authorize tha master, upon notice in the usual way, to receive bids for a limited time, commencing with the advance offered, the bidders to be required to make payments, and give notes as of the date of the original sale, and otherwise to comply with the terms and requirements of that sale, and the highest bidder at the end of that time to be the purchaser.

The American Law Record, concludes in its October number, with what we judge to be a very learned paper by A. T. Whatley, B. A., entitled Historical Sketch of the Law of Piracy. It also contains what we should take to be a very thoughtful and valuable paper by Sheldon Amos, A. M., on Materials of the Science of Law. It also publishes the case of Taylor v. Bonte, Superior Court of Cincinnati, General Term—a case which appears to relate chiefly to questions of local practice. It publishes several other interesting decisions, but these we have either published or noticed as they have appeared in other publications.

The Insurance Law Journal, for September, publishes thirteen important decisions on the law of insurance, fire and life. We may find space to notice some of these hereafter.

The Monthly Western Jurist (Bloomington Ill,), for October, has a leader on Selection and Summoning of Grand Jurors. It also prints Nugent v. Supervisors of Putnam County (*ante*, p. 153), with a valuable note. It publishes Merritt v. Tarman, McLean County (Ill.) Circuit Court (Tipton, J.), holding that a verdict of a jury before a justice of the peace in this form: "We the jury find for the plaintiff, fifteen dollars and costs," constitutes a valid judgment without any further order of the magistrate.

It prints Lovenguth v. City of Bloomington, Supreme Court of Illinois (Craig, J.), with the following syllabus:

1. This was an action brought in the circuit court by Joseph Lovenguth, against the city of Bloomington, to recover damages for an injury received by a minor son, Emil, in passing over a sidewalk in the city.

2. It appears from the record, that Emil Lovenguth at the time of the accident was eighteen years of age, he was working in the shop of the C. & A. R. R. Co., and in passing from the shop to his boarding place, over a defective sidewalk, he stepped upon a loose board, fell and fractured a bone of his ankle. He was well acquainted with the sidewalk, and knew it was in a bad and unsafe condition; had he so desired he could have gone over another sidewalk to his boarding place, which was entirely safe and secure, and the distance no greater.

3. Upon the evidence submitted, it was a question of fact for the jury to determine whether the accident occurred from the negligence and the want of proper care on the part of plaintiff's son, or from the neglect of the city to keep in repair the sidewalk in question. The jury found by their verdict that the injury received grew out of the negligence and the want of proper care of the injured party.

4. The instructions given and refused, examined, and *held*, that a party has no right to knowingly expose himself to danger, and then recover damages for an injury which he might have averted by the use of reasonable precaution.

5. The city having furnished a safe and secure sidewalk over which the plaintiff's son might have passed affirming the case of Centralia v. Krouse.

6. To recover damages after the commencement of the suit, and for future damages, it must appear from the evidence that the injured party has not at the time recovered, and that the injury is permanent, and if not permanent, at what time a cure could reasonably be anticipated.

It also publishes, Schintz v. Ballard, Circuit Court of Outagamie County, Wisconsin, (Ellis, J.), with the following syllabus:

1. By the terms of the will, the appropriations to the institute are to be made only on the condition that $75,000 shall be contributed by the citizens of Appleton, and the same to be actually paid to the said institute, or secured, to

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the satisfaction of its board of directors, and of the executor, within three years from the time of the testator's death, or from the time the executor may have $50,000 in readiness for the first endowment mentioned in the will. *Held*, that the proposed endowment is made to depend upon a condition that may never happen, and that until the contingency does occur, that there is no beneficiary legally capable of receiving the $75,000, nor any part thereof, and that without such a beneficiary, the trust is not *present* and *active*, two elements indispensably requsite to the validity of the trust.

2. That this will, if it could be construed as a conveyance of the real estate to the executor in trust, or as giving him a power of sale for the purpose of the intended trust, might, in view of the fact that it allows three years or more, within which the conditions may be fulfilled, create a perpetuity.

3. That by the terms of the statute of Wisconsin, the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuence of two lives in being at the creation of the estate.

4. That so much of the will as was intended for the benefit of the Appleton Collegiate Institute, or any other similar institute, etc., held null and void. And that the property intended to be conveyed to the institute, must go as the law directs in relation to the decent of the property of intestates.

5. That the personal property that shall remain after the payment of all debts and funeral expenses and expenses of administration, must be distributed as follows. One half to the defendant, Harriet S. Edwards, under the residuary claim of the will, and the other half, which is not legally disposed of by the will, to the heirs at law, one of whom is the said Harriet S. Edwards, under the statute of Wisconsin.

It republishes from a Pennsylvania Law Journal, the case of Northup v. The First National Bank of Scranton (Ward, Recorder), with the following head-notes. We desire to call attention to these, because they aptly illustrate a mode of constructing the head-notes of cases, which many American editors and reporters have fallen into. They have but one fault; they do not tell what the court decides. They do lay down several propositions of law which the court recognizes *arguendo*, and with these they sometimes mix points stated in the abstract, which the court may have actually decided; but they nowhere give the facts of the case, and the judgment of the court upon those facts. This the English reporters generally do; and this is one of the features in which their reports are greatly superior to ours:

1 A preliminary injunction should be granted only to prevent irreparable mischief.

2. Such mischief is that for which the law affords no adequate remedy; when such remedy exists an injunction should not be granted.

2. Such remedy is one that affords a full, speedy, complete, feasible and compensatory redress.

4. The bill should aver such mischief, or state facts from which it can be inferred. In this respect the bill is amendable.

5. The right to an injunction must be clearly established, not left in doubt.

6. When a preliminary injunction has been erroneously granted, it should be dissolved on motion.

7. United States bonds are commercial paper, pass by delivery, and subject to all its incidents.

8. A bona fide holder for value of commercial paper has an indefeasible title to it, though he receives it from one without title to it, and fraudulently in possession of it.

9. Such holder has a legal and equitable title to such paper, though it had been stolen from the owner and advertised.

10. When one takes commercial paper as a collateral security, for the payment of a debt contracted on the credit of such security, such debt is a valuable consideration.

11. A guardian has the exclusive right to the custody and management of his ward's estate, and a chancellor cannot restrain the guardian from the management of such estate, until proceedings to remove him are begun or contemplated.

12. The extension of time for payment of a debt, and leaving a pledge still in security for the payment, is not a new pledge for the payment of an antecedent debt.

The Monthly Western Jurist also contains a short but valuable article on Negligence in Crossing a Railroad Track; and another on Recognizances to Keep the Peace.

The Washington Law Reporter, for October 13, published a very interesting and well-reported decision of the Supreme Court of the District of Columbia, on Soap Factory Nuisances in Washington City. The title of the case is Bates v. District of Columbia. The syllabus is as follows:

1. The 26th section of the act of Congress, to provide for a government for the District of Columbia, designates a board of health, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; but it does not confer power upon said board of health to declare anything or any condition of things a nuisance, injurious to health, which was not a nuisance by the rules of the common law, or made such by some statute governing the district.

2. Where the defendant and his ancestors had prosecuted continuously the business of manufacturing soap and candles in the same place for a period of more than forty years, it was held it could not be removed unless the facts upon which the question of nuisance depended were tried by due process of law, consisting of indictment and trial by jury; and it was also held that the board of health had no authority to pass ordinances under which the defendant was prosecuted by information in the police court, for the purpose of recovering a fine or penalty, for maintaining the alleged nuisance.

3. Writ of certiorari is the appropriate remedy to review the proceedings of a subordinate tribunal which has proceeded or is proceeding to judgment without jurisdiction. In a case where the police court has no jurisdiction the writ may issue to review such proceedings, although the statute provides for an appeal where there is to be a re-trial of the case.

In the Irish Law Times, for October 3, we find a well-written leader on the British Revised Statutes. In the Irish Law Times Reports for the same date, there are several cases, which, though turning upon British statutes, may interest our readers. In Gogerty v. The Great Southern and Western Railway Co., Irish Common Pleas, the syllabus is as follows:

In an action against carriers for loss of the plaintiff's goods, upon an issue that the loss arose from the felonious acts of the defendants' servants, it is sufficient for the plaintiff, under the Carriers' Act, section 8, to prove facts which render it more probable that the felony was committed by a servant of the defendant's than by any one not in their employ. Vaughan v. London and North Western Railway Company, L. R. 9 Ex. 93, followed.

In Wallace v. The Dublin and Belfast Junction Railway Co., before the same court, it is held that:

Where goods exceeding £10 in value, and of the description specified in the 1st section of the Carriers' Act (1 W. 4, c. 68), are delivered to a common carrier, without declaring their nature and value, and paying an increased rate for carriage, as notified and required, the carrier is exempted by the statute from liability for delay in the carriage, caused by his having temporarily lost the goods. Compare Hearne v. London South Western Railway Co., 10 Ex. 793; Pianciani v. London South Western Railway Co., 18 C. B. 226.

Moore v. Midland Railway Co., same court, was an action for loss of, and injury to goods, booked at "through" rates, for conveyance by land and by sea. The railway company with whom the contract was made, pleaded conditions in the contract exempting them from liability—firstly, where the loss and injury occurred while shipping, during the voyage, or the landing; and secondly, where it occurred through the default of the master and crew of the vessel by which the goods had been conveyed during a part of the transit. Upon demurrer to the pleas,—*held*, that the conditions were null and void under the 7th section of the 17 & 18 Vict., c. 31, as limiting the liability of the defendants, for the default of them or their servants, no facts appearing on the pleadings to show that the conditions were "just and reasonable, within the concluding proviso of the section."

In McMullen v. Greene, same court, an agreement was entered into between the plaintiff and the defendant, that the plaintiff should enter the defendant's service, as "salesman," in the tea-trade, the plaintiff understanding that he was only to be employed as traveler. The plaintiff afterwards acted for some time in the capacity of traveler; but was ultimately required by the defendant to act in the wholesale warehouse of the defendant. In an action for breach of contract thereupon,—*held*, that evidence to explain the meaning of the word "salesman," in the written agreement, was admissible. Compare Shore v. Wilson, 9 Cl. & F. 567 (per Tindal, C. J.); Evans v. Pratt, 3 M. & G. 759; Clayton v. Gregson, 6 A. & E. 302; Smith v. Wilson, 3 B. & Ad, 728; Price v. Mouat, 11 C. B. N. S. 508.

The Irish Law Times also reprints, from the London Saturday Review, an article on Irish Juries, which convinces the reader upon indisputable evidence, that trial by jury is a mere farce in that kingdom. Wonder if it is any more a farce than it is in some of the United States? It also reprints from the English Law Times, a very interesting article on the Future of the Legal Profession.

Legal News and Notes.

—EFFORTS to secure the pardon of Udderzook have failed, and he will be hanged.

—THE new constitution of Arkansas has been adopted by about 75,000 majority, only three counties voting against it.

—ATTORNEY-GENERAL A. F. JUDD, of the Sandwich Islands, is travelling in the United States.

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—A law has recently been promulgated in Germany, by which the holder of a railway ticket may stop at any point on his journey, for any period, the ticket remaining good till used.

—A CASE is now pending in the Supreme Court of the United States—Phillips v. Payne—to test the constitutionality of the retrocession by Congress of a portion of the District of Columbia to Virginia.

—PRINCIPAL examiner of the patent office, Mr. Moritz B. Philipp, of Ohio, has been appointed an examiner of interferences, and first assistant examiner Henry A. Seymour, has been promoted to principal examiner, to take effect November 1.

—A mortage has lately been recorded in the recorder's office, in Reading, Penn., given by the Philadelphia & Reading Coal and Iron Co., to the Philadelphia & Reading R. R. Co., for the sum of $30,000,000. It comprises 257 pages of printed matter, and occupies in the mortage book, 158 pages.

—TWO attorneys, Mr. Hirst and Mr. Ingersoll, have recently been before the District Court of Philadelphia, on a charge of contempt in procuring fraudulent bail for clients. Mr. Hirst was suspended from practice until the first of January next, when the court will cease to exist, and Mr. Ingersoll was stricken from the roll.

—IN the United States District Court, district of Massachusetts, on the 30th September, Ellen Bell, a soldier's widow, was convicted of drawing a pension after remarriage, making oath that she still remained the widow of the soldier, and was sentenced to imprisonment for three months. Were such convictions more extensively noticed by the press, its effect would greatly lessen the committal of such crimes.

—CHIEF JUSTICE MCKEAN, of Utah, in his recent charge to the grand jury, urged them to look carefully into the institution of polygamy and to bring some of the most influential polygamists to the bar of justice; to bear in mind that the doctrine of polygamy goes hand in hand with the murderous doctrine of blood attonement, and to look more particularly after the principals than the agents.—[*Albany Law Journal.*

—ONE of the proposed amendments to the constitution of New York disqualifies from voting any person who shall "receive, expect, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribnte, to another, to be paid or used, any money or other valuable thing, as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding such vote."

—PRESIDENT LERDO of Mexico, formerly chief justice of that republic, is, it is said, seeking re-election to the presidency. This, it is stated, may cause trouble, as at the last election he secured the support of the Diaz party by promising that he would not be a candidate for re-election. President Lerdo ought to retire now, while his laurels are fresh and green. His predecessor a soldier, saved his country from foreign subjugation, but it was reserved for him, a lawyer, to inaugurate within its boundaries a season of prosperity and repose, such as it had not enjoyed since its independence.

MR. ALEXANDER MITCHELL, President of the Saint Paul Railroad, and and also a representative in Congress, has written a letter to Governor Taylor, of Wisconsin, that his company will obey the recent railroad law of that state, declared constitutional by the state supreme court, until it shall be passed upon by the national supreme court; but he states that the company will be obliged to reduce the quantity and quality of train service, in order to save itself from loss. It is reported that the state attorney-general has agreed with the counsel of the Northwestern company to unitedly ask the United States Supreme Court to set down the hearing of the appeal for December 10.

—THE Detroit Tribune, for October 8, prints a very full abstract of the able and elaborate argument of Hon. Charles L. May, on the homœpathic side of what is known as the University Case, being an application for a mandamus to compel the board of regents of the University of Michigan to establish a chair of homœpathy institution. Those who delight in the study of coustitutional law, and who take pleasure in the reading of solid and forcible legal argument, will not regret reading this. We have the pleasure to acknowledge receiving it, also, in pamphlet form. Mr. May was formerly Lieutenant Governor of Michigan, and is one of the ablest lawyers of that state.

—AN exchange says: "the Graphic prints an admirable cartoon illustrating the recent discussion between Reverdy Johnson and Charles O'Conor in the columns of the Herald. The two eminent jurists are represented splitting hairs, illustrating the lines—

They could distinguish and divide
A hair 'twixt south and southwest side.

The manner, features, and general appearance of Mr. O'Conor and Mr. Johnson are admirably preserved, and the whole cartoon is an admirable specimen of the art of this unique and successful journal." There is no splitting hairs about it. They differ on a point which is vital, and of such magnitude that none but the ignorant and vulgar can fail to understand it.

—THE resignation of Richard W. Busteed, United States District Judge for Alabama, recently tendered, has been accepted by the President. Among the bar of Alabama, so far as we know, he had the reputation of being a man thoroughly unscrupulous, but of great ability and unquestioned nerve, and withal so adroit in covering his tracks, that the difficulty in procuring sufficient evidence to make his impeachment probable, was very great. Although political feelings no doubt entered into this estimate somewhat, yet it will be remembered that the judiciary committee of the last house, by a vote of six to ten, voted to impeach both him and Judge Durell, and there is little doubt that had he remained on the bench, he would have been impeached at the coming session of Congress. Be this as it may, a man of his ability and address can make much more money in the practice of his profession, than he could honestly make as a federal district judge, especially since the last modification of the bankrupt law.

—POLICE COURT REPORTING.—It does not require a great knowledge of law to be a reporter—that is, a reporter of the decisions of a police court, but it requires a great deal of other knowledge to keep pace with the progress which has been made in that noble art within the last few years. Thus far the police court reporter of the Detroit Free Press, has distanced all his competitors. The following is his report of a recent maritime case:

"The officer said he found Frank Duffy, a lake sailor, rounded to in an alley. He ranged up under his lee rail, forged ahead, and boarded the prisoner at the bow, receiving a couple of kicks in the stomach as he was getting out a line to take the prisoner in tow. The prisoner said it wouldn't take him long to repair damages, and if let off he'd spread what canvas he had left and head for Buffalo. 'I think,' replied his honor, 'that you need to go into the dry-dock for a thorough overhauling. You need new topsails and repairs to the hull, and I notice that your deck-beams are badly sprung. There's your weather-eye all closed up, half of your reef-points gone, and there's three feet of whisky in the hold. You could probably hold three feet more, but you won't probably smell it for thirty days to come.' 'Then,' continued the prisoner, stretching out his arm, 'may you miss stays with breakers dead ahead!' It was an awful treat, and Bijah told him that as soon as the thirty days were out they'd arrest him on a charge of man slaughter, and send him where Concord grapes were $1 a pound every month in the year."

—THE following cost-bills are vouched for as authentic, and indicate that costs more to die than to live in New York City:

EXECUTING JAMES STEPHENS.

Building scaffold	$32 77
Sheriff's fee	25 00
Barber, shaving convict	24 00
Printing notices	4 25
Advertising certificate	7 80
Sundry expenses	30 00
Total	124 07

EXECUTING JEREMIAH O'BRIAN.

Building scaffold	$191 07
Sheriff's fee	250 00
Twenty-four deputies assisting	120 00
Two watchers	200 00
Summoning jury and witnesses	10 00
Certificate and two copies	25 00
Advertising same	9 25
Sundry expenses	135 00
Total	940 48

If this thing keeps on, the tax-payers of the Empire State will be obliged to abolish capital punishment in self-defence.

—JUDGE WILLIAM MCKINDREE BYRD.—The Selma (Ala.) Times of the 25th ult. reports the occurrence of the death of Judge William McK. Byrd, an eminent lawyer of that State. His death was caused the day previous by an accident on the Selma, Rome and Dalton Railroad. Judge Byrd was born in Perry county, Mississippi, on the 1st of December, 1819. He finished his education at Lagrange College, Franklin county, Alabama, where he graduated with distinction in 1838. Soon after he graduated he commenced the study of law with Judge Clayton, Holly Springs, Miss. Having completed his law studies and obtained license to practice, he soon afterward removed to Alabama, and in 1841 he opened a law office and pursued his profession in Linden, Marengo county, until some time in the year 1853, when he removed to Selma, where he still pursued his profession. At Selma he practised law with great diligence and success, until he was elected chancellor of the division in which he resided. In 1865 he was elected one of the judges of the Supreme Court of the State. His decisions while on the supreme court bench were distinguished for their learning and ability. He remained in that high office until 1868, when he was ejected from it by the military authorities of the United States, under the reconstruction acts.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, OCTOBER 30, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

INJUNCTION IN THE STATE COURT AGAINST OFFICER OF FEDERAL COURT.—We print elsewhere an interesting decision of the Supreme Court of Rhode Island, on this important question. We are able to lay this opinion before our readers in consequence of the courtesy of James H. Parsons, Esq., of Providence, who has kindly consented to furnish us, from time to time, with important decisions of the courts of that state.

The Grand Jury System.

In Washington City, Mr. A. A. Hall, a man of good standing in the community, was recently indicted for forging firemen's certificates. At the trial, all the witnesses who appeared before the grand jury were examined, and when their examination was concluded, the district attorney promptly stated that the government had "entirely failed to make out a case." Whereupon the Washington Chronicle makes the following enquires:

> What are we to think of the grand jury system which thus brands a citizen as a criminal without any evidence whatever? What security has any innocent man, no matter what his standing may be, against indictment for a penitentiary offense? How must that jury have been made up, or how manipulated, in order to bring in indictments without evidence of guilt, and thereby brand men as criminals, against whom there was no appearance of criminality?

And the same journal proceeds to say:

> The question does not now arise for the first time. In some of the states the grand jury system has been dispensed with; in others the subject is under consideration. Whether a city like Washington, peculiarly situated as to political relations, and as to classes of population, could as easily rid itself of the system as Vermont or Michigan could, is a question that will bear discussion; but a few cases like that of yesterday will drive thinking men to an active investigation of the whole subject.

The above is a specimen of the thoughtless and injudicious discussions of questions of law reform which we frequently meet with in the daily press. If the writer who penned the above paragraphs had referred to the history of the grand jury system, he would have seen that it was to prevent what this grand jury has done, that grand juries were originally established. It was justly considered that *twelve* men, selected from the body of the community, would be less apt to hold a citizen for trial for a high crime than *one* man—the prosecuting officer—appointed by the king, or by the governor, or elected and controlled by a political faction. When we consider that twelve grand jurors must, on their oaths, concur in every presentment or indictment, and that it is (other things being equal) twelve times as easy to bribe one man as it is to bribe twelve men, and that twelve men, selected suddenly from the people at large, will be far less apt to be subject to improper influences than one man who holds his office for a definite period, and whom there is time to approach and improperly influence before any desired action is taken—the wisdom of the grand jury system is fully vindicated.

Beside, it is doubtless true that, if the grand jury has been abolished in any state, it has been in deference to a clamor for less expenditure in the administration of justice, and not on account of abuses of the system, such as that which happened in the above case. On the other hand, it is confidently believed that whenever the propriety of abolishing grand juries has been agitated, the principal reason which has been urged in favor of retaining them, is that the system is a security to the citizen against the abuse which the above writer complains of.

Finally, we do not see how the abuse, which happened in this paticular case can be imputed to the grand jury system. Unless the law in the District of Columbia is entirely different from what we have been accustomed to, this was not a case in which the grand jury possessed *inquisitorial powers*—that is, in which they could send for persons and papers and prefer a presentment *on their own motion*; but it was a case in which, before they could act, it was necessary for the district attorney to investigate it, to draw an indictment and to send it before them, with the government's witnesses. Before taking these steps, it was the duty of this officer to satisfy himself that there was such probable cause as would justify the government in putting the person accused on trial. The primary fault, then, was his, and the case was one in which the grand jury may have abdicated their functions in deference to his opinion. If there had been no grand jury, and if the system of proceeding upon the information of the government's attorney had been in vogue instead, the result would have been the same. An officer who would send an indictment to the grand jury, would, under the same circumstances, prefer an information to the judge.

But this discussion is idle, so far as the District of Columbia is concerned; for the system of criminal procedure in that district, is controlled by the 5th amendment to the federal constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia when in actual service, in time of war or public danger." It follows that before the grand jury system can be abolished in the District of Columbia, either that district must be erected into a state, or the above constitutional amendment must be abrogated.

Seduction.

We are permitted to make the following extract from a note by Mr. Bigelow, to appear in his forthcoming Leading Cases on Torts. It will be observed that that portion of it which shows that in awarding damages in seduction the jury are not confined to the pecuniary loss suffered by the parent, but may take into consideration the disgrace brought upon his family, bears some analogy to the point lately under discussion in the JOURNAL concern ing damages in the law of slander (*ante*, pp. 424, 455).

Mr. Bigelow's note is appended to the case of Martin v. Payne, 9 Johns. 387, the case usually cited for the American doctrine, that a parent may maintain an action for the seduction of his infant daughter, though at the time of the seduction she was engaged in the service of another, and had no intention to return to the plaintiff; provided that the situation of the daughter was merely permissive on the part of the parent, and not binding. We now give the extract:

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The doctrine of the English case, Dean v. Peel, 5 East, 45, which makes the criterion of recovery in an action for seduction to depend upon the *animus revertendi*, where the daughter was living out at service (though still subject to the parent's authority and control) when seduced, has been generally repudiated in this country, and that of Martin v. Payne followed. But the allegation of service, though generally but little more than a fiction, is nevertheless held indisputable; and it must appear that the parent, whatever or wherever the situation of the daughter, had at the time of the seduction the *right* to control the daughter's services. If his power over her is gone at that time, whether by his own consent in emancipating her, or by the act of law in taking her away from him, he cannot maintain the action; though there has been some conflict upon this point, in case of the return of the infant to the parent after seduction, as will appear in a subsequent part of this note. See Sargent v. ——, 5 Cowen, 106, 116. But if he be not divested of his authority, the action will be maintainable, though the daughter be away from home at the time, and have no intention of returning. So, too, if the parent was divested of his power over the infant by the defendant's fraud, the action may be maintained. Speight v. Oliviera, 2 Stark. 493; Dain v. Wycoff, 7 N. Y. 191.

The doctrine of Martin v. Payne, has been followed in the following among many cases: Hornketh v. Barr, 8 Serg. & R. 36; Clark v. Fitch, 2 Wend. 459; Stiles v. Tilford, 10 Wend. 338; Mulvehall v. Millward, 11 N. Y. 343; and we are not aware of any case in this country in which a contrary ruling has been made.

In many of the cases, indeed, the fiction of service is spoken of with disfavor; but the necessity of proving the right to the services is not denied. Proof of acts of service, however, is not required; the right to the service is sufficient. And this is true even in England, where the courts have always been more strict in requiring proof of service than in this country. See Terry v. Hutchinson, Law R. 3 Q. B. 599, 602, Blackburn, J.; though this was a case in which the daughter was in fact returning to her father when seduced, after having been dismissed from the service of another.

Upon this point see also the language of Bronson, C. J., in Bartley v. Richtmyer, 4 Comst. 38, 47. After stating that several unsuccessful attempts had been made in England to maintain this action upon other grounds than the right of service, he says: "Our cases stand upon the same foundation, with only this difference, that we go further than the English courts in making out the constructive relation of master and servant, and hold that it may exist for the purposes of this action, although the daughter was in the service of a third person at the time of the seduction, provided the case be such that the father then had a legal right to her services, and might have commanded them at pleasure."

It follows, *a fortiori*, that where the infant daughter, when seduced, is only absent from her father upon a visit, the action is maintainable. See Griffiths v. Teetgen, 15 Com. B. 344; Bartley v. Richtmyer, 4 Comst. 38, 44.

And this is true even of an adult daughter, if the relation of master and servant continue to exist. Sutton v. Huffman, 3 Vroom, 58. It was said in this case that the arrival at majority does not emancipate the child if the parent continue to exercise authority, and the child to submit to it; emancipation being a question of fact, to be determined by the circumstances of the case and the intention of the parties. And the same doctrine was held in Lipe v. Eisenlerd, 32 N. Y. 229. See also Brown v. Ramsay, 5 Dutch. 117.

Upon this point Parker v. Meek, 3 Sneed, 29, went too far, since that case the (adult) daughter was seduced in the lifetime of her father, and the action was brought afterwards by her mother,—a point to be considered upon a subsequent page. (It is not reached in this extract).

Of course, where the daughter is of age when seduced, no action can be maintained if she no longer continue to submit to the authority of the parent, which shows again that the right of the service is at the foundation of the action. See Nicklson v. Stryker, 10 Johns. 115; Miller v. Thompson, 1 Wend. 447; Lee v. Hodges, 13 Gratt. 726; Manly v. Field, 7 Com. B. N. S. 96; Sutton v. Huffman, *supra*.

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With respect to the damages to be allowed in this action, there has been, apparently, a departure from the principle upon which the action is based, the loss of service; for it was said so long ago as in Lord Ellenborough's time, that the practice had become inveterate of giving damages far beyond the value of the daughter's services as a well person. Irwin v. Dearman, 11 East, 23. In this case the only actual damage proved by the plaintiff was the loss of the young woman's service for five weeks, during the time of her absence in the parish work-house where she was confined. But the jury gave £100 damages; and the verdict was upheld, and this, too, though the young woman was only an adopted child.

Mr. Justice Blackburn, approving of the doctrine of this case, says: "In effect, the damages are given to the plantiff as standing in the relation of parent; and the action has, at present, no reference to the relation of master and servant, beyond the mere technical point in which the action is founded." And further on, in the same opinion, he observes: "As to the amount of damages, I hold that now the jury are to consider the injuiy as done to the natural guardian, and all that can be referred to that relation. I do not say that they ought to calculate the actual cost of the maintenance of the grandchild, though they cannot well exclude that fact; but they may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbors, but that there is also a living memorial of the disgrace in a bastard grandchild. Considering this, are £150 damages too much? I cannot say that they are." And the other judges were of like opinion. But it was still considered necessary that the relation of master and servant should exist to give the right of action. Terry v. Hutchinson, Law R. 3 Q. B. 599, 602. See also as to the question of damages, Ingersoll v. Jones, 5 Barb. 661; Bartley v. Richtmeyer, 4 Comst. 38, 49; Damon v. Moore, 5 Laws, 454; Sargent v.—— 5 Cowen, 106; Badgley v. Decker, 44 Barb. 577; Moran v. Dawes, 4 Cowen. 412; Stiles v. Tilford, 10 Wend. 338.

The principle seems to be, that the matter of service is essential to the action, but that, when this has been established by showing the parent's right of control, the court has jurisdiction to proceed beyond the mere loss of the services, and award damages for the disgrace brought upon the family.

It has been held that if there be no seduction, and the intercourse be effected without objection, or the use of insinuating

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arts, this will be admissible evidence in mitigation of damages. Hogan v. Cregan, 6 Rob. (N. Y.) 138. But *quære*, if even then the plaintiff can never recover damages beyond the loss of service; the disgrace to the family would usually be greater in such a case, than when an unwillingness of the daughter had to be overcome. If this disgrace can be taken into consideration at all, what difference ean it make whether the daughter was quite willing or not, unless she was notoriously loose and had already disgraced her family? The above case of Hogan v. Cregan was disapproved in Damon v. Moore, 5 Lans. 454, as to the ruling that actual seduction was necessary to the giving of exemplary damages. In Damon v. Moore the alleged seduction was accompanied with force.

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Injunction in State Court Against Officer of Federal Court.

JOSIAH CHAPIN v. LUCINDA JAMES, ADMINISTRATRIX, *et als.*, IN EQUITY.

Supreme Court, State of Rhode Island, March Term, A. D. 1874.

A state court will not award an injunction to restrain an officer of a United States ourt from selling property levied on under process of such court. And this is so, although the ground on which the injunction is sought, is that the property levied on is that of a person who was not a party to the suit in which the judgment was rendered. In such acase the application must be to the court whose process is abused. [Acc. Freeman v Howe, 24 Howard, 450, 457; Buck v. Colbath, 3 Wallace, 334, 341; Brooks v. Montgomery, 23 La. An. 450.]

James Tillinghast, Benjamin T. Eames and *Charles Hart*, for complainant; *J. H. Parsons* and *Thomas A. Jenckes*, for respondents.

POTTER, J.—In this case the defendant admits having obtained from the United States Circuit Court, in a suit in equity, judgment against the Atlantic Delaine Company, took out her execution, and it was in pursuance of an order of her attorneys, Messrs. Jenckes and Parsons, indorsed thereon, levied by the United States marshal on the property of the present complainant, Josiah Chapin, it being claimed that he was a stockholder in the said corporation at the time the liability accrued, and that they had the right so to levy it by the provisions of the statute of Rhode Island regulating manufacturing corporations.

The said Chapin now files his bill in this court for an injunction against the United States marshal, to restrain him from selling the property levied on.

Mrs. James, by Messrs. Jenckes and Parsons, now moves that the bill be dismissed, for two reasons:

First. For want of proper service. That Mrs. James was not a resident of Rhode Island, but of Pennsylvania; and the only service was by leaving a copy at a place alleged to be her last and usual place of abode, whereas she had none in this state, and by service on Messrs. Jenckes and Parsons, who say that they were, and are, attorneys in the suit in the United States Court, but have no authority to accept service or appear for her in the present suit.

It is contended by Messrs. Jenckes and Parsons that the right to order substituted service applies only where relief is asked against a suit at law (this being a suit in equity), and that its validity depends on the old English chancery practice, and not on the new English practice as modified by their recent statutes.

We cannot see the validity of this objection. The power of this court to order service on persons out of the state, depends not on any old practice, but on General Statutes, cap. 181, § 25, which is sufficient to include the present case, if the court has jurisdiction of the property relations or person involved in controversy. So in England, substituted service depends now not on the old practice, but on the act of 1852, Stat. 15-16 Victoria, c. 86. See the subject commented on in Hope v. Hope, 4 De Gex, McNaughton & Gordon, 328, 341.

Second. The second ground for dismissal is, that the state court has no jurisdiction in the case.

The complainant contends that in the present case, so far as concerns the levy on real estate, the property cannot be considered as in possession of the United States Court. That the complainant, Chapin, was not a party to the suit, and that even if he was liable as a stockholder, the marshal has no right, on an execution against the corporation, to levy the execution on his property, inasmuch as the mode of proceeding provided in the Manufacturing Corporations Act has never been adopted by any United States statutes or rule of court; that the execution was issued on a judgment in a suit for tort, whereas the stockholder is only liable in case of contract; that Mrs. James, being a stockholder herself, was not entitled to that process, and that there is no remedy for the the complainant unless this court interferes.

The facts alleged being assumed as true for the purpose of deciding the present motion to dismiss, cannot the complainant raise in the United States Circuit Court all these and other questions of law he may make, and have them decided by that court?

Although a decree has been made in the suit in the United States Circuit Court, the case is still pending there. The execution is the process of the court for carrying its decree into effect, and except so far as regulated by statute, is still within the court's control. Courts of law, anciently, by "*audita querela*" and on motion, and latterly more generally by motion, have exercised control over their final process, and courts of equity have always done so. This is absolutely necessary to prevent the execution of a judgment or decree in one suit giving rise to a dozen other suits growing out of questions as to the mode of serving its process. The suit is not ended by the judgnent; it is still pending. Wegman v. Childs, 41 New York, 159; Mann v. Blount, 65 N. Carolina, 99, 101; Howell *et al.* v. Bowers, 2 Crompt., Mees. & Roscoe, 621; Spann *et al.* v. Spann, 2 Hill's S. Car. Chanc. Rep. 156. So far as the present controversy is concerned, the question is between courts of co-ordinate jurisdiction. The suit was in equity, and might have been brought either in the United States or in the state court; and it is a principle too well settled to need authority, that, in such case, the court which first acquires jurisdiction is to retain it, and is not to be interfered with by any other co-ordinate court, and that property in possession of the officers of the court is in possession of the court, and cannot be levied on by officers under authority of any other court of co-ordinate jurisdiction, whether state or federal. Hagan v. Lucas, 10 Peters, 400; Wallace v. McConnell, 13 Peters, 136; Smith v. McIver, 9 Wheaton, 532; Mallett v. Dexter, 1 Curtis, 178; Buck v. Colbath, 3 Wallace, 304, 341. Says Mr. Justice McLean, in Hagan v. Lucas: "A most injurious conflict of jurisdiction would be likely often to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by process of the other." In that case the United States marshal had levied on property previously attached by the state sheriff.

And see also the remarks of Judge Grier on the jurisdiction of the federal and state courts in *ex parte* Jenkins, 2 Wallace, Jr., 521-525. And as between state and United States courts it is well settled that, as a general rule, neither can enjoin the process of the other. In case of conflict of jurisdiction as to cases arising under the United States Constitution or laws, the Supreme Court of the United States, at Washington, is the final arbiter. Diggs v. Walcott, 4 Cranch, 179; McKim v. Voorhies, 7 Cranch, 279; Peck v. Jenness, 7 Howard, 612-625; City Bank v. Skelton, 2 Blatchf. 26; Brooks v. Montgomery, 23 Louisiana Annual, 450; and see Kendall v. Winsor, 6 R. I. 453; Coster v. Griswold, 4 Edw. Ch. 364-377; English *et al.* v. Millar *et als.* 2 Rich. S. Car. Eq. 320; and so as to a court of a sister state: Mead v. Merrit, 2 Paige, 402, 404; 2 Story on Const. (ed. of Cooley), § 1757; Story Eq. Juris. § 900; Conklin's U. S. Courts, 162, 272 (4th ed. 1864); Conklin's U. S. Courts, 176, 296 (5th ed. 1870); and see the very

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strong expressions of the majority of the Supreme Court of the United States, in Taylor v. Carryl, 20 Howard, 583, 596.

But it is said by the complainant that in this case an execution issued against A. has been levied on B.'s property, and that in such a case a state court may interfere; and he cites 1 Kent Comment. 410, supported by Cropper v. Coburn, 2 Curtis, 465; Greene v. Briggs, 1 Curtis, 311. The latter was the case of liquor seized by an officer, under a state law, which said Greene replevied out of the possession of the state officer, on a writ brought to the United States Circuit Court. In that case the question of jurisdiction was not raised.

Judge Kent cites as his authority, Bruen v. Ogden, 6 Halsted N. Jersey Law Rep. 370, which was a case of replevin, and Dunn v. Vail, 7 La. Term R. 416; 3 Martin, La. Rep. 602, which latter was an action of trespass where there could be no actual conflict of jurisdiction, and therefore is no authority for us.

The doctrine contended for by complainant was also held by the Supreme Judicial Court of Massachusetts in a replevin case. Howe v. Freeman, 14 Gray, 566. But this case was carried up to the Supreme Court of the United States and there reversed; (Freeman v. Howe, 24 Howard, 450, 457); where the opinon was delivered by Nelson, J., one of the oldest and most learned and experienced justices of that court.. This case, as observed by Mr. Justice Miller (3 Wallace, 341), took the profession by surprise, as overruling the decision of the Supreme Judicial Court of Massachusetts and the opinion of Chancellor Kent. But it was upon this very point, expressly affirmed by the United States Supreme Court in Buck v. Colbath, 3 Wallace, 334, 341. It is said that the marshal, on execution against A., has no right to levy on the property of B., which is claimed to be the present case. The very point decided in these two latter cases was, that in such a case the court from which the process issues, must, of necessity, decide the question, and the case of Brooks v. Montgomery, 23 La. Ann. 450, is exactly in point. The decision there was that the state court would not enjoin the United States marshal from selling property, on the ground that the property was not the property of the defendant in the original suit, but of the person who applies for the injunction. It is asked, if the marshal, on a writ against A. should arrest B., would not the state court grant relief? We think in that case the application should be to the court whose process is abused. Suppose, for instance, a case of disputed identity. The court issuing the process could decide it, and it could only lead to an unseemly conflict for another court to interfere.

It is to be observed that there is a great distinction between actions of replevin and injunctions, which actually interfere with the process of a court, and actions of trespass and case where damages only are claimed against an officer, in which latter there is no danger of conflict, and which may be peaceably taken from the state court to the United States Supreme Court, whose decision is final. Buck v. Colbath, 3 Wallace, 334, 343, 347.

It is argued that in actions of trespass and case the claimant only recovers damages, whereas he ought to be protected in the possession of the property itself. The same argument was urged in Freeman v. Howe, and was overruled.

It is said that here Chapin was not a party to the original suit, but was a stranger to it, and could have no remedy in the United States Circuit Court, growing out of the peculiar limitations on their jurisdiction over parties.

In a state court, and so also in the United States court, but for the limitation as to citizenship, there can be no doubt that even a stranger, who had suffered from the execution of a decree, might obtain relief by petition to the court for an order in the case. 1 Hoff. Chanc. Prac. 89; Platto v. Deuster, 22 Wiscon. 482, 485, citing M'Chord's Heirs v. McClintock, 5 Littell, Kentucky, 304, where a person, not a party to a suit, who had been turned out of possession on the execution was relieved by petition in the same suit. See also Dyckman v. Kernochan, 2 Paige, 26; Spann *et al.* v. Spann, 2 Hill, S. Car. Chanc. 156; Lane v. Clark, 1 Clarke (N. Y.), Chanc. Rep. 307–9. And as to the United States courts it seems to be settled by the case of Freeman v. Howe, 24 Howard, 450, 460, that where the process was in a suit at law, a bill on the equity side of the court would lie to regulate or restrain proceedings, and that such a bill would be not original but ancillary, and might be brought by any one whose interests were affected by the process. And while limiting the relief to parties before the court, or who may come before it, the same court, by Mr. Justice Miller, in Buck v. Colbath, 3 Wall. 334, 345, laid down the same rule, viz.: that persons interested in the possession of the property in custody of the court, may, by petition make themselves so far parties as to have their interests protected, although, if it was an original suit, the qualifications as to citizenship would not be such as to give the federal courts jurisdiction. See also Dunn v. Clarke, 8 Peters, 1; and Kendall v. Winsor, 6 R. I. 453. In Christmas v. Russel, 14 Wall. 69, 80, there are some remarks which might seem to throw doubt on this view but for the very peculiar circumstances of that case.

The motion for a preliminary injunction must, therefore, be dismissed.

INJUNCTION DISALLOWED.

NOTE.—The property levied on in the above case was real property. In the same case a preliminary injunction was refused by Mr. District Judge Knowles, sitting in the United States Circuit Court, to restrain the sale of *personal* property which had been levied on. The opinion of the learned judge in that case is before us. He quotes the following language of the court in the Earth Closet Company v. Ferner, 5 Fisher's Patent Cases, 15, as indicating the nature of the discretion of the court on applications of this character, and, upon an examination of the merits, concludes that an adequate remedy for any injury done, exists against the officer and his sureties; that the principles of equity relating to "cloud upon title," have no reference to personal property, and that a preliminary injunction ought not to be granted:

"A motion for a preliminary injunction is one of the class addressed in technical parlance to the discretion of the court. For *precedents*, in any recognized sense of that word, it is therefore idle to search. By one judge, an injunction may be granted to-day under a given state of facts, and by another be refused to-morrow, upon identically the same state of facts, and yet neither functionary be chargeable with even error in judgment. The law makes the judge's discretion the rule, not unheedful that in the qualities of mind which give character to an exercise of discretion, individuals differ scarcely less than in form and features. The judge is bound to decide a question of this kind as in his judgment, upon the particular case before him, the principles of equity and the practice of its courts warrant or dictate, and this whether his decision be in accord or at variance with that of his brother officer, of whatever grade or whatever locality. The largest liberty imaginable is his, practically, 'with no rules to restrain — no after-reckonings to dread.' Neither upon appeal, nor by writ of error, nor even by petition for revisory action, can a judge's rulings or orders upon a motion for a preliminary injunction be subjected to correction or even criticism on the part of his superiors in official position or in judicial acumen." This opinion, *sub nom.* Chaffee v. Coggshall, will be found in full in 6 Legal Gazette, 342.

Liability where Coupon Tickets are Purchased of one Company, and the Passenger is Killed on a Connecting Line.

NASHVILLE AND CHATTANOOGA RAILROAD CO. v. W. L. SPRAYBERRY.

Supreme Court of Tennessee, September 26, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" THOS. J. FREEMAN,
" JOHN L. T. SNEED,

The plaintiff purchased from an agent of the Nashville and Chattanooga Railroad Company, at Chattanooga, coupon tickets for himself, wife and children from that place to Shreveport, Louisiana. While *en route*, on board a steamboat belonging to the last connecting line embraced in the tickets, an accident occurred, in which his wife and two children were drowned. *Held*, that an action will not lie against the company selling the tickets. The owners of the steamboat are not to be regarded as the servants or

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agents of the company selling the tickets, but the latter are to be regarded as the agents of the former.

McFARLAND, J., delivered the opinion of the court:

Sprayberry purchased from an agent of the Nashville & Chattanooga R. R. Co., at Chattanooga, tickets for himself, wife and two children, from that place to Shreveport, Louisiana. The tickets are what are known as coupon tickets—and indicated the route to be by the Nashville & Chattanooga road to Nashville—and by other connecting roads to Memphis, and from that point to Shreveport by steamboat. After passing over the railroads to Memphis, the party took the steamboat called the Nick Wall, to which they were directed, and while on the route on the Mississippi river, an accident occurred, in which the wife of Sprayberry and his two children were drowned. This action was brought by Sprayberry against the Nashville & Chattanooga R. R. Co.; the drowning is averred to have been the result of the misconduct and want of skill of the officers and servants of the boat. A demurrer was filed upon the ground that the plaintiff could not maintain the action in his own name, for wrongs or injuries causing the death of the wife and children. This, we think, was properly overruled. An action of this character is unknown to common law, and is only given by statute, and where such an action is given by statute, and a remedy prescribed, that remedy must be pursued. As the injury occurred in the state of Mississippi, the right of action and the remedy prescribed by the statute of that state, is the one to which the plaintiff was entitled. The statute of this state on the subject has no application. The action, though predicated upon the Mississippi statute, may be brought in this state. In such case, the declaration must aver the statute under which it is brought. This was sufficiently done. That statute gives the remedy to the husband and father—and we enforce that remedy in our courts.

The next question, and one of importance, is as to the liability of the Nashville & Chattanooga Railroad Company for injuries to the passengers caused by the wrongful acts, negligence or want of skill in the officers and servants of the steamboat, after the passengers had passed beyond their line. The declaration avers that the defendant was in partnership with the company or line of carriers owning the boat. This was put in issue. The judge, in his charge, instructed the jury, in substance, that it was not necessary for the plaintiff to prove this to entitle him to a recovery, but if the plaintiff purchased the tickets from an authorized agent of the defendant, the defendant thereby became bound for the transportation of the passengers over the entire line for which the tickets were sold, although beyond the terminus of its own road. That the company selling the tickets incurs a responsibility as though the entire route was its own—unless it stipulate at the time for a less responsibility. This we understand to be the substance of the instructions to the jury on this question. This doctrine rests upon the theory that the contract is alone with the company from whom the tickets were purchased for the entire route, and that the connecting lines are but agents of the first in carrying out this contract; and as a consequence, the acts or negligence of the servants causing the injury, are the acts of the joint company. This is laid down as the true doctrine in Shearman & Redfield on Negligence, sec. 272, though it is conceded that the American cases do not always support it. The cases referred to in support of the position, we have not had an opportunity to examine. In the case of Carter and Hough v. Peck, 4 Sneed, 202, the language of the judge delivering the opinion of the court, seems to favor this view. In that case, however, it appeared that the plaintiff purchased from the defendants, the proprietors of a stage line, through tickets from Nashville to Memphis. The defendants did not own the entire line, but had an arrangement with another company owning a stage line, to receive the passengers at Waynesboro, on the route, and carry them to La Grange, for their share of the fare, from which point they were to be taken to Memphis by railway, but this arrangement was not known to the plaintiff. The connecting line at Waynesboro failed and refused to carry the plaintiff, and he was compelled to pay his fare upon another route. It was held that the plaintiff was entitled to hold the first company liable for this failure, upon the ground that this contract was alone with them.

The case of Fustenhiem v. The Memphis & Ohio R. R. Co., decided at Jackson, by this court, in April, 1872, was this: The plaintiff purchased a through ticket from New York to Memphis, from the Pennsylvania Central R. R. Co., and received a check for his baggage to be delivered at Memphis. It was held that upon this the plaintiff could not recover from the last company running into Memphis, for an injury to his baggage, which occurred while on the Pennsylvania Central road; for this injury he must look to that company. We are also referred to several cases, and one of them, our own, holding that a carrier receiving freight to be carried beyond the terminus of its own road, is responsible for its delivery at that point, unless a different liability is stipulated for—and there are, as stated, authorities holding that the same rule applies to passengers.

On the other hand, there are authorities holding that a different rule applies to passengers from the rule applicable to freight and baggage. That where tickets of this character are sold they are to be regarded as distinct tickets for each road, sold by the first company as agent of the others, so far as passengers are concerned. This is the doctrine maintained by Judge Redfield in his work on carriers. He refers, among others, to the case of Ellsworth v. Tartt, 26 Ala. 733, in which he says the question was a good deal examined, and the rule laid down to be, "if the proprietors of different portions of a public line of travel, by an agreement among themselves, appoint a common agent at each end of the route to receive the fare and give through tickets, this does not of itself constitute them partners as to passengers, so as to render each one liable for losses occurring upon any portion of the line." He refers also to other authorities. See Redfield on Carriers, Sec. 444. And the same author maintains the same doctrine in his work on the Law of Railways, Vol. 2, Sec. 201.

In this conflict of authority we are left to adopt the rule which seems to us supported by the soundest reasons.

The extent and termini of great railway lines, owned and operated by companies incorporated by public laws, may be supposed to be known, at least in general, to persons of ordinary intelligence, when they purchase tickets to travel over them, especially when this is shown by the tickets themselves. The system of selling through tickets is one of great importance and convenience to travelers, as it avoids trouble, besides securing in some instance lower rates. The theory that the company selling the ticket shall be held, from this alone to have actually contracted to carry the passengers over roads besides its own, and that the owners of the other roads are but the agents of the first to carry out the contract, seems to us to be an arbitrary assumption—a sort of legal fiction, and contrary, in some cases at least, to the truth of the case. Assuming that in fact the different lines of road are separate and distinct, and owned and controlled by different companies, with different agents and officers, and that there is no contract or priority between them in regard to carrying passengers, except the arrangement to sell through tickets, and that these facts appear in proof shall the fact that the first company, with the authority of the others, issues and sells the tickets, be held of itself to establish exactly contrary to the truth, that the other companies are but the agents and servants of the first? There is nothing in this record to indicate that the officers and agents of the steamboat, whose wrongful acts or negligence are said to have caused the death of the plaintiff's wife and children, were the servants of this defendant, or in any manner under its control, except the simple fact that the defendant sold the tickets. To allow this of itself to establish this arbitrary conclusion against the truth, would be to attach unjust reponsibility upon the company selling the tickets. We are of opinion that in such cases, the company selling the tickets shall be regarded as the agent of the other lines, when the tickets themselves import this and nothing else appears, and the purchaser

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may well understand with whom the contract is made, and who is bound for its performance.

Of course the company selling the tickets may, by contract, either expressed or to be fairly implied from its acts, bind itself to be responsible for the entire route; but this should not be held conclusively established from the sale of the tickets alone, nor should it be held to throw upon the defendant the onus of proving that it expressly limited its liability. If a partnership in fact appear, the case would be different. For this error the judgment must be reversed and a new trial awarded. JUDGMENT REVERSED.

NOTE.—We are indebted, for the foregoing opinion, and for another which we shall publish next week, to Mr. Attorney-General Heiskell, of Tennessee.

Railway Mortgage—Foreclosure—Parties.

CHARLES ALEXANDER *et al.* v. CENTRAL RAILROAD OF IOWA, *et al.*

United States Circuit Court, District of Iowa, October Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.
and " JOHN LOVE, District Judge.

1. **Foreclosure—Trustee—Cumulative Remedy.**—A provision in a railway mortgage, authorizing the trustee, on default of the company to pay interest, to take possession of the road, operate it and receive its income, and upon notice, to sell it, is a cumulative remedy, and does not affect the right to foreclosure by bill in equity.

2. ——. **Trust Deed Construed.**—The special provision of the deed of trust in question, held not to require a majority of the bondholders to unite in a suit to foreclose for interest, or request the trustee to bring such suit.

3. ——. **Default of Trustee—Who may Sue.**—If a trustee improperly refuses to bring such suit, an individual bondholder may bring it for himself and others, and make the trustee a party defendant.

4. ——. **Suit by Trustee—When Permitted.**—On a dismissal, by the plaintiff of the bill as to the trustee, the court has a discretion to allow the trustee to file a bill for the benefit of all the bondholders.

This is a bill in equity to foreclose a mortgage made by the defendant on its railroad and property. The bill is filed by the plaintiffs as bondholders, who allege that they bring it for themselves and all other bondholders who are similarly situated. It charges default in the company to pay interest. It alleges that the plaintiffs have made a demand on the trustee in the mortgage, viz: the Farmers' Loan and Trust Company, of New York, to bring the suit, and its refusal, and the said company is therefore made a defendant. There is no averment in the bill that a majority of the bondholders unite in bringing it, or united in the request to the trustee to bring it. The trustee appears and files an answer, setting up that a majority of the bondholders have never demanded action on the part of the trustee, and that it is willing to submit to the direction of the court as to its duty in the premises, and to become plaintiff if the court so orders. The railroad company demurred to the bill, on the ground that under the provisions of the deed of trust, there could be no foreclosure by bondholders, or by the trustee, unless a *majority* of the bondholders so desired, and there was no such averment.

The following are the provisions in the deed of trust relied on in support of the demurrer: "And the said party of the first part [the Railroad Co.] doth hereby covenant, promise and agree, for itself, its successors or assigns, to and with the said trustee, their successor or successors, that the said company will well and truly pay each and every of said bonds issued by them, and secured by this mortgage, together with the semi-annual interest to become due thereon, at the rate of seven per cent. per annum, at the times, in the manner, and at the places specified therein, in United States gold coin. And that in case said company shall, for the space of six months, make default in the payment of the said semi-annual interest to become due upon any, either or the whole of of said mortgage bonds, then, after the expiration of twelve months from the time it became due, and without demand or notice, at the *election or option of a majority of the holders of said bonds, the whole principal sum mentioned in each* and all of the said mortgage bonds then outstanding shall, *forthwith, become due and payable*, and the lien or incumberance hereby created for the security and payment thereof may at once be enforced.

And it is agreed, in case of the default of the payment of the semi-annual interest, as above provided, that said trustee, or its successors, is hereby expressly authorized and empowered, upon the request in writing of a majority of the owners or holders of said bonds, to enter into and upon, and to take actual possession of all the property, real and personal, and rights, franchises and privileges of the premises hereby conveyed, and each and every part thereof, and by their agents or attorneys, have, hold, use, and enjoy the same, and from time to time make all repairs and replacements, and all useful alterations, additions and improvements thereto, as fully as the parties of the first part might have done before such entry; and to collect and receive all tolls, freight, incomes, rents, issues, and profits of the same and of every part thereof; and the said trustee, and their successors, shall and may, and hereby is expressly authorized and empowered to sell at public auction, to the highest bidder, the entire property, real and personal, rights, franchises, and privileges herein conveyed; said sale shall be either in the city of Marshalltown, Iowa, or in the city of New York."

Platt Smith and *J. F. Duncombe*, for the plaintiffs; *Boardman & Brown*, for the railroad company; *Grant & Smith*, for the trustee.

DILLON, Circuit Judge:—

1. The authority in the deed of trust to the trustee, on default of the payment of interest, and upon the written request of a majority of the bondholders to take possession of the road, to operate it and receive its income, and on three months' notice to sell the same, and divide the proceeds of the sale *pro rata* among the bondholders, is a cumulative remedy for the benefit of the mortgage creditors, and does not exclude their right to resort to the judicial tribunals for a foreclosure. Especially is this so, as the laws of the state of Iowa, forbid sales under powers of this character by proceedings *out of court.*

2. Provisions in an instrument of this character limiting the right of a mortgage-creditor to resort to a court of chancery to foreclose his security, are not to be extended beyond the fair meaning of the language used; and it is our opinion that there is no restriction in the deed of trust before us, upon the right of the coupon-holder to forclose *for interest* upon default; although a majority of the bondholders do not unite in the suit, or request the trustees to bring it. The provision in question gives a majority of the bondholders, on default of the payment of interest, the option or election, after the expiration of a year from the default, to have the *whole principal sum* become due at once, and the mortgage security enforced accordingly. This is not inconsistent with the unabridged right of any coupon-holder to foreclose for *interest*, in the manner sought in the present bill, and it was not necessary that a *majority* of the coupon-holders should unite in bringing the bill, or in a request to the trustee to bring it.

3. As the bill alleges that the trustee refused to bring suit, the bill was properly brought in the name of the plaintiffs, for themselves and the other coupon-holders, making the trustee a defendant.

4. If the plaintiffs elect to dismiss the bill as to the trustee, we will allow the trustee to become a party plaintiff, and to file a bill for the benefit of all the bondholders; but it would be anomalous to have the trustee on the record, both as defendant and plaintff in the same proceeding. The demurrer of the railroad company to the bill is overruled. ORDERED ACCORDINGLY.

HON. PETER W. GRAY, one of the most eminent lawyers and citizens of Texas, died at Houston, on the 5th instant. He had but recently returned from Virginia, where he had gone for his health. He was born in Fredericksburgh, Va., in 1817, and accompanied his father to Texas in 1837.

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[Correspondence.]

James T. Brady.

The great men of the nation—those who have given the world a direction towards the good — are endearing and enduring ornaments.

To rescue from forgetfulness, to keep fresh and green the memory, and to cherish with just pride the names of those who have elevated and ennobled a beneficent calling, ever tends to raise mankind to a higher level of thought and action.

We recur with pleasing recollections—after a lapse of several years since his death—to him who did all that lay in his power, and his bounty was large, to alleviate the condition of the unfortunate, to vindicate the rights of man, and to adorn the profession he so dearly loved.

James T. Brady was indeed a brilliant ornament—the Curran of the New York bar—while in the social circle he was peculiarly attractive, possessing at the same time, in a liberal degree, the better amenities of our nature. Genial, gentle, and sympathetic, he was always considerate and generous toward his younger brethren of the bar. Companionable and noble, and largely endowed with the spirit of love for his fellow-men, he was ever the delight of his auditory, whether in the court-room, or before a popular audience.

And a festive gathering, in many of which he figured so delightfully, was considered incomplete—a play without a star—if he were absent; for he was

> "From the charmed council to the festive board,
> Of human feelings the unbounded lord."

His boyhood education was under the guidance and direction of his father, Thomas Brady, who was a man of clever legal abilities and varied accomplishments, having kept a school and afterwards practiced law with success, in the city of New York. In that rudimentary school, it was about fifty years ago, that young Brady might have been seen, a large-headed little boy of seven or nine years of age, poring over his books, and laggingly committing his lessons, for he was "slow of study" at that age, as was Webster and many others, who, in manhood, became distinguished; he displayed no marked, distinctive qualities of mind or genius while a youth, which foreshadowed eminence in coming years.

"I remember him," says Chief Justice Daly, now of the Common Pleas Court of New York, who was with him while a boy in the school of his father. "I remember him, and such of his schoolmates as survived remember him, as a great, warm-hearted little boy; exceedingly unselfish, most affectionate in his attachments to his young school companions, and exceedingly beloved by them; qualities, which in all his subsequent career, and the distinction that attended him, were never abated or extinguished, as every one will testify that ever knew him, nor came in personal contact with him."

Although he was a shy and retiring lad, his father—who knew his nature best—regarded him as a self-reliant and remarkable boy, who was one day to make a figure in the world.

From the impressions of those who remember him in early manhood, we glean that, his earliest ambition was to be a lawyer; and he ever after had an elevated opinion of the nobleness of the profession; he considered that the beauties and honors of *Justitia* far out-shone the wealth of "Ormus and of Ind."

His natural powers of oratory were great, while an unhesitating command of language and a wonderful felicity of classical illustration, favored and marked him, even from the time he pleaded his first case; these made him engaging and majestic before any audatory.

Of a Celtic origin, he partook largely of the fervid imagination and flowery style peculiar to that race. In his later efforts he displayed such genius, such astuteness and eloquence as to render him worthy to tread in the footsteps of Thomas Addis Emmet and kindred lights of the bar.

When young Brady was admitted to practice, the profession was as now, we doubt not, crowded, or seemed to be; for such men as George Wood, Daniel Lord, David Graham and Ogden Hoffman, filled the higher places, the labyrinths of the profession; but the proud, self-reliant young knight, sprang into the arena undaunted, ready to cope with the ablest of them—doubtless believing, with Webster, in regard to the profession, that there was "room enough up stairs."

His influence over a jury was very great—probably equal to that of Choate in his palmiest days. While he had a pleasing address, he possessed a remarkable magneticalness which ever wins a jury more than labored logic; these, combined with great felicity of thought and expression, which at times pierced like a Damascus blade to the centre, gave him a powerful lever to distinction. And thus it was, that a gleam of light and beauty shone through whatever he gave his mind to, and made the subject or contested point stand out in radiant characters. But while his diction and eloquence were ever conceded to be remarkable, his powers of analysis, logic and solid argument can but deeply impress the mind of any one who may take occasion to read his forensic speeches, and such of his briefs, legal pleas and arguments as are preserved to us. It has well been said by one who knew him better, that in this regard, "many of his noblest productions were not unlike the Corinthian pillar, in which the strenghth of the column is lost sight of in the symmetry of its proportions and the beauty of its decoration."

While not insensible to his own merits, he was generously ready to accord a word of praise to his associate or antagonist in a cause where he deemed it deserving.

The Great Advocate was engaged in most of the important cases in the state of New York, during a period of twenty-five years. It were idle to attempt to collate in order the various cases in which he figured, but some may be mentioned as they occur to us—as we remember the impressions made at the time of their occurrence.

In 1862 Mr. Brady was one of the counsel to defend the commander and crew of the privateer Savannah, who were arraigned for piracy. The facts in brief were, that the schooner Savannah, a Confederate vessel, having captured the brig Joseph, laden with sugar, was afterward taken by the United States brig-of-war Perry, and brought into the port of New York, where a "true bill" for piracy was found. We may mention in this connection that, as a short time before this, the men of the privateer Jefferson Davis, had been tried in Philadelphia and convicted of piracy, a precedent in such cases had been established.

Mr. Brady handled the cause with marked ability, and as far as we have been able to learn, without pecuniary reward. The closing sentence of his plea to the jury in behalf of the privateermen was about as follows: "I do wish that it were within the power of men, invoking the Great Ruler of the Universe, to bid these doors open and to let the revolutionary sages to whom I have referred, and a Sumter, a Moultrie, a Greene, a Putnam and the other distinguished men who fought for our privileges and rights in the days of old, march in here and look on this trial. There is not a man of them who would not say to you that you should remember in regard to each these prisoners, as if you were his father, the history of Abraham, when he went to sacrifice his son Isaac on the Mount—the spirit of liberty, the principles of American jurisprudence and the dictates of humanity constituting themselves another angel of the Lord, and saying to you when the immolation was threatened: 'Lay not your hand upon him.'"

He also figured conspicuously in the Forrest divorce case—the accounts of which at the time flooded the newspapers and periodicals of the country. It will be remembered that the cross-firing on the part of the litigants, was kept up for several years—Mr. Forrest having set the ball in motion by an action for divorce—but which finally resulted in Mrs. Forrest recovering judgment for her support from 1850 to 1860, which, in the aggregate, amounted to a large sum—and thus, as was then said, Birnham Wood had come

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to Dunsinane. Mr. Forrest took an appeal from the final judgment, and from each and every part of any further judgment aud order in the action. In these appeals it was that our advocate acted down to 1862, achieving a world-wide reputation.

In the notorious trial of Gen. Geo. W. Cole, for the murder of Hon. L. Harris Hiscock, at Albany, in December, 1868, James T. Brady won bountiful laurels for the graceful and masterly manner in which he defended the prisoner. Notwithstanding his ill health —he then being under the doctor's care—it is generally conceded that he acquitted himself ably and well, and that his efforts wrought out a vindication of the accused in the minds of the jury. We would not, however, in this commendation, be understood as detracting one jot or tittle from the astuteness, genius and eloquence exhibited by the learned and accomplished gentlemen associated with him on that occasion.

The trial of Cole attracted much attention, and was as renowned in pith and moment as that of Sickles for the murder of Barton Key, years ago in Washington.

In his plea to the jury, Mr. Brady made touching allusions to the heroic services rendered to the nation by the prisoner; that after being decorated with badges of honor, for patriotism and heroism in the services of his country, he turned his footsteps homeward to share his glories with her, for whom he would have laid down his life: "But," in deepest pathos, exclaimed Mr. Brady, "what found he there? Alas! that hearthstone was desecrated; the spoiler had been there. Where joy and brightness had reigned luxuriantly, sorrow and gloom were. That beautiful fabric of domestic love and tranquility was overwhelmed in ruin, and the ravens of dispair were croaking and gloating over the dark desolation. Gentlemen, what is home without its jewels; what is earth without its flowers; what is heaven without its stars." He then makes an apposite simile in referring to Cæsar being struck down in the senate chamber by his best friend. "He, also, experienced the pangs of knowing that it was his most trusted friend that struck him to the heart—

> 'For when the noble Cæsar saw *him* stab,
> Ingratitude, *more* strong than traitors' arms,
> Quite vanquished him.'"

Although the plea had very great weight with the jury, some have expressed a disappointment at this effort. It may be Mr. Brady had, on some former occasion, when in the prime of health, been more pleasing and eloquent, but considering the fact that his constitution was then much shattered, we may justly accord a tribute of praise, believing that his decided influence over that jury was the result of a solemn pathos well fortified with convincing logic. A verdict of "not guilty" was rendered.

Our generous advocate was ever ready to defend the ignorant, the weak, the worthy "without money and without price,"—and the field for such labor, be it remembered, in any great metropolis is boundless—so that years before, and at his death, full many a poor, unfortunate man and woman whom he had befriended pronounced him blessed, and would fain have laid upon his bier offerings of adoration.

Whether prosecuting or defending a case for pay, or for charity's sake, he was always faithful,—faithful to his abilities, to his client, and faithful to himself.

He possessed abilities of the peculiar kind and description to have shone favorably in public life, but he uniformly declined political honors. The position of Attorney-General of the United States was once tendered him, but he did not accept it, although it was believed that he would have filled the office gracefully and well.

The gerat advocate having courted the jealous mistress of the law, in early manhood, too assiduously to devote time to the tender passion, passed on through life without having married. He never realized the concealed comforts of "The Hanging of the Crane" —*Pendre la cremaillere*, so charmingly portrayed by Longfellow, in his poem just published under that title. Had he ever been able to say and realize,

> "O fortunate, O happy day!
> When a new household finds its place
> Among the myriad homes of earth"—

he would doubtless have been a happier, if not a better man. Being of a sunny and mercurial nature, he latterly floated on the tide of fawning and flattering society, in which his smiles were ever courted.

The honorable John R. Brady, the accomplished judge of the Supreme Court of New York, is a brother of the subject of our sketch, a man of marked ability and highly revered.

At the meeting of the members of the bar of New York, in memory of Daniel S. Dickerson, one great advocate pronounced a sentiment which appositely illustrates his catholic spirit and humane character: "Like you," he observed with a high sense of regard for the opinion of his associates, "I honor greatness, genius, and achievements; but I honor more those qualities in a man's nature which show that, while he holds a proper relation to the Deity, he has also a just estimate of his fellow-men, and a kindly feeling toward them. I would rather have it said of me after death, by my brethren of the bar, that they were sorry I had left their companionship, than to be spoken of in the highest strains of gifted panegyric." That sentence bespeaks the nature of the man.

Five winters and summers have rolled their onward course since James T. Brady was called from his beneficient sphere of usefulness,—since a void was occasioned in the Bar of New York, which has scarcely yet been redeemed—and thousands still miss his companionship.—

> "Nor e'er was to the bowers of bliss convey'd
> A fairer spirit, or more welcome shade."

New York. JOHN F. BAKER.

Book Notices.

CRIMINAL LAW REPORTS: Being Reports of Cases Determined in the Federal and State Courts of the United States, and in the Courts of England, Ireland, Canada, Etc. With Notes. By N. ST. JOHN GREEN, formerly Lecturer on Criminal Law at the Dane Law School, and now Lecturer on Criminal Law at the School of Law of Boston University. New York: Published by Hurd & Houghton. Cambridge: The Riverside Press. 1874.

We are glad that the preparation of a series of criminal law reports has been undertaken by an editor so competent to perform the task, and by publishers who stand foremost in their department of the book-making art. It is an undertaking of which a large portion of the profession have felt the need for some time, and it is matter for congratulation that it has not fallen into bad hands. The practice of the criminal law separates itself so completely from every other field of legal labor, that in the large cities it is rapidly falling into the hands of a separate class of lawyers, some of whom never appear in a civil case. The establishment of separate criminal courts in many of the large cities has had a further tendency to segregate the criminal lawyers from the rest of the profession. Such of those lawyers who have not access to complete libraries can furnish themselves with the current decisions on criminal law, of states other than their own, in no other way than through a series of this kind. We believe the time is not far distant when each of the leading departments of the law will have its separate series of reports; when, in other words, we shall have Criminal Reports, Bankruptcy Reports, Admiralty Reports, Commercial Reports, Equity Reports, Ecclesiastical and Divorce Cases, Land Cases and the like, in separate and concurrent series, embracing all courts. The law involves too vast an accumulation of knowledge for any one man to excel in all its branches, and the dictates of good sense and self-interest will soon lead each lawyer, at least in large cities, to confine himself to a particular department of his profession. When that time comes—when we shall have specialists in law, as we now have in medicine—every successful practitioner will be able to support a series of reports devoted to his own specialty. The criminal practice has so far become a specialty with a certain class of lawyers that this may be done now.

An attempt is made in this series to give, in about one volume per year, all the current decisions on the criminal law in the English and American courts. The editor promises that in future volumes no case which is deemed to be of the slightest importance will be omitted, that doubtful cases will be commented upon in notes, in which an endeavor will be made to treat the subject historic-

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ally as well as theoretically, and that cases which are now established as leading cases, will, as occasion serves, be added in full in the notes.

Unless we greatly deceive ourselves, this undertaking cannot be carried out in one or two, or even three volumes a year. The present volume, although honestly printed, with large pages and without leading or stuffing, comprises, in 814 printed pages, but 98 reported cases. Mr. Green in his preface tells us that the number of volumes of reports published last year was 98. This would make an average of but one criminal case to each volume of reports. We believe from such an examination of the subject as we have been able to make, that the average will come nearer a dozen than one. There is such a diathesis of violent crime in some sections of the country, that we doubt if one volume per annum would do more than comprise the homicide cases alone. We recently had occasion to note ten homicide cases in a single volume of Alabama Reports. We therefore confidently think that Mr. Green must either resort to some principle of selection, or else he and his publishers must conclude to face the task of getting out several volumes per year.

We have not space to notice the many valuable cases comprised in this volume; but, glancing at the work of the editor, we find many scholarly notes of great value—which will be of equal delight to the student and profit to the practitioner. In these notes the learned editor does not limit his efforts to the collecting of decided *points*, but, in searching for the reasons and foundations of the rules under discussion, he carries us back through the old authors and through the most learned and instructive historical enquiries. This will appear from a portion of a note which we select at random, on p. 502, in which the editor traces the origin of the principle that a man's house is his castle. The following brief note, which we find on p. 295, will also show the discriminating cast of Mr. Green's mind:

"Many *dicta* are to be found in the reports to the effect that it is a well settled rule of the common law—'that in setting out a statutory offence it is generally sufficient to follow the words of the staute.' State v. Lockbaum, 38 Conn. 400, 402. There is no such rule of law. No distinction is made by the common law as respects the degree of particularity and precision essential to the description of an offence, between statutory and common law offences. All indictments must specify the criminal nature and degree of the offence, and the particular facts and circumstances which render the defendant guilty of that offence. If the statute sets out fully and precisely the necessary ingredients of the offence, then an indictment is generally sufficient which follows the words of the statute. But such indictment is good, not because it follows the words of the statute, but because it satisfies the common law rules of pleading. 1 Starkie on Crim. Plead. Ch. 12; Archb. Crim. Pl. 13th Ed. pp. 50, 51 and cases cited; Purcell's Plead. & Ev. pp. 79, 80, 81 and cases cited. In England by Stat. 7 Geo. 4, ch. 64, Sec. 21 (1826), it is enacted that 'when the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.'

"This statute has probably not been generally re-enacted in this country. It is undoubtedly true as a matter of fact, that where a statute creates an offence, it is generally sufficient to follow the words of the statute. But this is true, not because there is any rule of law to that effect, but because when the legislature make a new offence they generally specify the facts necessary to constitute the offence."

The following note (p. 183) will also show the ready learning with which the editor illustrates interesting questions here and there, and by which he sets his readers to thinking:

"Coke says (3 Inst. p. 233), 'a pardon is a work of mercy, whereby the king either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debtor, duty, temporal or ecclesiastical; all that is forfeited to the king by any attainder, etc., he may restore by his charter; but if by the attainder the blood be corrupted, that must be restored by authority of parliament.'

"Hobbes, who had a marvellous faculty for stripping words of their ambiguity, says in his dialogue between a philospher and a lawyer, while commenting upon the matter of pardon as treated by Coke:

"'P. * * * * Now tell me what it is which is said to be a pardon?'

"'L. What can it be, but only the offence? If a man hath done a murder, and be pardoned for the same, is it not the murder that is pardoned?'

"'P. Nay, by your favor, if a man be pardoned for murder or any other offence, it is the man that is pardoned; the murder still remains murder. But what is pardon?'

"'L. Pardon, as Sir Edward Coke says (3 Inst. p. 233), is derived of *per* and *dono*, and signifies thoroughly to remit.'

"'P. If the king remit the murder, and pardon not the man that did it, what does the remission serve for?'

"'L. You know well enough that when we say a murder or anything else is pardoned, all Englishmen understand thereby, that the punishment due to the offence is the thing remitted.'

"'P. But for our understanding of one another, you ought to have said so at first. * * * * '"

But Mr. Green might have done more in the way of notes and comments on his principal cases than he has done. Thus, in Bohannan v. Commonwealth, p. 613, the Court of Appeals of Kentucky criticises two preceding opinions of the same court, Phillips' case, 2 Duval, 328, and Carico's case, 7 Bush, 124. Had Mr. Green turned to these cases, he would have found an extraordinary doctrine announced and enforced by vigorous reasoning. The opinions of the court in these cases (or at least the more striking language contained in them) would have been worthy a place as a foot note to Bohannan's case. The case of Sylvus v. State, p. 679, on the burden and quantum of proof where self defence is urged in justification of homicide, afforded the editor an excellent opportunity to exercise, upon a point as to which the professional mind is unsettled, the fine discrimination which he elsewhere exhibits. The extraordinary doctrine laid down in Fields v. State, p. 635, should not have passed unchallenged, unless the editor thought (as we do) that it carries with it its own refutation.

But the efforts of an editor must end somewhere; and Mr. Green and his publishers are entitled to the thanks of the profession for what they have done in this first volume, and the profession is to be congratulated that the literature of the law is to be enriched by so valuable a series. We ought not to omit to add that, with the exception of the paper, which seems not quite as good as the publishers usually select, the mechanical execution of the book sustains their excellent reputation.

THE NEW YORK SUPREME COURT REPORTS. Cases Determined in the Supreme Court of New York, from November, 1873, to June, 1874. Edited by ISAAC GRANT THOMPSON and ROBLEY D. COOK. Volumes II and III. John D. Parsons, Jr., 1874.

We have heretofore taken occasion to express our gratification that the reporting of the decisions of the Supreme Courts of New York has at last fallen into good hands. We have likewise taken occasion to express regret that after Messrs. Thompson and Cook had begun this undertaking and begun it so well, the publication of the former "official" series, which had been suspended simultaneously with the suspension of the series of Barbour, had been resumed by another editor. The present series gave, and still gives, promise of so much usefulness that we thought it a misfortune to have the old anarchy resumed. So far as our means of judging extends, there is no series of reports now published, whose editors achieve what the profession require at their hands, more nearly than do the editors of this series.

In the first place these reports are *prompt*, following but two or three months behind the decisions reported. This, if there were no other excellence, would cover up a multitude of sins. In the second place, the work is well done—both editorial and mechanical. Of course we are not prepared to speak upon this point, as unqualifiedly as a practitioner would be who had for some time used these books; but from such a hasty examination as a reviewer can make, we are convinced that there are no reporters in this country who deserve more credit for careful and judicious work. In the third place, these volumes have a great deal of meat in them, if we may be permitted to use such an expression. Volume 2 contains one hundred and sixty-five reported cases—fifty per cent. more than ordinary volumes of reports; whilst volume 3 contains 273 cases, considerably more than twice as many as will usually be found in a volume of state or federal reports. With reference to the nature of these cases, they are what would be expected in decisions of the courts of a great commercial state. We notice a large—perhaps we may say an unusual number of cases—novel in their character and of general interest, and which do not rest in statutes peculiar to New York. We have selected a number of these, and hope to find space to notice them hereafter.

These reports, however, have one vital defect. They are decisions of courts not of final resort, and many of them are re-examined, and some of them reversed by the court of appeals. A "*corrigenda*" in each volume shows the disposition of the cases of the preceeding volumes which were appealed from, and in which a final judgment has been rendered. We shall not enter again into the propriety of reporting the decisions of courts which are not final. Suffice it to say that we believe that the commercial test is the only one which can be applied. If the profession want such reports, they ought to be published; and those who do not want them, need not buy them. The objection to the publishing of such reports is in our judgment the objection of the case lawyer, and not the objection of the lawyer who thinks.

THE PYSCHOLOGICAL AND MEDCIO-LEGAL JOURNAL. Conducted by WILLIAM A. HAMMOND, M. D., Professor of Diseases of the Mind and Nervous System in the University of the City of New York, etc. Assisted

by T. M. B. CROSS, M. D., Assistant to the Chair of Diseases of the Mind and Nervous System in the same university. New York: F. W. Christern, 77 University Place. London: Williams & Norgate. Paris: Charles Rienwald & Co. Leipsig: L. A. Kittler. Monthly. $5.00 a year. Single numbers, 50c.

We have now received the fourth number of the new series of this valuable publication. It consits of papers on subjects connected with diseases of the mind and nervous system, read before various medical societies, mostly before New York Neurological Society. These papers are unquestionably of great value, and deserve the attention of every member of the legal profession whose investigations lead him into the domain of medical jurisprudence, and particularly into that department of it which relates to insanity. The treatment of the insane by our criminal law is but slowly emerging from the barbarism which treated madmen as possessed of the devil, and which prompted Rosalind to say to Orlando in "As You Like It," "Love is mere madness; and, I tell you, deserves as well a dark house and a whip, as madmen do." In our unscientific efforts to be humane, we have reached a point where the question of criminal accountability is tried before an ignorant jury, upon expert testimony, based upon hypothetical questions, and jumbled together with the general issue of guilty or not guilty. It has therefore become a scandal and reproach to the administration of justice, in which the legal profession must, in some measure, share, that the more atrocious and unnatural the crime, if it be one of a violent nature, the greater the impunity with which it may be committed. It belongs to the medical profession to enlighten the legal upon questions of this kind; and to this end, the dissemination of papers prepared by men of such eminent ability as those connected with this journal, cannot fail to be of great benefit.

[Correspondence.]

Insanity as an Excuse for Crime.

The following interesting letter should have appeared before, but it got inadvertantly mislaid:

SAVANNAH, GA., Oct. 3. 1874.

EDITORS CENTRAL LAW JOURNAL:—In your number of the 24th of September, 1874, in noticing a review of Dr. Wharton's work on Criminal Law, you allude to a bill pending in the Ohio legislature which provides that where the defendant, in a criminal trial, pleads insanity, an issue upon that point is to be made up and tried by a special jury, in advance of the trial upon the indictment.

Such has been the law in Georgia for a number of years. I quote from section of the code, 4,299.

"Whenever the plea of insanity is filed, it shall be the duty of the court to cause the issue on that plea to be first tried by a special jury, and if found to be true, the court shall order the defendant to be delivered to the superintendent of the asylum, there to remain until discharged by the general assembly."

Two decisions have been made by the supreme court, touching this section of the code.

In Long v. The State of Ga. 38 Ga. 491, it is decided that the plea must allege that the prisoner is insane *at the time of the trial*.

In Anderson v. The State, 42 Ga. 9, it was decided that when this special plea was filed, but the defendant did not insist that there should first be a trial on it, but went to trial on the general issue of "not guilty," and relied on the insanity to show that he was not guilty, the jury might find him guilty or not guilty, under the evidence, without finding for or against the special plea.

From these two decisions it appears that the law is practically inoperative in this state; for, first, although the defendant was insane at the commission of the offence, yet if he is sane at the trial, the special plea cannot be filed; and, second, though the plea of insanity *at the time of trial* is filed, yet the defendant may go to trial on the general issue of not guilty, without a trial on the special plea of insanity.

If the defendant was insane at the commission of the offence, but sane at the trial, he must be acquitted. If he was sane at the commission of the offence, but insane at the trial, he must be sent to the asylum, if he should choose to go to trial on the special plea, but may be convicted if he should choose to go to trial on the general issue, as actually occurred in the Anderson case referred to in 42 Ga.

My own opinion is, that the question of insanity should never be allowed to come up in criminal trials. The violent and blood-thirsty members of society should be put out of the way of further outrage, without reference to the motive which induced them to disregard the rights of life and property. The laws of man should be administered in the same spirit as are administered the laws of nature. A short-sighted man, who has miscalculated his distance in attempting to swim a river, drowns, not because his motive is malignant, but because he has violated a law. Insanity, like blindness, or a "wicked and abandoned heart," is a defect of organization, and the highest triumph of human tribunals should be to minister to the survival of only the fittest. Very truly, etc.,

HENRY B. TOMPKINS.

Notes and Queries.

APPEAL FROM SATISFIED JUDGMENT—ANSWER TO B.

MONTGOMERY, ALA., OCT. 14, 1874.

EDITORS CENTRAL LAW JOURNAL.—Your correspondent "B," of Elko, Nevada, puts a case in your "Notes and Queries" of Oct. 8, on which he desires information. Permit me to say that just such a case has been passed on here, except that our case originated in a superior court of record, of general, civil and criminal jurisdiction. An appeal was taken to the supreme court (our highest court) by plaintiff, but pending the appeal, execution was issued on the judgment by the clerk, and was paid by defendant to the sheriff, while the execution was in his hands. The plaintiff did not order the execution issued, and instructed the sheriff to return the money to defendant; the sheriff tendered the money back to defendant, but he refused to take it, and the sheriff, by direction of defendant's attorney, returned the execution to the clerk's office, "satisfied." In the supreme court defendant moved to dismiss the appeal, because it was taken on a satisfied judgment.

After citing several Alabama decisions to the effect that plaintiff will not be permitted to prosecute his appeal further, if he has, of his own accord, coerced payment of the judgment, the supreme court say: "But the appellant (plaintiff) has done all that ought to be required in this case, by instructing the sheriff to return the money. The motion is therefore overruled."

I will add that we have no statute affecting the matter—the court exercised its inherent power. Respectfully,

R. D. RUGELEY.

REMARKS.—Will our correspondent be kind enough to give us the name of the above case, and the volume in which it is reported?

Summary of our Exchanges.

The Legal Gazette, for October 23, publishes the decision of the Supreme Court of Pennsylvania in Watts v. The McLean and Elk Land Improvement Company, in which the following interesting points are ruled:

1. The power of a corporation to contract, necessarily involves the cognate power to create debt, and the defendants having the power by their charter to dispose of the whole of their land, the minor power of mortgaging those lands, upon a proper occasion, belongs to them.

2. The company having power "to aid in the development of the minerals and other material" in and upon their lands, and "to promote the clearing and settlement of the country," the erection of saw mills and of a hotel were strictly within that power, and the directors cannot be held to account, as an abuse of their authority in erecting such buildings.

3. When an act done by directors of a corporation is in excess of their authority, yet has been done with the *bona fide* intention of benefiting the corporation, and a shareholder, knowing thereof, does not dissent within a reasonable time, his assent to the act will be assumed, and he will be estopped from gainsaying it.

4. When the act complained of is to be followed by a large expenditure of money, the shareholder should follow up his protest by active preventive means. His neglect to act at the proper time, bars his right of action as effectually as his neglect to protest.

It also publishes a decision of the Philadelphia Court of Quarter Sessions, Paxson, J., in the Matter of Opening Fifteenth Street, in which a jury, appointed to assess damages for the opening of streets through a cemetery, reported also an award in favor of the cemetery company for the cost of suitable enclosures upon the line of said streets. Upon exceptions, the report was sent back to the jury, with instructions to report upon the question of damages only. And this, notwithstanding the act of assembly, under which the streets were opened, directed that "in assessing damages for said opening, the cost of a" suitable enclosure of said cemetery ground, on said streets, shall be allowed.

It also publishes Chapin v. James, which we publish in this issue; and also the opinion of Mr. District Judge Knowles, in Chafee v. Coggshall, which we notice at the foot of the former case.

The Chicago Legal News, for October 17, publishes the opinion of Mr. Circuit Judge Drummond, in what are known as the Tuck Creaser Cases.

It also publishes an anonymous opinion of Mr. District Judge Deady of Oregon, on the subject of selling liquor to Indians, which has the following syllabus:

All Indians born and resident in Oregon, are, *prima facie*, members of some Oregon tribe, and are therefore under the charge of the superintendent of Indian affairs in Oregon, appointed in pursuance of the act of June 5, 1850 (9 Stat. 437), within the meaning of § 20 of the act of June 30, 1834. (4 Stat. 732), as amended by § 1 of the act of March 16, 1864. (15 Stat. 29).

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An Indian born in Minnesota is, *prima facie*, not a member of an Oregon tribe, though he might become such by adoption.

The clause in § 6 of the act of February 17, 1873 (17 Stat. 463), providing for the abolishing of Indian superintendencies after June 30, did not of itself abolish such superintendency, but only took effect when and as the President designated and appointed.

The payment of a superintendent's salary until September 1, 1873, is *prima facie* evidence that his office was continued until that time, although he was notified that his office was one of those selected under the act to be abolished.

It also publishes a decision of the Supreme Court of South Carolina, by Willard, J., in Magwood v. The South Carolina Railroad and Bank, on the Transfer of Stocks held in Trust.

It also prints a decision of the Supreme Court of Illinois—Amick v. Young, by Breese, Ch. J., expounding the Illinois statute in regard to replevin, and stating under what circumstances the declarations of a party exercising acts of ownership over property, are competent evidence in a suit where the title to such property is in question.

The Legal News also prints the opinion of the Supreme Court of Illinois, Scott, J., Walle v. Arnold, which arose under a somewhat novel state of facts. A deed of trust given to secure a debt authorized the sale to take place "at the north door of the court-house, in the county of Cook," etc. Before the maturity of the debt, the main body of the court-house, including the "north door," was destroyed in the great Chicago fire. A bill for injunction was brought, to restrain the sale, on the ground that the *place* where the sale was to be made was an element of the power, and, that being wanting, the whole power had become nugatory. The court thought differently, and affirmed a decree restraining the trustee from making the sale at the new court-house, but permiting him to make it "at the place midway in space between La Salle and Clark streets, where the north door of the old court-house was previous to the fire."

old court house having been destroyed, pursuant to the terms of said deed."

Mr. Justice Scott said: "It is not essential to the valid execution of the power given by the trust deed in this case that it should be executed in or at the 'north door' of the court-house as it was then constructed. Parties in making their contract must be presumed to have done so with reference to mutations that must necessarily take place in all structures, however permanently erected; that the old building occupied as a court-house was liable to be destroyed at any time and a new one erected. It would be absurd to hold the power could not rightfully be exercised at the "north door" of a new court house, had one been erected on the location of the one destroyed. The essential element in the power is the place rendered certain by the description given in the deed; and whether it is executed at the top or at the foot of the steps, or whether they have been destroyed and new ones erected, or whether there are none at all there, seems to us wholly immaterial. The mere fact that there has been a physical change in the buildings at the point designated, ought not to be held to destroy the power. This would be a narrow and illiberal construction which we are unwilling to adopt. While construing such powers strictly, they must have a reasonable construction given to them. Greater strictness out not to be required than the parties, by a fair construction of the provisions of the deed, contracted should be observed. Anything further savors of useless technicality. We entertain no doubt whatever that the power of sale contained in this trust deed can be well executed at the ruins of the north door of the old court house in the city of Chicago."

The same number of the Legal News also contains a brief decision of English Vice Chancellor Bacon, in Cox v. Bennett, where the court refused to discharge a person, who had been committed for contempt for marrying an infant ward of court, until the certificate of the due solemnization of the marriage had been produced, and a proper settlement of the wife's property had been approved.

The Chicago Legal News, for October 24, publishes the case of the U. T. Co. v. The Rockford, Rock Island, and Saint Louis Railroad Co., United States Circuit Court at Chicago, which involved a conflict of jurisdiction between the federal circuit court and the state court. The federal court, on the 20th of July, sustained a general demurrer to complainant's bill of complaint, and entered judgment dismissing the suit. On the 22d day of July, the complainant, Nickerson, filed his bill in the state court, and made his motion for a receiver on the 24th of July, which was of the same term at which the demurrer was sustained. The order dismissing the cause was set aside on motion of the complainant's solicitor, and leave to amend and file a supplemental bill given, and on the 25th of July, Nickerson, by consent of the defendant, obtained an order appointing receivers in the Henry County Circuit Court. *Held*, that the United States Court had not lost jurisdiction of the case when the suit in Henry county was commenced, and although the suit was technically dismissed, on the record, from the 20th to the 24th of July, yet it was all the time subject to the power of the court to set aside the order, and Nickerson could not, by commencing a suit in another county, supersede the jurisdiction of the United States Court over the subject-matter, and that the state court had no jurisdiction to appoint a receiver. The opinion was by Mr. Distrirct Judge Blodgett.

The Legal Intelligencer, for October 16, prints several interesting cases.

In Commonwealth v. Jones, the Philadelphia Court of Quarter Sessions (Paxson, J.,) holds that an *attempt* to vote illegally is, in Pennsylvania, an indictable offence.

The same court (Ludlow, J.,) holds that former paupers in the almshouse, who have been discharged as such, but who remain in that institution under contract of service for hire, are entitled to vote as residents of the precinct.

In Burrows v. Lehigh Zinc Company, United States Circuit Court, Eastern District of Pennsylvania, Mr. Circuit Judge McKennan refuses to uphold Burrows' patent for a furnace to be used in the manufacture of white oxide of zinc, as he was not the first inventor.

In O'Mara and Irwin v. The Commonwealth, Supreme Court of Pennsylvania, the syllabus is as follows:

1. When the opinion of a juror as to the prisoner's guilt has not become a fixed belief, but is founded on rumors or reports which he feels conscious he can dismiss, and he is able to say that he can fairly try the prisoner on the evidence, free from such opinions or impressions, he is competent to serve as a juror.

2. It is competent for an expert to state a fact known to him as an expert, bearing upon other facts proved.

3. Evidence of what the defendant's wife said to him, and his reply, or want of reply, as a part of the *res gestæ*, is admissible.

4. *Prima facie* every unlawful killing is murder, for malice is presumed. But this presumption rises no higher than murder of the second degree; and the burden is on the commonwealth to show murder of the first degree.

5. The 9th section, article 5th, of the new constitution, was not intended to exclude the associate judges unlearned in the law, from the several courts named in that section, in those districts where these associates remain.

In Maxson & Wolfensden's Appeal, same court, A. agreed to sell realty to B., payments to be made in instalments, and deed on final payment; B. made the first payment, went into possession and mortgaged his interest to C.; who afterwards sold the same under a judgment on his mortgage and purchased it. In the meantime, A. had recovered in ejectment against B., for non-payment of instalments, the verdict or award to be released on payment within a certain time. B. failed to pay and surrendered possession to A. *Held:* that a bill filed by C. against A.'s vendees, to compel conveyance of the legal title on payment of the balance of instalments, must be dismissed, as being after the time limited for such payment.

Decisions of the Supreme Court of the United States, in the following cases, are reported at large in the Legal Gazette, for October 16, with full statements of the facts and arguments of counsel:

Insurance Co. v. Dunn: 1. Where, after a suit has been properly removed from a state court into the Circuit Court of the United States, under the act of March 2d, 1867, which allows such removal in certain cases specified by it, "at any time before the final hearing or trial of the suit," the state court still goes on to adjudicate the case, against the resistance of the party who got the removal, such action on its part is a usurpation, and the fact that such a party has contested the suit in such state court, does not, after a judgment against him, on his bringing the proceedings here for reversal and direction to proceed no further, constitute a waiver on his part of the question of the jurisdiction of the state court to have tried the case.

2. The language above quoted—"at any time before the final hearing or trial of the suit"—of the act of March 2d, 1867, is not of the same import as the language of the act of July 27th, 1866, on the same general subject—"at any time before the trial or final hearing." On the contrary, the word "final," in the first mentioned act, must be taken to apply to the word "trial," as well as to the word "hearing." Accordingly, although a removal was made after a trial on merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a state where by statute the party could still demand, as of right, a second trial, *held*, that such first trial was not a "final trial" within the meaning of the act of Congress; the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the state.

The Lucille: 1. An appeal in admiralty from the district to the circuit court, in effect vacates the decree of the district court, and a new trial in all respects, and a new decree, are to be had in the circuit court. The latter must execute its own decree, and the district court has nothing more to do with the case.

2. An order of the circuit court merely affirming the decree of the district court, and nothing more, is not such a decree as the circuit court should render, and is not a final decree from which an appeal lies to this court.

Osborne v. United States: 1. A distiller's bond taken in pursuance of the

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act of July 20th, 1868, imposing taxes on distilled spirits, and which enacts "that a distiller shall, on filing with the assessor notice of intention to commence business, make a bond, with sureties, to be approved by the assessor, and that no bond of a distiller shall be approved unless he is the owner in fee, unincumbered, of the land on which the distillery is, or unless he files with the assessor, in connection with his notice, the written consent of the owner of the fee, and of any person having a lien thereon, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and stipulating that the lien of the United States for taxes and penalties, shall have priority of such incumbrance, and that in case of the forfeiture of the distillery premises, the title of the same shall vest in the United States, discharged from such incumbrance," is not void, even as against sureties to the bond, because the ground was incumbered, and, because it being so, the bond was approved without the consent of the incumbrancers to postpone their liens; the bond not having been delivered as an escrow simply.

2. This is not altered by the fact that if the consent of the incumbrancers had been got to postpone their liens, the ground on which the distillery stood was of sufficient value to discharge the taxes due by the distiller, and so relieve the sureties from their personal obligations.

Morgan's Executor v. Gray: 1. Where a citizen of one state, as endorsee of inland bills, drawn or accepted by a citizen of another — the plaintiff claiming through the endorsement of the payee, or of the payee and subsequent endorsers—sues the drawer or acceptor, in the circuit court, the eleventh section of the judiciary act requires that the citizenship of such payee, or of such payee and subsequent endorsers, be alleged to be different from that of the defendant. It is not enough to allege that the plaintiff is a citizen of one state and the defendant of another.

2. It is not competent for a circuit court to determine, without the intervention of a jury, an issue of fact in the absence of the counsel of the party, and without any written agreement to waive a trial by jury.

Commissioners of Boise Co. v. Gorman. A writ of error granted under the act of Congress of 1872, will operate as a supersedeas only from the time of filling the bond in the clerk's office. Process issued before that time will not be set aside.

Hall v. Jordan: 1. Where the consideration in a deed is expressed to be so many dollars, the stamp required is the same, whether, in point of fact, the sum named be paid in gold or in notes of the United States, made by law a legal tender.

2. A party alleging that the stamp on a deed was too small (he being, by the law of the state where the deed was made, obliged to put on the stamps), who brought such a question here, delaying the judgment below for two years and a half, punished under the twenty-third rule, by a judgment of ten per cent. damages in addition to interest and cost.

It also publishes a case determined in the Court of Common Pleas of Columbia county, Pennsylvania—Locust Mountain Coal and Iron Company v Curran, in which the following points are ruled:

1. In a proceeding by bill in equity to restrain the collection of school taxes, the court will not enquire into the validity of the appointment of the collector, he having given bond with sureties approved as required by law.

2. The act of May 8th, 1854, did not establish a fixed rate of taxation for school purposes. It merely provided a standard, by which the maximum rate could be ascertained at the time the tax is levied; to-wit: the amount of both state and county taxes authorized by law.

3. The act of 23d of February, 1866, exempting real estate from the three mill tax for state purposes, operated as a reduction of a like amount on that species of property for school purposes.

The Washington Law Reporter, for September 20, publishes the following decisions of the Supreme Court of the District of Columbia, in general term:

Joseph B. Stewart v. James G. Blaine: The house of representatives has power to commit for contempt, and when a party is found guilty of a contempt, the order of the house directing his commitment is a complete protection to the speaker, who orders him into the custody of the sergeant-at-arms.

Smith *et al.* v. Woodruff: Where two patents have been granted for articles which resemble each other, a presumption arises, from the action of the office, that there is such a difference between them that the use of one constitutes no infringement of the patent for the other.

If one paper-file holds the paper better than another which is patented, and has driven it out of market, that is *prima facie* evidence that the mechanism is different, and is a new invention, and that the use of it does not violate the patentee's monopoly.

A patented combination may be used without infringing the patent, if one of the elements of the combination is omitted, although another is substituted in its place, which is new, or performs a substantially different function, or if it was not known as a proper substitute when the patent issued.

Legal News and Notes.

—HON. ORANGE JACOBS, of Washington Territory, having received the republican nomination for delegate to Congress, has resigned as Chief Justice of the Territory, in order that there may be no mixing of the judiciary with politics. Judge Bedle, the democratic candidate for governor of New Jersey, has not resigned.

—THOMAS THURLOW, a nephew of Lord Thurlow, died in England last month, and the British public is relieved of its burdens to the extent of $60,000 a year. He received pensions to that amount in consideration of the abolition by law of certain obsolete offices formerly held by the chancellor, his uncle. By the statute abolishing the offices the emoluments were continued "for three lives."

—THE Union Pacific Railroad tax cases have been advanced on the docket of the United States Supreme Court, and set for argument, December 14. The granger railroad cases, the Grant Parish cases, and the case involving the constitutionality of the California State law forcing the return to China of Chinese women, brought there for purposes of prostitution, are likely, also, to be set for an early hearing.

QUÆRE.—Whether Lord Chancellor Thurlow was the same Lord Thurlow who once thought himself a poet, and on the leaf of one of whose volumes of effusions Byron wrote—

> "When Thurlow this d——d nonsense sent,
> (I hope I am not violent)
> Nor men nor gods knew what he meant."

If so, it teaches that a man may be a great judge and yet not a great poet.

—Considerable excitement has been created by the publication of an opinion by Attorney-General Field, of Louisiana, holding that the Second District Court of New Orleans has no jurisdiction to naturalize foreigners. The judges of election, themselves judicial officers, will, then, in determining this question, have to choose between the opinion of the second district court and the opinion of the attorney-general. We believe that they should, if otherwise in doubt, follow the opinion of the court, which is the best judge of its own jurisdiction.

HON. HENRY D. MAXWELL.—Intelligence has just reached us of the death on Saturday, the 3d instant, of the Hon. Henry D. Maxwell, of Easton, Penn., a lawyer widely known throughout New Jersey and Pennsylvania, having practiced in those states since 1833, and having in the latter held many offices of judicial and public trust, to the satisfaction and approval of men of all political parties.

Judge Maxwell was that rarest of men in these times, a man of political and social prominence, the holder of high office, and at the same time a model, Christian gentleman, *sans peur et sans reproche*. Upon his tombstone may most fittingly the epitaph be inscribed: "*Exegi monumentum perennius aere.*" —[*Albany Law Journal.*

—THE Constitution of Missouri contains the curious provision that the justice of the supreme court having the shortest term to serve, shall preside. The object of the provision is, either that the oldest in commission shall preside, or else that none shall quit the bench without having taken his turn at that honor. But the provision has twice led to this curious and grotesque result: that a judge appointed to fill a short vacancy, and who is, in a measure, unfamiliar with the workings of the court, takes precedence over the entire bench. Thus, Judge Lewis, appointed the other day to fill the vacancy occasioned by the resignation of Judge Adams, and whose term will soon expire, becomes the central figure in the court, while on one side of him sits Judge Napton, venerable and white-haired, who occupied a seat on that bench thirty years ago, and who is now serving on it for the third time, and on the other side, Judge Wagner—a judge of great learning and vigor of intellect, who has been a member of the court for nine or ten consecutive years.

—AN adjourned meeting of the bar of the United States Supreme Court was held on the 15th inst., Judge Campbell presiding, and Mr. D. W. Middleton, clerk of the court, acting as secretary. A series of resolutions were adopted in testimony of their great affection and esteem for Judge Benjamin Robins Curtis, in life, and of their sense of the great loss which the Courts and the bar of the whole country, and the community at large, suffer in his death. They commemorate his fidelity to society, to government, to religion, and to truth. All these traits of duty, as the rule of his life, the bar present to the living lawyers, and to their succeeding generations, for their sincerest homage. The resolutions having been agreed to, Attorney-General Williams was requested to present them to the supreme court, and to move they be entered in its minutes, and the chairman of the meeting was requested to forward a copy of them to the family of the deceased. Reverdy Johnson and others pronounced eulogies.—[*Albany Law Journal.*

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, NOVEMBER 6, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

In the very interesting article on the Judiciary of Massachusetts, which we print in another column, our readers will recognize the pen of Hon. Francis Hilliard, the distinguished legal author, who favors this journal with occasional contributions. We have seldom had the pleasure of reading anything at once so well written and so full of interest, and hope it may prove of equal enjoyment to our readers.

LAW SCHOOLS.—We reprint elsewhere an article on this subject, from the Western Jurist. It will repay the reading by those who have taken an interest in the discussion which has been going on on this question. We are glad that we have succeeded in "*refreshing*" our excellent neighbor, and are sorry that our articles on the subject of admissions to the bar should be construed into "manifest hostility to law schools, unconsciously entertained and not intended to be expressed." Again we beg leave to define our position on this question: We are in favor of law schools, but are opposed to admitting young men to the bar who are not properly qualified for its duties.

LARCENY BY JOINT OWNER.—They have a statute in the province of Quebec, which provides that, if any joint owner steals or embezzles any money or other property, of which he is a joint owner, "he shall be liable to be dealt with, tried, convicted and punished as if he had not been, or were not, a member of such co-partnership, or one of such beneficial owners." Under this statute, it was held in the Court of Queen's Bench of Quebec, by Ramsay, J., that an indictment for larceny will not lie against a partner. The Court said: "To have had the effect sought to be given to it, the statute should have stated that the unlawful conversion of the partnership property should be deemed to be larceny. But if the act had been drawn in that form, it can hardly be supposed it would have passed. Such a law would destroy any tangible distinction between guilt and innocence, for partners are every hour of the day found unlawfully converting the partnership property, if their acts were strictly examined. The simple unlawful conversion of the property of another is not indictable, and it should not, in our opinion, be made indictable."

SUPERVISORS OF ELECTION APPOINTED BY U. S. CIRCUIT COURT.—A curious, but highly important function, that of appointing supervisors of elections in certain cases, is devolved upon the federal circuit judge, by section 2 of the amendatory act of Congress, "to enforce the right of citizens to vote." 16 Stat. 433. The provisions of this section are as follows:

That whenever in any city or town having upwards of 20,000 inhabitants, there shall be two citizens thereof who, prior, to any registration of voters for an election for representative or delegate in the Congress of the United States, or prior to any election at which a representative or delegate in Congress is to be voted for, shall make known in writing to the judge of the Circuit Court of the United States for the circuit wherein such town or circuit shall be their desire to have said registration or said election, or both, guarded and scrutinized, it shall be the duty of the said judge of the circuit court, within not less than ten days prior to said registration, if one there be, or if no registration be required, within not less than ten days prior to said election, to open the said circuit court at the most convenient point in said circuit. And the said court, when so opened by the said judge, shall proceed to appoint and commission, from day to day, and from time to time, and under the hand of the said circuit judge, and under the seal of said court, for each election district or voting precinct in each and every such city and town as shall, in the manner herein prescribed, have applied therefor, and to revoke, change or renew said appointments from time to time, two citizens, residents of said city or town, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as supervisors of election.

The duty of appointing election inspectors under this act was recently performed by Mr. Circuit Judge Woodruff. According to a New York paper, United States Commissioner Davenport handed in a list of names, some eleven hundred in all, for the confirmation of the court. One-half were named by the democratic party of the city, represented by Tammany Hall, and the other half by the republican party.

Mr. E. D. Gale was present in the interest of the Tammany organization.

All the names placed before the judge were confirmed, no objection being raised. Some ten or eleven others, which completed the list, were confirmed during the day.

Politics and the Bench.

Our able contemporary, the Western Jurist, after quoting from articles under the above caption, which have appeared in this journal and in the Albany Law Journal, (*ante*, pp. 435, 486), makes the following judicious observations:

We, too, have our views upon the subject, and confess to the entertaining of more radical notions than either of our contemporaries. We agree that the state should not be deprived of the services of its best men in its purely political offices, because these men may have occupied positions upon the bench. But, in our view, no man should ever be a *candidate* for a nomination to a political office *while* he holds a seat upon the bench. When he decides that he wants a nomination, or even consents that his friends may seek it for him, he should at once res gn. He has no right to sit upon the bench *after* he has become a seeker for political office.

A somewhat extended observation and experience, both at the bar and on the bench, has convinced us, that even in conscious integrity and the purest motives, the human judgment often reflects the bias of education, of association, and of party. It is not necessary that a judge shall be corrupt in order to decide according to his party preferences, or to vindicate the interests of his associates or friends. Human nature needs all the aids possible, and to avoid all the known hindrances to its best judgments,—even then its errors are quite too frequent. What peril of a fine would encompass a juror who was tardy in his appearance at court on the eve of an election, when it was known that his tardiness was caused by an electioneering effort in favor of the judge of the court whose authority he had contemned? Judicial discretion, under such circumstances, would equal the broadest mantle of charity. The fact is, that there is no political position in the land so favorable for the cultivation of personal popularity as in the *nisi prius* bench, and it can readily be converted, into what the bench should never be, a stepping-stone to political place.

There are three men from Iowa in the present Congress, who went there directly from the bench; and we have in the present canvass, three candidates for Congress who secured the nominations while on the bench, and two of them are remaining on the bench and dispensing justice during the canvass. In fairness to these men, personally, it ought to be said that they are among the best judges the state ever had, and one of the last named is confessedly the best district judge in the state; their integrity is above suspicion, and no man who knows them can for a moment doubt that they have and will administer the law and justice, *as they see it*, in perfect uprightness. For them we entertain the highest respect and confidence and sincerely desire their election.

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But, in our view, their course in this respect is a mistaken one. It is an evil and a growing evil. The sooner it is corrected, the better.

With the foregoing views we substantially agree. We think, 1, That no judge should seek, work, or intrigue for a political nomination while on the bench. 2. If a judge is spontaneously nominated by a political convention, for a political office, there is nothing in the fact that he was on the bench when so nominated, which should, of itself, preclude him from accepting it; but when he does accept it, he ought to retire from the bench, or, at least, suspend the exercise of his judicial functions during the canvass, and allow his friends to do the electioneering.

Centralization—Uniformity—A National Commercial Code.

The Daily Register says:

There is a manifest tendency to centralization in law as well as in government. In law this tendency manifests itself in the advocacy of a unity of practice and forms of procedure. Let any one scan the history of jurisprudence in the several states, and he will notice an assimilation in the laws and in their interpretation clearly shown in all the states. If law is the embodiment of right and justice, it should be one and the same in the states and in the nation, for these two principles are immutable. In such of the states as have adopted Codes of Procedure, and thereby superseded the common law, there is a very striking resemblance in them all. It is probable that, one by one, the states will adopt this reform, and, by proper attention on the part of the legal profession, these codes can be assimilated each to the other, and one general system of practice made to prevail throughout the Union. This is a "consummation devoutly to be wished," because uniformity of procedure will do much to harmonize the present somewhat discordant elements of judicial opinion and practice of the courts.

We think the writer of the above makes a mistake when he designates the tendency to uniformity and homogeneousness, by the term centralization. Uniform codes of law voluntarily acquiesced in by local governments, do not necessarily imply centralization. Such uniformity only becomes centralization when it is enforced by a superior central power. There is, under the federal constitution, no central power which possesses jurisdiction to enforce this uniformity, unless it be with respect to commerce between the states. It is a question worth the attention of the bar of the country, whether Congress does not possess the power, under that clause of the constitution which delegates to it the regulation of interstate commerce, of establishing a uniform commercial code for the whole country. We do not believe that Congress ought to attempt the exercise of such power if its existence is doubtful; but at the same time, when we consider that commercial paper, emitted by private individuals and corporations plays a far greater part in facilitating the exchanges of the country than legal tender notes, it seems scarcely tolerable that such paper should be governed by one kind of law in New York, and by another in Missouri. And yet such is the case in one very essential particular at least. It was held in New York, that a person who has suffered himself, through the fraudulent representations of another, to sign a negotiable instrument, supposing it to be something else, cannot resist payment of such paper, when in the hands of an innocent holder for value. Chapman v. Rose, *ante*, p. 242. The contrary was held in Missouri in Briggs v. Ewart, 57 Mo. 245, a case which has met with universal dissent on the part of the profession, so far as we have heard any opinion expressed.

—CHARLES M. KELLAR, a prominent member of the New York bar, and one of the foremost patent lawyers in the country, died recently.

Something About Judges.

We have in our mind's eye two conspicuous examples of men who, without being members of the legal profession, exercised the functions of the judge, the one a soldier, the other a sailor. We shall not attempt to moralize on the lesson taught by these examples, further than to suggest that they teach that it is better that every man should stick to his own calling.

The first was no less a personage than the Emperor Julian, surnamed the Apostate, who often placed himself by the side of his Prætorian præfects on the seat of judgment. "The acute penetration of his mind," says Gibbon, "was agreeably occupied in detecting and defeating the chicanery of the advocates, who labored to disguise the truth of facts and to pervert the sense of the laws. He sometimes forgot the gravity of his station, asked indiscreet or unseasonable questions, and betrayed, by the loudness of his voice and the agitation of his body, the earnest vehemence with which he maintained his opinion against the judges, the advocates and their clients. But his knowledge of his own temper prompted him to encourage, and even to solicit, the reproof of his friends and ministers; and whenever they ventured to oppose the irregular sallies of his passions, the spectators could observe the shame, as well as the gratitude, of their monarch. The decrees of Julian were almost always founded on the principles of justice; and he had the firmness to resist the two most dangerous temptations which assault the tribunal of a sovereign under the specious forms of compassion and equity. He decided the merits of the cause without weighing the circumstances of the parties; and the poor, whom he wished to relieve, were condemned to satisfy the just demands of a noble and wealthy adversary. He carefully distinguished the judge from the legislator; and though he meditated a necessary reformation of the Roman jurisprudence, he pronounced sentence according to the strict and literal interpretation of those laws, which the magistrates were bound to execute, and the subjects to obey."

It must be confessed, if this account be correct, that Julian, notwithstanding his lack of judicial dignity, did very well as a judge; but he was a philosopher and an orator, as well as a soldier, and many of his compositions have come down to us as models of finished Greek and forcible Latin. As to the other example, that of the sailor, we shall leave our readers to judge whether he too was a philosopher.

An account of this hero we find in a late chapter of Governor Foote's "Reminiscences," which are being published in the Washington Chronicle. It was after the Louisiana purchase, and there was a dispute between our government and Spain, as to whether a portion of the present state of Louisiana, including the town of Baton Rouge, was included in the purchase, or whether it was a portion of Florida. At length the American inhabitants of this portion of territory, tired of the oppressions of the Spanish officials, rose up in insurrection, and without bloodshed overturned the Spanish authority and established a government "republican in form." The high court of judicature of the new empire, consisted of Fulwar Skipwith, a polished gentleman, who had been a consul of our government in France, and who is honorably mentioned in Mr. Jefferson's "Life and Correspondence," with whom were to be associated an unassuming farmer named Thomas,

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and a bluff and plucky old sea captain whose name is forgotten. The court was to meet for the first time in a log house, in which a platform of planks had been erected, and on it placed their chairs for the judges. Governor Foote says:

About the hour of nine o'clock in the morning, Fulwar Skipwith, dressed in the richest and most imposing vestments, which he had brought with him from the renowned French capital, made his appearance in the village of Baton Rouge, in a splendid coach, drawn by four magnificent horses, with a coachman dressed in full livery and a postillion to match. He drove up very grandly in sight of the crowd which the occasion had naturally drawn together. His carriage door being opened, he descended to earth, and strode with all the pomp of majesty within the humble tenement where he was expecting soon to act so important a part. He advanced to the platform, and after bowing with an air of gracious condescension to the staring multitude, took his seat and waited with absolute quietude for the coming of his official *confreres*. In a few moments the plain and unassuming farmer-justice displayed his person before the door of the court-house, seeming not to know exactly how to dispose of himself, when Mr. Skipwith, observing his embarrassment, beckoned to him most graciously to come forward, pointing him at the same time to the vacant seat nearest himself, as being the one which he was expected to occupy. Thus encouraged he advanced to the platform, and after cordially saluting his venerated associate, plumped into the chair which he had been bidden to honor. So soon as his confusion had passed away, and he had begun visibly to feel quite at home in his dignified position, Mr. Skipwith leaned forward, and in a *sotto voce* tone, thus addressed him: "Brother Thomas, I presume we can do little more to-day than organize the court and designate a chief justice. To-morrow we shall be able to address ourselves to our duties as the administrators of the justice of the land." After a little hesitation, Judge Thomas spoke out, quite audibly, but with the most marked deference: "Why, as to that, Mr. Skipwith, you will have, of course, to be chief justice, knowing, as you must do so well, how to perform the duties of the place." To this suggestion Mr. Skipwith responded: "I am decidedly of opinion, Brother Thomas, that the station of chief justice is one which ought neither to be sought nor declined. If my worthy brethren of the bench call me to this honor I shall certainly not refuse it." In a few minutes more the judicial triumvirate was complete, for the "Old Man of the Sea" made himself visible in the court-yard, clad in a naval uniform, which was now much the worse for wear, with a rusty sword hanging at his side, and with an impetuosity which brooked of no delay, rushed within the portals of this palace of justice, and, staring fiercely at Skipwith and Thomas—who, he evidently thought had done him wrong in ascending the platform before he should have arrived—pushed forward at once to the vacant chair and seated himself therein with an air and manner which clearly indicated the conviction that rested on his mind, that he was himself the very embodiment of the new government. So soon as the sensation caused by the arrival of so august a personage seemed to have a little subsided, Mr. Skipwith turned to his grim-looking associate, and repeated the words which he had previously uttered, in regard to the chief justiceship and the order of proceeding proper to be adopted; when up jumped this terrible son of Neptune, exclaiming: "Oh, as to the chief justiceship of this court, that's a question d—d easily settled. I am the chief justice of this court, by God!"

And this he is reported to have said, not without a significant glance at the sword which dangled from his belt. "Ah!" says Skipwith, "if you desire to be chief justice, be assured that no one here will dispute your claim to this dignity." Upon which, the new chief justice, glancing fiercely around the room, where by this time a large crowd had collected, called to the officer in charge of the jail, wherein several prisoners had been recently incarcerated, and demanded of him in tones that almost shook the building, what criminals he had in his keeping. This officer responded that there were several. "What are their offences?" asksd the rampant chief justice. "Why," responded the functionary, thus boisterously interrogated, "there is one fellow in for larceny, and another for murder." "Bring out the wretch charged with murder immediately," vociferated the chief justice. This mandate was obeyed quickly. Meanwhile this Jeffries of the new world, was "nursing his wrath to keep it warm," and preparing, as the English Jeffries was want to do, to chastise the alleged culprit with "the rough side of his tongue"—all the while looking eagerly toward the door for the appearance of his destined victim. The wretched man was presently dragged forward and brought within sight of the court. "Stop him there!" bawled the chief justice, when, rising from his seat and drawing up his person to its fullest altitude, which was about five-feet five inches, and projecting menacingly his rotund and "well-lined" paunch, he looked the trembling prisoner in the face, with a physiognomy that might well have reminded the admirers of Milton of his description of another much-dreaded personage, ("fierce as ten furies, terrible as hell"), and propounded this horrific interrogatory: "What have you to say why sentence of death should not be immediately pronounced against you?" "Why," with most overwhelming embarrassment the poor fellow, trembling from head to foot, answered, "may it please your honor, I have employed this here lawyer to defend me," pointing to a young and fine-looking gentleman seated in the court-house, and apparently watching the proceedings in progress with the most intense interest. "What!" exclaimed the chief justice, "you have employed a lawyer, have you?" Then putting on the whole armor of insult and menace, and glancing toward the barrister in question (who, of course, could not be any other person than our friend Judge Turner, in after years playing the part himself of a criminal judge in New Orleans), with that morbid suspiciousness of aspect so often exhibted of late in some of our courts in reference to the sagacious and erudite members of the legal profession, on the part of ignorant and presumptious persons, he thus addressed him: "Oh! by G—d! none of your quirks and quibbles of the law; if you are guilty, which I have damned good reason to believe, I'll be damned if you ever slip through these fingers!" holding both his red and chubby-looking hands aloft, and stamping with his right foot so potently as almost to break his way through the platform upon which he stood. After great effort, Mr. Turner succeeded in procuring a delay of five days before the trial should be brought on; and, in the meantime, news reached Baton Rouge that Mr. Madison had succeeded in his negotiatiou with the Spanish crown, and that what was so near becoming the sovereign state of Florida, would henceforward be a part of the United States of America, the inhabitants of which would never be again exposed to the insolence and oppression of the provincial agents of King Ferdinand, or those of any of his successors of true Bourbon blood and derivation.

Criminal Procedure—Sentences upon Information for Misdemeanor Containing Several Counts—Amendment of Record after Close of Term.

THE PEOPLE *ex rel.* MICHAEL MANYX v. GEORGE T. WHITSON, SHERIFF.

Supreme Court of Illinois, September 28, 1874.

Present, Hon. PINCKNEY H. WALKER, Chief Justice.
" SIDNEY BREESE,
" W. K. MCALLISTER,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" BENJAMIN R. SHELDON,
" ALFRED M. CRAIG,
} Justices.

1. **Criminal Procedure—Sentences upon Several Counts.**—Where a prisoner was tried, upon an information containing one hundred and five counts, for selling liquor contrary to a statute, and was convicted upon forty counts, the verdict not specifying *which* counts, and was sentenced to ten days' imprisonment upon each count;—*held*, that the judgment was entire; that the several sentences of imprisonment were concurrent in point of time, and that when one had expired, all had expired.

2. ——. **Power to Correct Judgment after Close of Term.**—At common law, a court has no power, in a criminal case, to correct its judgment after the close of the term.

3. ——. **Case Followed.**—*Ex parte* Lange, 18 Wall. 163, stated and approved, and its doctrine applied to the present case.

The facts are fully stated in the opinion.

Edgar Anderson, for relator; *Edward P. Vail*, state's attorney, *contra*.

Mr. Justice MCALLISTER delivered the opinion of the court.

The question for decision in this case arises upon *habeas corpus* awarded at a former day of this term, upon the petition of Michael Manyx, alleging that he was unlawfully imprisoned by the sheriff of Schuyler county, by virtue of a supposed final judgment or sentence of the county court of that county. In support of which allegation, various matters were set forth, and certified copies of the record of said court, so far as material to the questions raised, were attached to the petition and made a part thereof. By the return of the sheriff, which merely sets forth a copy of the judgment as the cause of the caption and detention of relator, and a stipulation between his counsel and the state's attorney, the record of proceedings in the county court is before us, with the same effect as if it had been sent up in return to a writ of *certiorari* accompanying that of *habeas corpus*. The case before us is this: At the March term, 1874, of the County Court of Schuyler County,

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the state's attorney, upon affidavits filed, and by leave of the court, filed an information against Manyx for alleged violations of the act, approved January 13, 1872, entitled "an act to provide against the evils resulting from the sale of intoxicating liquors," etc., the information containing more than one hundred counts. The case was tried upon a plea of not guilty, and a verdict returned of guilty, as charged in the complaint, upon forty counts. Whereupon, at that same term, as appears by the record, the court sentenced the prisoner to ten days imprisonment upon each count. On this judgment relator was, on the 26th day of March, 1874, committed to the county jail of that county, and there confined until the 26th day of June, when he was discharged upon a writ of *habeas corpus*, issued upon the prisoner's petition, by Chief Justice Walker, at chambers, on the ground that, by the terms of the sentence entered of record, the prisoner had undergone the punishment to which he was sentenced,—all of the terms having commenced and ended simultaneously. It is conceded by the state's attorney that there was no judgment entered for any fine or costs, and he does not question the propriety of the ruling of the chief justice in discharging the prisoner for the reason stated, and we may add, that although neither the county court nor this court have any right to review that decision, yet in our opinion, it was upon well settled legal principles entirely correct. That decision did not involve the question whether it was competent for the court to have entered consecutive judgments of so many days imprisonment on each count, when no particular counts of the one hundred and five contained in the information, were specified as comprising the forty on which he was found guilty, or whether consecutive judgments can be entered without a statute authorizing it. It was sufficient that, so far as appeared by the record, there was no attempt to enter consecutive judgments. The judgment was entire. The several sentences of imprisonment, if they could be called several, were concurrent in point of time, and when one had run, they had all expired. 1 Bish. Cr. Procedure, sec. 1129; Miller, Warden, etc. v. Allen, 11 Ind. 389; James v. Ward, 2 Met. (Ky.) 271; Buck v. The State, 1 Ohio State, 61.

After the prisoner was so discharged upon *habeas corpus*, and at the August term, 1874, of the county court, at the March term whereof he had been convicted and sentenced as above stated, said court, upon the petition of the state's attorney and ten days notice to prisoner, entered an order amending the judgment of the March term, and directing the same to be entered *nunc pro tunc*, to the effect, that defendant, Michael Manyx, be imprisoned in the county jail for the term of ten days, and fined in the sum of twenty dollars on each of the forty offences or counts of which the jury in their verdict found him guilty, the term of imprisonment on each subsequent count after the first to begin on the termination of the term of imprisonment on the one next preceding, and that he be imprisoned until said fine and costs of prosecution herein are paid; and, therefore, it is considered and ordered by the court that the people of the state of Illinois recover of the said defendant, Michael Manyx, the sum of twenty dollars fine for each of the several forty counts of the information of which the jury found him guilty, being in the aggregate the sum of eight hundred dollars, and also their costs herein, and may have execution therefor. Upon a certified copy of this last mentioned order of judgment, Manyx was re-arrested by the sheriff and committed to the county jail of Schuyler county; and which the sheriff, in his return to the writ of *habeas corpus* issued by this court, has set up as the cause of prisoner's caption and detention. If the entry, at the August term, of the order amending the judgment of the March term was a mere error which would subject it to reversal upon writ of error, then we have no authority to discharge upon *habeas corpus*. But if, on the other hand, the county court had no power or jurisdiction to make it, then it is absolutely void, and we not only have authority, but it is our duty to discharge the prisoner from that unjust, because unlawful, imprisonment. Amendments in criminal cases are entirely excepted out of the operation of the statute of amendments and jeofails, and the question of the power of the court to alter or amend its judgment, at a subsequent term, is therefore to be determined by the common law. The rule, as laid down by Starkie, in his work on criminal pleadings, is, that during the term, assizes or session, in which judgment is given, it remains in the breast of the court, and he states that the fine imposed, or any other discretionary punishment, may be varied, but he adds that after the term it becomes matter of record and admits of no alteration. 1 Stark. Cr. Pl. 262. Chitty says: "In case of misdemeanors, it is clear the court may vacate the judgment passed, before it becomes matter of record, and may mitigate, or pass another, even when the latter is more severe, and the justices at sessions have the same power during the sessions, because it is regarded as only one day; but they cannot do it at any subsequent period, unless an adjournment be entered on the roll, and no court can make any alteration when once the judgment is solemnly entered on the record." 1 Chit. Cr. Law, 721. So Archbold says: "A judgment pronounced by a court of oyer and terminer or jail delivery may be altered or amended by the judge at any time during the same assizes; a judgment by a court of quarter sessions may be altered at any time during the same sessions, and a judgment of the Court of Queen's Bench at any time during the same term, provided the sentence be not actually entered of record." 1 Arch. Cr. Pr. & Pl. (Am. Ed.) 186. In the State v. Harrison, 10 Yerg. (Tenn. R.) 542, the court observed that the judge, during the term, is a living record, and, therefore, during that period of time he may alter and supply, from his own memory, any order, judgment and decree which has been pronounced, and this because, having made them himself, he is presumed to retain them in his recollection. But, at common law, after the term had elapsed, the judge had no such power, because it was supposed that there would be a period at which a judge would cease to retain in his memory the things which had been ordered and adjudged; and that period, it was well conceived, might be the end of the term, as he would be apt to dismiss from his thoughts the things which had been previously passing in them. It is, however, a very delicate power and might be subject to much abuse, especially in criminal cases, if the extent to which it might be carried was not well defined and properly checked by law. By analogy to this principle, it has been held that in criminal cases before a justice of the peace, the power of that magistrate is completely exhausted when the record of conviction has been made and signed, and final commitment made. The People v. Duffy, 5 Barb. 205; The People v. Brown, 23 Wend. 47.

In the recent and very interesting case, *ex parte* Lange, 18 Wallace, 163, the power of the court in criminal cases to alter its judgment after the prisoner has suffered part of the punishment under it, received a very exhaustive discussion in the Supreme Court of the United States. Lange had been indicted in the United States Circuit Court, under the act of Congress, for stealing, etc., certain mail bags belonging to the post-office department. Upon trial, he was found guilty, and the value of the bags appropriated was found to have been less than $25. In that case the punishment provided by the act is imprisonment for not more than one year, *or* a fine of not less than ten, nor more than two hundred dollars. The court sentenced the prisoner, upon the verdict, to one year's imprisonment *and* to pay a fine of two hundred dollars, on which he was committed to jail in execution of the sentence. The next day after his commitment he paid the fine to the clerk, who turned it over to the United States Treasurer. Some five days afterwards the prisoner was brought before the court, at the same term, and an order was entered vacating the former judgment, and the prisoner was again sentenced to imprisonment for one year from that date. Having been committed on this latter sentence, he applied to the supreme court for the writ of *habeas corpus* and

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certiorari, and return having been made of the proceedings in the circuit court, it was held that the second sentence was a nullity, on the ground that, while the first sentence was irregular, in that it included both imprisonment and fine, while the law affixed but one, still it was not void, and the prisoner having suffered part of the imprisonment and paid the fine which had gone into the treasury, and that being one of the punishments prescribed for the offence of which he was found guilty, the second sentence was in effect to punish the prisoner twice for the same offence, and prohibited by both the common law and bill of rights; that the second sentence was therefore void, and the prisoner entitled to be discharged.

That case is not so clear as the case at bar. There the court in the first sentence of Lange added to his punishment more than the law permitted. Fine and imprisonment were both imposed, when the statute required that it might be one or the other, but did not authorize both. In the case in hand, the statute required both fine and imprisonment and the court imposed only the latter. The people could not have sued out a writ of error for the omission to add the fine, and the error being in the prisoner's favor, he could not have taken advantage of it. So, that if the first sentence was not void in Lange's case, it certainly was not in the case at bar. The sentence being legal, and the prisoner having suffered the punishment according to the legal effect of that sentence, the second judgment was void according to the ruling of Lange's case, without reference to the question of the want of power to enter it at a subsequent term.

The state's attorney takes a very singular position. He says the clerk did not enter the sentence which the court pronounced, and therefore there was no judgment at the March term, and it was entirely competent, for that reason, to enter one at the subsequent August term, *nunc pro tunc*. That this is not the amendment of a judgment, but the entry of one, where there had been none before. This attempt to argue about a matter which admits of no argument necessarily, runs it into absurdity. The record of the proceedings in the cause shows that there was a verdict rendered, upon an information containing one hundred and five separate counts, of guilty upon forty counts without any specification of which counts they were. This was necessarily a verdict of acquittal upon sixty-five counts, but which ones they were, nobody can tell. It is a rule founded in good sense, that when there are numerous counts in an indictment, and the jury find the defendant guilty of some of the charges, and not guilty of others, it is necessary that they should point out with certainty upon what charges they find guilty and of what they acquit, and it would be error to sentence the prisoner upon counts other than those upon which he is found guilty. Woodford v. The State, 1 Ohio State R. 427. Here the prisoner was tried on an information containing one hundred and five distinct charges or counts. The jury return a verdict of guilty upon forty counts, without pointing out in any manner which they were, and the court and state's attorney fail to have the verdict corrected and made more specific. In that form it becomes a part of the record. Now, what judgment can the court pronounce? Upon what counts of the information will he give judgment? If he declared consecutive judgments, as the state's attorney says he did, where would he begin? Upon the first count? How did the court know but the prisoner was acquitted upon that? So it will readily be seen that the judgment which was entered of record by the clerk was the only safe and proper one which could have been entered upon that verdict. But however that may be, a judgment was in fact entered, that the prisoner be imprisoned ten days upon each count, the legal effect of which was, that the time began concurrently upon each. When the term elapsed, that entry became conclusive evidence of what the judgment was; and to say that the supposed judgment, entered at the subsequent term, which comprised forty consecutive sentences, is not an alteration of that former judgment, is sheer nonsense. If valid, it would be a serious alteration.

But the court had no power or jurisdiction at a subsequent term to make it. Hence it is void, and the prisoner must be discharged from imprisonment under it.

RELATOR DISCHARGED.

Partnership Real Estate—Rights of Creditors.

THOMAS B. MARRETT, ASSIGNEE IN BANKRUPTCY OF JOHN W. BAKER, SURVIVING PARTNER OF ATTERBURY, BAKER & CO., v. WILLIAM MURPHY AND JOHN GRACE, SHERIFF.

United States District Court, District of Minnesota, October 16, 1874.

Hon. RENSELLAER R. NELSON, District Judge.

Property purchased with partnership funds is treated in equity as the personalty of the partnership. It must, therefore, as against a judgment-creditor of one member of the firm, be first subject to the payment of the firm debts.

The bill of complaint in this case is filed by the assignee to determine which party to this suit has the right to the real estate mentioned therein standing of record in the name of Livingston, Atterburry and John W. Baker. The defendant, Murphy, claims the better right to the interest of Atterbury in the real estate, by virtue of two judgments and executions levied. The first judgment was rendered and docketed October 11, 1872, in the District Court of Ramsey connty, Minnesota, in a suit pending between Murphy and Livingston, Atterbury and Crawford Livingston, partners; the second was rendered in the supreme court of said state, August 18, 1873, and docketed in the Ramsey County District Court, August 20, 1873, in a suit pending between the same parties.

The sheriff had levied upon the interest of Atterbury in the real estate owned by Atterbury and Baker, and was proceeding to sell the same when an injunction was issued by this court.

The assignee claims that the property was purchased with partnership funds, by the firm of Atterbury, Baker & Co., as partnership property, and that Atterbury's interest is first subject to the debts of the creditors of the firm, before the individual creditors of Atterbury can assert their claims, whether they are in the nature of judgments or otherwise.

The undisputed facts show, that Baker, as surviving partner, was adjudicated bankrupt May 23, 1873; that Marret was appointed assignee June 10, 1873, and received the proper instrument of assignment, which included the real estate in controversy, mentioned in the schedules of the bankrupt as the property of the firm; also, that the firm of Atterbury, Baker & Co., commenced business in May, 1872, and continued until March 3, 1873, when Atterbury died, and that during the existence of the firm, the property in dispute was purchased, and the firm notes given for the purchase-price of a portion of it, which were taken up and paid at maturity or shortly after; that for two of the city lots payment was made by deducting the amount out of the contract price for certain materials furnished and work performed by the firm in the line of its business.

The deeds were executed to Livingston, Atterbury and John W. Baker. The firm is wholly insolvent.

E. C. Palmer, solicitor for complainant; *J. V. D. Heard* and *H. J. Horn*, *contra*.

NELSON, District Judge.—The rule in relation to the real property purchased with partnership funds, at least so far as the partners and their creditors are concerned, is pretty well settled. Equity treats such real estate, without reference to the situation of the record title, as the personalty of the partnership. The tenure real estate applied to partners, is that they become tenants in common, and each partner can only convey his own share, but the general current of authority, although there is some conflict, in equity, charges such real estate with the debts of the partnership. If there is a survivor, the share of the deceased partner in the sur-

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plus of the partnership real estate remaining after the payment of the partnership debts, and the adjustment of claims between the individual members of the firm, is considered as real estate only, in any controversy between the heirs at law and the personal representatives of the deceased. Story on Part. sec. 93, pp. 136-7, 3d ed; 2 Barbour, Ch. Rep. 165. The doctrine establishing, by an equitable fiction, partnership real estate as personalty, is in favor of trade and for the benefit of surviving partners and firm creditors.

I do not understand or so interpret the statutes of Minnesota that they change in any respect the equitable doctrine above stated.

The claim here is not a secret trust, or secret equitable right. If it exists at all, it is the result of the operation of law, and nothing in the statutes of this state defeats it.

I do not mean to assert that, as an abstract proposition, partners cannot with partnership funds purchase real estate, and hold it otherwise than as partnership property. If it was not the intention of the partners to so purchase and hold it, there can be no objection to a purchase, in good faith, for their individual account.

In this case, however, the testimony shows that it was the intention to hold it as partnership property. The surviving partner so states in his evidence, and has so returned it in the schedules. It must, therefore, as against this judgment creditor, be first subject to the payment of the firm debts.

Decree will be entered for the complainant.

DECREE FOR COMPLAINANT.

Limited Partnership—Contracts of Partners out of Scope of Business.

ELISHA TAYLOR, ASSIGNEE, v. AUGUST RASCH AND WILLIAM BERNART.

United States Circuit Court, Eastern District of Michigan, October 19, 1874.

Hon. JOHN W. LONGYEAR, District Judge.

1. **Limited Partnership—Notice.**—All persons dealing with a limited partnership are chargeable with notice of the scope of the partnership business as specified in the articles of copartnership when the articles have been duly filed and published as required by law.

2. ——. **Contracts by General Partners out of the Scope of the Partnership Business.**—The same principle of law that protects a general partnership against liability upon contracts by individual partners out of the scope of the partnership business, protects the capital of special partners, in a limited partnership, against liability upon like contracts by general partners.

3. ——. ——. No departure by general partners, no matter how common or long continued, if not consented to or known and acquiesced in by the special partners, can have the effect to change or enlarge the scope of the partnership business as specified in the articles of copartnership.

In Equity. On pleadings and proofs.

When this case was before the court on a former occasion, on demurrer to the bill, it was held that a proper case for relief was made out by the bill. The demurrer was overruled, and the defendants were granted leave to answer. 5 N. B. R. 309; 1 Am. L. T., 201. Thereupon the defendants answered and proofs have been taken.

The issues of law arising in the case as made by the bill, were disposed of by the decision of the court upon the demurrer. All that remains to be done, therefore, is to dispose of the issues made by the answer. They are as follows:

1. That the arrangement or agreement under which the furniture in question was purchased by defendants, was not as set up in the bill, but was made with "the firm of Tillman, Sillsbee & Company, by and through said William Tillman," and was of the tenor and effect, "that if the said defendants or either of them would purchase furniture of the said firm of Tillman, Sillsbee and Company, that then the said firm of Tillman, Silsbee & Company, or any of the members thereof, should purchase clothing of these defendants in payment of the same." 2. That the arrangement and agreement was within the scope and ordinary course of business of the firm.

Ashley Pond, for complainant; *O. Kirchner* and *G. V. N. Lothrop*, for defendants.

LONGYEAR, J.—The firm of Tillman, Sillsbee & Company was a limited partnership, and was composed of William Tillman and Charles E. Silsbee as general partners, and John S. Newberry as special partner. Whatever the proofs show as to the general partners being parties to the arrangement for exchange of patronage between them and the defendants, or as to what the particular character of that transaction was, one thing is certain, and that is, there is no proof or pretense that the special partner was in any way privy to the arrangement, or knew of it, or in any way assented to it. It is contended, however, that by the statutes of Michigan the general partners had authority to bind the firm. The statute referred to is as follows: "Section 3. The general partners only shall be authorized to transact business, to sign for the partnership and to bind the same." 1 Compiled Laws of 1871, page 520, sec. 1569. The effect of the statute is simply to exclude the special partner from active participation in the business of the firm; and as to the general partners, it confers no authority upon them to transact business, sign for the partnership, and to bind the same in any manner, or to any extent whatever, beyond the purposes and scope of the partnership. Therefore, conceding that the arrangement in question was made with the general partners, as claimed in the answer, if it was not within the scope and purposes of the partnership, it was wholly unauthorized and therefore void. This brings us to the second and only remaining issue made by the answer.

The scope and purposes of the partnership are specified in the articles to be as follows:

"Second—That the general nature of the business to be transacted by said partnership, is the purchase, sale and manufacture of all kinds and descriptions of furniture, chairs, upholstering, furnishing and upholstered goods, lumber, and all kinds of articles, merchandise, tools and machinery, used in such manufactures."

Surely it does not require argument to show that a contract for the purchase of clothing for the individual general partners, or otherwise, does not come within "the general nature of the business to be transacted by said partnership," as specified in the articles.

But it was contended that such had been the usual course of business of the firm, and proofs were adduced tending to show that such was the fact; and it was argued that, therefore, the defendants had a right to assume that the transaction was within the scope of the partnership. The articles of copartnership were duly filed and published, as required by the statute, and all persons dealing with the firm were bound to take notice of, and were chargeable with knowledge of their contents. No departure by the general partners, no matter how common or long continued, if not consented to or known and acquiesced in by the special partner, could have the effect to change or enlarge the scope of the business as specified in the articles. To hold the contrary would be to disregard plain provisions of law for the protection of special partners and the public, and would make a limited partnership one of extreme hazard to the special partner.

In the opinion of this court, overruling the demurrer to the bill (*supra*), it was shown that a general partnership could not be made liable upon a contract by an individual partner out of the scope of the partnership business. The same principle of law that protects general partners from liability in such cases, protects the capital of special partners in a limited partnership. Troubat on Limited Partnership, sec. 377.

It results that the complainant is entitled to a decree against the defendants for the balance of the account of Tillman, Sillsbee & Co., against them over and above the fifty dollars actually paid to the firm by one of its employees on account of defendants, together with interest on such balance from and after the date of the last item in the account, viz.; June 8, 1870, and for costs.

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The balance of the account as alleged in the bill, and admitted by the answer, was - - - - - - $473 25
Interest from June 8, 1870, to date, October 19, 1874, four years, four months, eleven days - - - 144 47

Total - - - - - - - $617 72

DECREE ACCORDINGLY.

Bankrupt Act—Discharge—Limitation as to Time.

In re BARRETT.

United States District Court, Eastern District of Texas, October 22, 1874.

Hon. AMOS MORRILL, District Judge.

Section 29 of the bankrupt act provides, that "if no assets have come into the hands of the assignee," the bankrupt may apply for his discharge "at any time after the expiration of sixty days, and *within one year* from the adjudication of bankruptcy." No power resides in the court to extend this limitation on account of sickness or other disability, and if the application be not made within the year, it cannot be entertained.

MORRILL, J.—The question for adjudication is whether the bankrupt, whose estate had no assets, is entitled to a discharge from his debts if he shall have neglected to apply for such discharge for more than one year from the time he was adjudged a bankrupt.

The first paragraph of section XXIX of the bankrupt act provides: "That at any time after the expiration of six months from the adjudication of bankruptcy, or * * * if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and *within one year* from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts."

The statute contemplates in this section two classes of bankrupts, the difference between them being the having and not having assets. To one class no limit is assigned as to the time the bankrupt may apply to the court for a discharge after the expiration of six months from the adjudication of bankruptcy; to the other it is provided that "he may apply at any time after the expiration of sixty days, and *within one year* from the adjudication of bankruptcy."

It must be considered that, as the bankrupt act does, by its provisions and effects, impair the obligations of contracts, and would, on that account, be unconstitutional, if not expressly provided by the constitution, the construction to be given to this act must be strict; and certainly when the act expressly provides the way and manner, and within what periods of time a bankrupt may be discharged, the only question that can arise is, does the applicant come within the provisions?"

In this case the applicant seems to have realized the fact that he has not applied within the proper time, and has stated the causes and reasons for delay.

If the act authorized a judge to extend the time in consequence of the sickness or other disability of a party, there would be a different case presented from the one now before the court. As the case now stands, since the statute says that "the bankrupt may apply for a discharge after the expiration of sixty days and within one year," and does not authorize the application to be made at any other time, a court cannot consider an application made at any other time than as provided by the statute. The court can not extend, enlarge or contract the evident and express provisions, meaning and intent of the statute. The court has no more power to discharge an applicant who fails to comply with one provision of the act than another, or all others. The application is refused.

DISCHARGE REFUSED.

INDEX TO THE JOURNAL.—In answer to several correspondents, we would say that we are preparing an index to the JOURNAL, which will be issued as a separate number at the end of the year, number 53. Unless we deceive ourselves, it will be elaborate and complete, and *bring every thing to the surface.*

[Correspondence.]

The Jurisprudence of Massachusetts.

A recent article in the CENTRAL LAW JOURNAL, concerning the late Chief Justice Shaw, of Massachusetts, suggests some fragmentary reminiscences of the court over which that distinguished magistrate presided, and the judges, who from time to time, have been connected with it. This is comparatively not a very wide field of enquiry; because the Supreme Court of Massachusetts enjoys the now enviable distinction of being a *consitutional* tribunal, not existing at the mercy of each annual legislature; and its judges have always held their offices for life. The consequence has been, not merely that they have, as a rule, been able lawyers, but also that they have been very few in number, when contrasted with the same class of officers in those states which are in the habit of abolishing their courts to humor the popular will, and, at longer or shorter intervals, of appointing or selecting their judicial officers.

Not long ago was published the one hundredth volume of Massachusetts Reports. It would almost seem as if the legislature, which recently restored the original system of numbering the volumes, had contemplated some special notice of the approaching *centennial.* After the seventeenth volume of Massachusetts Reports, so called, the series became broken up into the fragmentary collections known by the names of the successive reporters, Pickering, Metcalf, Cushing, Gray and Allen; deriving, no doubt, some accession of value and authority from the names of these eminently qualified individuals, but hardly enough to compensate for the accompanying loss of unity and sequence, and especially of that *prestige* which has indeed always attached to the jurisprudence of Massachusetts, and which cannot be fully accomplished without the express imprint upon each volume of its judicial law of that identical name.

In a notice like the present; number *one* of the one *hundred*, of course demands special attention. It is the *Genesis* of Massachusetts jurisprudence, and though doubtless deemed apocryphal by those who are prone to "ring in the new" in law as well as literature and life, upon examination does no discredit to the court or to the state of which it is the representative. Indeed, with reference to this and all the early volumes, the words of the primeval, sacred book may, without exaggeration, be quoted: "There were giants in those days." Francis Dana, chief justice, who appears only in the first volume, the son of a very distinguished lawyer, took a high rank among the eminent men of his day. He was in intimate communication with Washington. John Adams makes honorable mention of him as a leader among "the sons of liberty." He was a member of the first provincial Congress; sent on a private ante-revolutionary embassy; filled a variety of offices connected with the formation of the new governments, and, immediately before his appointment to the bench, was minister to Russia. But, for some reason or other, even during the short period for which he presided over the court, Chief Justice Dana seems to have been unaccountably reticent, his associates on the bench, Strong, Sedgwick, Sewall and Thacher, having in a majority of the cases delivered the opinion of the court. Many other names of the period, fully bear out the remark, that it was one abounding in distinguished men. Theophilus Parsons appears conspicuously at the bar in volume first, but early in the second is transferred *per saltum* to the chief justiceship. Among the "Examiners of Counsellors and Attornies" appointed by the court, March term, A. D. 1806, are the names of Parsons, Gore, Dexter, Otis, M. Sullivan, A. Jackson, Dane, Prescott, Putnam, Story, Ward, T. Bigelow, all men of mark, and most of them of national fame.

In looking over volume first of the reports, two criminal cases arrest our attention as decidedly *sensational*, sufficiently so to justify the payment of a liberal bounty to any newspaper runner of our own day, who might have been fleetest in the race to serve them up for a generation which loves to "sup full of horrors." John Battis, a negro, was indicted for the murder of Salome Talbot, a white

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girl aged thirteen; also for a rape upon the same girl. To both indictments he pleaded guilty, but was informed by the court of his rights, and of the legal consequences of such pleas, and remanded to prison that he might have opportunity to retract them. Being again set to the bar, he repeated the same pleas, upon which the court examined the officers and the committing magistrate as to his sanity, and "whether there had not been tampering with him by promises, persuasions, or hopes of pardon, if he would plead guilty." Nothing of the sort appearing, he was again remanded and the pleas recorded. On the last day of the term the prisoner received his sentence, "which the chief justice delivered in a solemn, affecting and impressive address to the prisoner." He was afterwards executed.

Five pages after this case comes that of Seth Braley, indicted for the murder of his wife. To the question "whether he was guilty or not guilty, the prisoner, in a voice scarcely audable, said, he did not know what to say—that it appeared to him she was still alive—it seemed to him he had seen her since." After repeated cautions from the court, he continued to make the same answer, firmly adding, "that he was guilty of what he had done, but did not know what he had done." Being remanded, on the next day "he said that he was guilty of all he had done he must confess." Upon these indications of insanity, confirmed by the circumstance that soon after the alleged murder, the prisoner had cut his own throat, the court immediately impanneled a jury, to try whether he neglected or refused to plead of his free will and malice, or by the act of God. The jury found the latter; "whereupon the prisoner was remanded (not to an insane asylum,—some progress in seventy years—but) to gaol."

Another noticeable case in volume first is that of Martin v. the Commonwealth, very elaborately argued and adjudged, in which the estate of a married woman was held not liable to confiscation under the *absentee* act.

With the close of the first volume terminates the judicial career of Chief Justice Dana, and the great seal of Massachusetts falls into the hands of Theophilus Parson. We have already applied the expressive, if hyperbolical, term *giants* to the lawyers of that period; and from the eulogy of Judge Parker it appears that this was the favorite designation of Chief Justice Parsons by his cotemporaries. That memoir, found at the close of volume 10, is perhaps rather less marked by discrimination, than by genuine and unqualified respect and admiration. But, making all allowances for the partiality of an official associate and a warm friend, such a tribute from such a source could not well have been paid to any other than a great and good man. In one respect particularly, it is confirmed, so far as all our recollections extend, by universal tradition: namely, that Judge Parsons, besides being a profound and learned lawyer, was equally remarkable for the extent and variety of his general information; an *expert* in classical literature, in science, and more than all, in everything pertaining to the common affairs of life. To this distinguished reputation his reported judgments hardly do justice. In the first place, they are comparatively few in number, and the merit of a judge, as of every other intellectual producer, must be tried by the compound test of number and quality. If it were possible to conceive that Shakspeare, with the central fire in his heart and brain which burst forth in Macbeth, should never have written anything else, miracle of genius as it is, he would not have attained the unapproachable pinnacle of fame which he actually occupies.

And so Lord Mansfield, Lord Eldon, Judge Story and Judge Shaw, not merely because they filled their respective offices *so well*, but also *so long*, are entitled to the first rank among English and American judges. During the entire period for which Judge Parsons presided over the court, the number of *per curiam* opinions, and of those given by the associate judges, is unusually large. Down to the 4th volume the *seriatim* practice prevailed, one feature of which is, that the chief justice is the last of three or four to speak, when it may well be supposed there is little left for him to say. One gets slightly weary of this rather unaccountable practice, and cannot help sometimes longing, in military phrase, for a *counter-march*, which will bring the commanding general to the head, where he belongs. In fact, where the judges are all agreed, especially if in premises and conclusions alike, the sometimes three or four times repeated "I fully agree with my Lord," found in the latest English reports, becomes superfluous and pretty costly verbiage. We learn from the biographical sketch of Judge Parker, that Judge Parsons for two years before his death, was prostrated by disease; and this may account for the greatly diminished number of opinions to which his name is attached in the later volumes of his chief justiceship. His judgments in important cases, as might be expected from the character of the man, are marked rather by clearness, precision, and sometimes logical or almost *mathematical* demolition of adverse arguments, than by great or profound learning. In this respect he very much resembles Chief Justice Marshall.

If elsewhere sometimes exaggerated, the following extract from Judge Parker's memoir of Judge Parsons is fully borne out by a careful examination of the reports: "He presented his propositions in regular and lucid order, drew his inferences with justness and precision, and enforced his arguments with a simplicity, yet fullness, which left nothing obscure or misunderstood. He seemed to have an intuitive perception of the cardinal points of a cause, upon which he poured out the whole treasures of his mind, while he rejected all minor facts and principles from his consideration. He was concise, energetic and resistless in his reasoning. The most complicated questions appeared in his hands the most easy of solution; and if there be such a thing as demonstration in argument, he, above all the men I know, had the power to produce it."

Brief as was Judge Parsons' term of office, his remarkable character and talent were of inestimable service in laying the foundations of Massachusetts' jurisprudence. For this great purpose mere legal learning was by no means the primary requsite. The English common and statute law was no doubt for the most part our law, and to understand it thoroughly was an indispensable qualification of a Massachusetts judge. But few pages of the early reports can be read, without finding illustrations of the fact, that immemorial usage, and early colonial and provincial statutes, had, upon a vast variety of subjects, almost created a law of our own. Judge Parsons was precisely the man to learn, appreciate and apply this local jurisprudence; and his happiest efforts are those in which, perhaps, by way of reply to learned arguments of counsel, founded upon the text of the English law, he adduces unanswerable enactments and precedents to disprove its binding authority in the State of Massachusetts. In such cases, we see the thoroughly practical man, conversant with all sorts of things, and familiar with all sorts of people; the man who, endowed by nature with extraordinary capacities which study and learning had indefinitely improved and developed, allowed none of the innumerable occasions to pass, when he was brought into contact with others, without making some important addition to his stock of available knowledge.

It may have been the result of these peculiar traits, that while Judge Parsons presided over the court, there were so few cases of divided opinion. Without assuming to reveal the secrets of judicial deliberation, it is not presumptuous to believe, that no single cause can contribute so strongly to unanimity among consulting judges, as the recognized oversight of one strong and commanding mind, ready to avail itself of argument and authority, but after all, often harmonizing or neutralizing mere technical precedent by the application of some simple and indisputable principle of common sense. It is certainly worthy of notice, that in one of the earliest volumes of the reports subsequent to the death of Judge Parsons, are contained many important cases, in which the court were divided. It had then come to consist of at least two eminent men—

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Chief Justice Parker and Judge Jackson—who might be considered to represent two opposite phases of the judicial mind; the former, bordering, perhaps, on the latitudinarian, prone to construe away any technical rule which might stand in the way of substantial justice; the latter, one of the most exact, though at the same time finished and accomplished of American jurists.

It would be an unpardonable omission, in dismissing Chief Justice Parsons and his times, not briefly to mention another cotemporary sage of the law, to whom he himself sometimes alludes in terms of high respect and regard, as his valued counsellor and friend. Judge Trowbridge may be regarded as a somewhat *mythical* character. He flits across the stage of our early judicial annals, wearing "a kingly crown," indeed, but vanishing, like the phantom kings of the play, almost before we have time to bestow a glance upon him. His *Reading on Mortgages* is the only surviving memorial of his legal learning. Although a valuable composition, in its day, of a subject then imperfectly developed and understood, and very often cited with approval by eminent judges, it can hardly be now considered as a very complete or in all respects accurate statement of the law of mortgages.

The immediate successor of Chief Justice Parsons was Judge Sewall, for many preceding years a justice of the court, who, however, survived his predecessor but a very short time, both his appointment and his death being recorded in the 11th volume of the reports. In immediate connection with him may be mentioned *Judge Demey* father of the late Judge Demey, whose death succeeded his appointment in an equaliy short space of time, volume 11 recording the latter and volume 12 the former. Unlike his excellent and distinguished son, some of whose numerous opinions are among the most valuable to be found in the entire series of Massachusetts Reports, no recorded judgment perpetuates the memory of Judge Demey. To Chief Justice Sewall succeeded Judge Parker who had also been on the bench almost from the commencement of the reports. We are informed by the reporter, in announcing his appointment, that the office was tendered to Judge Thatcher, an older judge, but he declined it "*propter invaliitudinem.*" Chief Justice Parker presided in the court for a longer period than any other man except his immediate successor, Judge Shaw. Judge Parker must no doubt be regarded as the *chancellor* of Massachusetts jurisprudence; entitled to all the praise and all the censure which may be involved in the application of that title to the judge of a common law court. If at times, to disturb ancient foundations and explain away well established but technical and sometimes obsolete and *outlived* rules, is more than balanced by infusing into jurisprudence the progressive spirit of a constantly improving age; then he deserves to be called a jurist of the highest order. And whatever opinion may be entertained upon this point, as specimens of rhetorical composition, of flowing and graceful language, often rising into eloquence where the case calls for sympathy or rebuke, Judge Parker's judgments have very few superiors in English or American Reports. In the case of Goodwin v. Hubbard, 15 Mass. 210, the law of which can hardly be said to have long survived its propounder, the chief justice says, "the question presented....is whether....the demandant can maintain his action for the land. If he can, we must submit to the humiliation of having a gross fraud and conspiracy successfully practiced, without being able to afford any relief.....But we apprehend that our laws do not merit such a reproach; and that by attention to certain *general principles and rules*, always recognized and respected as the basis of judicial decisions, *justice may be done*, the purity of the laws vindicated, and the purposes of this fraudulent combination defeated. He sometimes relieved the usual gravity and dullness of judicial opinions with a passing witticism. Thus in Peele v. the Suffolk Ins. Co., 7 Pick. 256, he says: "Indeed we cannot but think there has been a straining of the cause, as well as of the vessel, in order to charge the underwriter."

We propose only to glance at the judges who have successively sat upon the supreme bench of Massachusetts in later times. One of the most conspicuous, for the length of his term of office, and the good old age at which he died, was Judge Wilde. His first appearance is in the year 1815, in the 12th volume of Massachusetts Reports; his last in the year 1850 in the 6th volume of Cushing. He resigned November 5th, 1850. He was a man remarkable for simplicity of manner and character, of great learning, but without the slightest pretension or display. Some of his judgments, particularly in cases relating to real property, are among the best in the Reports. If he had any fault, it was that of sometimes, in a hasty reliance upon his own rare sagacity, propounding a rule of law, as indisputable, which is by no means borne out by the authorities. As where, in the case of Mason v. Thompson, 9 Pick 284, he holds an inn-holder to be, like a common carrier, the *insurer* of his guest's property; or where, in Lowell v. Boston, &c., 23 Pick. 31, he says of the now substantially overruled case of Bush v, Steinman that "this decision is fully supported by the authorities and by well established principles." Few judges have ever been more venerated and beloved than Samuel Sumner Wilde.

Another conspicuous judge was Marcus Morton who came upon the bench in the year 1825, and whose first opinion is found in the 3d volume of Pickering. Judge Morton, having been elected governor, resigned his office as judge in January, 1840. He too was a learned and able jurist, as abundantly appears from his recorded judgments; but his *forte* was at *nisi prius*, and more especially in his charges to the jury. In this department he probably never had a superior, if an equal, in the state. Samuel Hubbard is another conspicuous judge, although his term of office was comparatively short, and his opinions are few. He first appears in the year 1842, in the 3d volume of Metcalf, and died in 1847. No man ever saw through the intricacies of a complicated account more quickly or keenly than Judge Hubbard. His noble form and benignant countenance did no more than justice to the strength and kindness of the man. It is within the knowledge of the writer, that a youthful member of the bar, an entire stranger to judge Hubbard, happened to argue a cause before the full court, but during the argument Judge Hubbard was casually absent from the bench. He came in soon afterwards, and, seeing the counsel pass from the court-room into the library, the Judge stepped from the bench, followed him, expressed his regret at not hearing the cause argued, adding, "I understand it was very well argued," and then returned to his seat. That young man, if alive, is young no longer; but cannot have outlived the recollection of this simple, but most expressive act of judicial kindness.

In the year 1820, first appeared at the bar of Massachusetts, a man, whom not to single out for special mention would be a most glaring defect in any notice, however cursory, of the jurisprudence of that state. Daniel Webster stands as pre-eminent among lawyers and jurists as among publicists and statesmen. For that intellectual greatness which consists in the combination of powers and attainments, rarely found united to an extraordinary degree in the same individual, and in fact to some extent incompatible with each other, Mr. Webster never had his equal in this country, and perhaps few superiors in any other. Thus, he was a faultless writer. His style is almost a model of pure English; never wanting in force and vivacity, yet never running into rhetoric or exaggeration. It is needless to speak of him as an orator, for no one who ever heard him speak will question the proposition, that his eloquence was peculiar to himself; not merely superior *in degree* to that of any other man, but more differing in *kind*, and, until his head and face and eye and form, in fact until the whole man could be transferred to another, not approachable or imitable, so much was it the individuality of Daniel Webster. As a lawyer, in which light we would now more particularly look at him, it mattered not whether he was called upon to enchain or *storm* a jury, often perhaps to the overthrow of some strict rule of law, or the disregard of decided

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intimations from the bench; or whether, before the highest tribunal and most illustrious judges of the nation, he vindicated the constitutional sacredness of charter rights, or the right of a state to defend itself against treason, or the Christian faith as the vital spirit of all true charity;—in all these emergencies, Mr. Webster was perfect "master of the situation," and "what man dare do" he both dared and was able to accomplish.

In the 6th volume of Pickering, in the year 1827, we first find the name of Rufus Choate. Mr. Choate's earliest appearance before the profession and the community was rather like the flash of a meteor than the gradual rising of a star. We know of no term which better expresses the peculiarities of the man—physical, mental and moral—than electric. The only man to whom we ever likened him in personal appearance was Lord Byron, as seen in his professed likenesses. The resemblance may have been in part occasioned by the fact that the young lawyer, like the young poet, so arranged the dress about the throat, as to leave it comparatively open, thus greatly increasing the effect of his curved lip, flashing eye, and curling black hair; the *tout ensemble* being that of a poet, an orator, an artist, or whatever else might occur to the man or *woman*, for the first time meeting him; but, to each and all alike, a genius of the highest order, destined to make his mark upon the age, and such as only in a cycle of years lights upon this prosaic world.

Mr. Choate was indeed an extraordinary man; one who combined, almost without a parallel, in this or any other country, mental qualities the most diverse and opposite—genius and logic, poetry and philosophy, heart and head. Yet of all his traits we should select as the most striking, *simplicity;* simplicity of character and purpose; forgetfulness of self; an entire absence of personal ambition; appreciation of the true and the beautiful; consecration of all his splendid faculties to the performance of his duty. This it was more than anything else, which made him the idol of his friends and professional brethren, the charm of society, and the pride of the commonwealth.

In a cursory review of the Massachusetts Reports, no one can fail to be impressed with the constant recurrence of subjects of litigation, which have now wholly or partially disappeared from the jurisprudence of the state. Take, for example, the title of *Militia*, chiefly applicable to the periodical *trainings* and *musters* of the enrolled soldiery in time of peace. The quibbles, dodges and evasions resorted to, for the purpose of escaping a half day's inspection upon the public square, or march through the streets, were embodied in *certioraris*, the discussion and adjudication of which, in numberless cases, appealed to the concentrated wisdom and learning of the four or five assembled judges of the Supreme Judicial Court of the Commonwealth of Massachusetts; the grand point at issue being the payment of a fine of two or five dollars. Another change, of far higher moral significance, is the comparative disappearance of law-suits connected with *ministers, churches and parishes;* often taking the form of actions brought by clergymen for their salaries, and defended upon grounds involving the most invidious personalities. *The sale of intoxicating liquor*, also, though still lingering, as a subject of litigation, even in the highest court, furnishes a somewhat diminished number of points for the consideration of the supreme court. Though not able to say with regard to all these topics, and others of similar character, "*nous avous fait avec* TOUT *cela*," yet the citizens of Massachusetts, justly proud, as they are, alike of their laws and of the magistrates who have construed and administered them, may well congratulate themselves, that somewhat higher issues have, to some extent, taken the place of those which assumed an inglorious prominence in years gone by. F. H.

JUDGMENTS IN CRIMINAL CASES.—The important opinion of the Supreme Court of Illinois, which we elsewhere print—People *ex rel.* Manyx v. Whitson, has been delayed several weeks for want of space. For it we are under obligations to Edward P. Vail, Esq., state's attorney for Schuyler county, Illinois.

Summary of our Exchanges.

The Chicago Legal News, for October 31, contains a very interesting decision of Mr. Circuit Judge Drummond, United States Circuit Court, Northern District of Illinois, on the assignment of patents. The following is the syllabus, prepared by James L. High, Esq., of the Chicago bar:

1. Object of the Recording Act.—The object of the 11th section of the act of Congress of 1836, requiring assignments of interests in patents to be recorded within three months, being for the protection of *bona fide* purchasers, without notice of previous assignments, a conveyance of a patentee by a right under the patent, is valid, as between the parties, without being recorded.

2. Subsequent Assignment Operative on Residuary Interest.—Where a patentee conveys all his right, title, and interest in the patent in a particular territory, but has previously parted with some interest under the patent in a portion of the same territory, the second assignment will be held to operate only upon the residuary interest of the patentee, after having made the previous assignment, even though the first assignment be not recorded until after the second.

3. Construction of Second Conveyance.—Where the patentee has any remaining interest in the patent upon which a second assignment can be said fairly to operate, and the second assignment purports to convey only his existing interest, it will not be construed as showing an intention on the part of the assignor to convey what he had previously conveyed.

4. The Case Stated.—Complainants, in a bill to enjoin the infringement of a patent, and for an account, claim title under assignments from the patentee, executed in 1860, of the right under the patent for the counties of W. and H., in Illinois. Defendant claims under an assignment from the patentee, executed in 1870, of all his right, title and interest in the patent in certain territory, including Illinois, which assignment was first recorded. *Held*, that the first assignment is operative, though not recorded until after the second, and that a plea to the bill setting up the second assignment in bar of complainants' right of action should be overruled.

5. Recording Act of 1870 Construed.—The provisions of the 36th section of the act of Congress of 1870, with regard to the recording of assignments of patents, are substantially identical with those of the 11th section of the act of 1836, as construed by the courts.

Kennicott v, Supervisors of Wayne county, sounds familiarly, and we find that it is the same case which is reported in 16 Wallace, 452. It had been remanded to the court in which it had originated, and now the Legal News prints an opinion of Mr. Circuit Judge Drummond, finally disposing of it, we presume. The syllabns, prepared by Mr. Bissell, the official reporter, is as follows:

1. Letters Between Third Parties—engaged in negotiating the bonds, are not competent evidence to impeach them in the hand of parties claiming to be *bona fide* holders, unless they are shown to have had some connection with such letters.

2. Bonds Given for Goods.—The fact that bonds were received from the treasurer of the railroad company in payment of goods, is not of itself sufficient to bar the merchant from claiming as a *bona fide* holder, if the goods were of such a character as would be of value to the company in the construction or operation of the road.

3. Correcting of Mistakes.—Where a case has been to the supreme court, the circuit court, in passing upon a collateral branch of the case, will not allow that that court has made a mistake in regard to any facts which it has actually passed upon—the party moving to correct such mistake must go to the supreme court for relief.

4. Proofs Before Master.—Under an order requiring claimants upon bonds to appear before a master and prove their claims, a presentation of the bonds by an agent or attorney is sufficient, though the proofs were taken in another state, under the act of Congress, that is sufficient if no suspicion has been thrown upon the *bona fides* of the bonds.

5. Bona Fide Holder—Presumption.—Upon the presentation of a negotiable bond, the presumption of law is that the person presenting is a *bona fide* holder, until evidence is introduced tending to negative that presumption, he is under no obligation of proving himself a *bona fide* holder.

The Legal News publishes another ruling of Mr. District Judge Blodgett, in *Re* Scammon (*ante*, 328). The point involved is a matter of practice under § 39 of the bankrupt act as amended, and the learned judge rules that if it appears that the requisite number of creditors have not joined in the petition, the court will dismiss it on motion, without requiring the debtor to file a schedule; and that on such motion the court will hear affidavits and evidence

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offered by either party, and will order the person verifying the petition to be examined before the register.

And this reminds us of a mare's nest which we think we have found. When we published *Re*, Scammon, in our issue of July 2, we were in such anxiety to get it in that number that we took it from the Chicago Times, and forgot to give the proper credit. Two days afterwards, *Re* Scammon was published in the Chicago Legal News (Vol 6, p. 328), with the name of the official reporter of the court attached; and we were astonished to find in it a much longer and an entirely different opinion from the one we had published—no resemblance between them. We stammered out such an apology as we could, and directed our readers to the Legal News for a much fuller report of the case than our own. And now we are beginning to think we had better said nothing about it; for we find *Re* Scammon published in the National Bankrubt Register Reports, as we published it, and we find the *Re* Scammon of the Legal News published in those reports under the name of the Joliet Iron and Steel Co. There is evidently a mistake somewhere. Speaking of our scandalous conduct in failing to give the Chicago Times the proper credit in case of Scammon, calls to mind the following article on the subject of journalistic credit in this number of the Legal News:

"We take pleasure in saying that the American Law Times, in its digest of cases, gives the volume and page of the law periodical where the opinions are reported at length. This adds to the value of the Times, and should help to increase its circulation. The weekly legal periodicals owe it to themselves and to the profession to expose the monthlies and quarterlies that make up their digests of cases without stating where the opinions may be found. We will do our part in calling the attention of the profession to it."

We think our excellent neighbor overestimates the damage done by the monthlies and quarterlies. When the facts are rightly understood, the monthly and quarterly law journals will be obliged to limit themselves to publishing heavy articles, such as the weeklies cannot find space for, or else will be obliged to transform themselves into weeklies at heavy hazard to their publishers. We say when the facts are rightly understood, for we are satisfied, on a close examination, that the Chicago Legal News publishes annually four times as much valuable matter, by printers' measurement, at two dollars a year, as any monthly or quarterly publishes at five dollars a year. And then, when we come to consider the advantage of having legal news while it is news, instead of after it has become one or two or three months old, the difference is very striking. There is only one way in which the monthlies and quarterlies can compensate their readers for this enormous disproportion between them and the weeklies, and that is in the *superior value* of the matter which appears in their columns. And this compensation they but partially make; for they publish almost nothing in the way of novel and important judicial decisions that is not previously published in the weeklies. It is true the quarterlies publish valuable essays which would be beyond the limits of the space of a weekly. This, in our judgment, is the legitimate province of a quarterly law review. It ought to be composed of solid articles, written by the ablest men, on important questions of law and law reform, and reviews of law books, elaborate, thorough and impartial. When it undertakes to give a resume of the important decisions which have been reported in the twenty-five or thirty volumes since its last issue, it gets beyond its depth; and if its weekly contemporaries have done their duty, most of its *news* will be found *old* to its readers.

We think the Chicago Legal News will join us in certifying that there are but two or three journals, monthly or quarterly, that borrow matter from the weeklies without giving the proper credit.

The Chicago Legal News also publishes *Re* Frost, an interesting decision under the new bankrupt act, in which Mr. District Judge Blodgett holds, that in determining whether the requisite number of creditors have joined in a petition under the amendment of June 22, 1874, only those are to be counted whose debts are unconditionally provable—those claiming liens or holding security cannot be reckoned.

It also publishes a decision of the Supreme Court of Illinois—Mathes v. Dobschutz—with the following syllabus:

1. Rights of Party Putting Improvements on Minor's Land.—A father died leaving a widow and minor children. He devised certain real estate to his children. After his death his widow married again. This real estate was graded and a house built on it, which was claimed to have been done by the step-father and with his money. A creditor of the step-father sued him, obtained judgment, levied an execution on the land, had it sold, and filed a bill for the purpose of reaching the improvements made upon the lot, or the value of the property over and above the widow's dower and the value of the lot, had no improvements been made thereon. *Held*, upon no principle of equity could the bill be sustained.

2. The Term Real Estate.—That the term real estate embraces not only lands, but all improvements of a permanent character placed upon real estate, and such improvements are to be regarded as a part of the land.

3. Stranger Making Improvements.—That where a stranger constructs a building upon land of another without his consent, it becomes a part of the land, and he would become a tresspasser by removing it.

4. Consent.—That the owners of the fee were minors and could not consent.

5. The Step-Father and his Creditors.—That the owners of the lot did not, nor were they in law, capable of contracting with the step-father, and whatever money he may have invested in the lot was placed there at his own risk, and it can neither be reached by him or his creditors.

6. Sale Under the Execution.—That the purchaser of the lot at the sale under judgment against the step-father, acquired no title to the premises, for the reason that he had none to be sold or acquired.

It also publishes an interesting opinion of the same court, Craig, J., in Dinet v. People *ex rel.* Pfirshing, with the following syllabus:

1. Appeal—Waiver.—That if appellee desired to avail himself of the objection that no appeal would lie from the order committing appellant for contempt, he should have made a motion to dismiss the appeal; having failed to do so, he waived the right to insist on a dismissal of the appeal.

2. Contempt for Failure to Pay Moneyed Decree.—That it is not proper for a court of equity to imprison for contempt on a failure of party to pay a moneyed decree, unless the disobedience is wilful.

3. No Power to Imprison Appellant.—That if there has been a failure to pay according to the term of the decree, such failure was from an honest misconception of the true construction to be placed upon it, and not to an intent on the part of appellant to set at naught or bid defiance to the decree. Under these circumstances, the criminal court had no power to imprison appellant for the alleged failure to comply with the decree to pay the attorney's fees.

It also publishes McElroy v. Parker, Circuit Court of Cook County, Illinois, Sibley, J. In this case the defendant sold to the plaintiff three hogs, and received five dollars on the purchase. He promised to deliver the hogs at White's scales, "on the 4th or 5th of March." He took the hogs on the 5th of March to White's scales, and remained there with them till two o'clock. The plaintiff not being there to receive them, he returned home. The plaintiff found the defendant on the evening of the fifth at his own home and demanded the hogs. *Held*, that the plaintiff could neither recover damages for a failure to deliver the hogs, or the three dollars paid on the contract.

The Albany Law Journal, for October 24, contains an article on Delivery of Bonds on Condition, in which it examines the following cases: Millet v. Parker, 2 Metc. (Ky.) 608; Lovett v. Adams, 3 Wend. 380; Bronson v. Noyes, 7 Wend. 188; People v. Bostwick, 32 N. Y. 445; King v. Smith, 2 Leigh (Va.) 157; Tindall v. Bright, Minor (Ala.), 103; State v. Peck, 53 Me. 184; Dair v. United States, 16 Wall. 1; Webb v. Baird, 27 Ind. 481; Pepper v. State, 22 Ind. 399; State v. Garton, 32 Ind. 1; Ward v. Churn, 18 Grat. (Va.) 801; Seeley v. People, 27 Ill. 173; Chamberlain v. Brewer, 3 Bush, (Ky.) 561; Decker v. Judson, 16 N. Y. 439.

It concludes as follows:

"The conclusions, which we think ourselves warranted in drawing from this hasty and imperfect review, and from some other cases which we have not had space to speak of, are the following:

"1. In the absence of all evidence of a conditional delivery by an obligor who has signed a bond, the presumption of law is that he has consented to the delivery to the obligee; and this is true, whether the bond is executed by all the persons named in it as obligors, or not; but this presumption may be rebutted.

"2. The mere faith on the part of the obligor signing the bond, and the assurance to him by others, that other persons, named or not named in the bond, are also to execute it, is not enough to release him in case this assurance is not fulfilled; there must at least be a delivery by him upon the express *condition* that the others also execute.

"3. If an obligor signs and delivers a bond to a stranger or a co-obligor, with the expressed oral conditions that others, whether named in the bond or not, are also to execute it, or upon any other condition, and the condition is not fulfilled, the bond is void, not only as to the obligor so signing and delivering, but also as to other obligors subsequently signing and delivering without condition; and in this state it makes no difference even if the delivery was to the obligee himself.

"4. If, in an action by the obligee, one of the several obligors is discharged from liability, for the reason that he delivered the bond upon a condition which has not been fulfilled, he is not liable in contribution to other obligors who have been held liable.

"As to the first and fourth of these propositions, we think there is no difference of opinion in adjudged cases. As to the second, we think it accords with the weight of authority, although we are aware of some cases holding, that if the bond passes into the obligee's hands unexecuted by some of the

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persons named in it as obligors, it may be avoided by obligors who executed on the faith and with the assurance that it should be executed by the others, even if not delivered strictly upon that condition. As to the third, we think it sustained by the preponderance of authority, and the better opinion; but its application in cases of delivery to the obligee himself, finds no countenance we think, outside of this state.

"As these questions are very important and abstruse, and the subject of variant opinions, we cordially invite the criticisms and suggestions of our readers upon them."

It concludes its very interesting article on the salaries of judges. It has a very useful letter from F. P. M., of Buffalo, on the Alteration of Notes, and contains its usual amount of other interesting matter.

The Albany Law Journal, for October 31, has an article by Theron G. Strong, under the caption, Can Actions at Law be Maintained between Husband and Wife? The following cases are examined: Freethy v. Freethy, 42 Barb. 641; Longendyke v. Longendyke, 44 Barb. 366; Adams v. Curtis, 4 Lans. 165; Whitney v. Whitney, 49 Barb. 319; Power v. Lester, 23 N. Y. 530; Strong v. Skinner, 4 Barb. 555; Dyett v. N. A. Coal Co., 20 Wend. 573; Minier v. Minier, 4 Lans. 421; Moore v. Moore, 47 N. Y. 467; Perkins v. Perkins, 62 Barb. 531; Wright v. Wright, 54 N. Y. 437; Dygert v. Reimerschneider, 32 N. Y. 429; Whitney v. Whitney, 49 Barb. 319; Diver v. Diver, 56 Penn.St. 109.

It also has an article on the Lateral and Subjacent Support of Lands, prepared by H. G. Wood, Esq., from the text of his forthcoming work on the Law of Nuisances. It also reprints the long address of Lord Moncrieff, read before the Legal Reform and Social Science Congress, September 30th. It publishes an important decision of the Supreme Court of California—*Ex Parte* Wall—rendered September 28, holding that the local option liquor law of that state is unconstitutional.

We wish we had space to publish a synopsis of the many excellent insurance cases reported in the Insurance Law Journal for October. We are obliged, however, to content ourselves with believing that every insurance lawyer takes this journal.

The Chicago Railway Review, for October 31, prints an interesting decision of a New Jersey chancery court— Mettler v. Eastern and Amboy R. R. Co. —of which the following is the syllabus:

The charter of a railroad company entitled them to take possession of land for the use of the road, when they could agree with the owners as to compensation, with a provision for arbitration and appeal to the courts. Arbitration was made, the report was set aside, and the issue tried in the Circuit Court, where the jury, under instructions from the judge, brought in a verdict for the damages, and found also specially the amount of interest from the time of the condemnation. The court reserved its judgment upon payment of the interest until next term. Meanwhile the company desired to proceed with the work, tendered the amount of damages without the interest, and took possession of the property; and the complainant filed his bill for an injunction. On motion to dissolve the injunction, *Held*, that the company was not entitled to possession until the amount to be paid was finally decided by the court, and payment made of the full sum. Yet, as the building of the road was a matter of public interest, the injunction would be dissolved if the company would pay into court a sum sufficient to cover the interests, costs, etc.

The Pacific Law Reporter publishes, without a syllabus, a very elaborate constitutional case decided in the Supreme Court of California, involving the construction of the provision of the constitution of that state, which prohibits the legislature from passing special acts creating corporations.

The Legal Intelligencer, for October 30, publishes De Witt's Appeal, Supreme Court of Pennsylvania, in which A., the holder of a mortgage, obtained judgment on the accompanying bond, and assigned the judgment on the docket to B. Subsequently, A. satisfied the mortgage of record. There was a second mortgage on the same property, which, after the entry of satisfaction of the first mortgage, was assigned to C. *Held*, that C. took it subject to the first mortgage, as the assignment of the judgment was notice to him that A. had parted with her title, and had no authority to satisfy the mortgage.

Also Knoll v. Light, same court, which has the following syllabus:

Where parties owning property along a water-course, carelessly permit dirt, and other accumulations to obstruct the natural flow of water, and it shall overflow and damage the property of another, they are liable for damages.

But if the stream is obstructed by the growth of grass or other substances, over which they have no control, they are not liable.

One party may enter upon the lands of another and abate such a nuisance.

Also, Lovett v. Lovett, Bucks County Common Pleas, of which the following is the syllabus:

1. A lapsed legacy or devise usually falls into the residue and goes to the residuary legatee or devisee. If there be no residuary legatee or devisee, or if the lapse be of a part of the residue itself, then it passes as intestate property to the next of kin or heirs of the testator.

2. An executory devise may be limited to take effect after several intervening estates, either vested or contingent, if the final contingency upon which it is to vest, be not too remote; that is, it must happen, if at all, within a life or lives in being and a competent time afterwards.

3. The widow of a tenant in fee, which fee is determined by the death of the tenant without issue, is entitled to dower in the estate thus determined.

Also, Hughes v. Gallans, Schuylkill Common Pleas, with the following syllabus:

The contracts of an infant at common law cannot be enforced except for necessaries. When the infant represents himself of age, and thus obtains the credit, he becomes liable in an action on the case for damages.

Legal News and Notes.

—IT is reported that Germany has definitely proposed to the great powers the adoption of a general international maritime code.

—AMONG the recent appointments made by the President, is that of Wesley Ogden, to be collector of customs at Indianola, Texas. He was lately a judge of the supreme court of that state.

—CHIEF JUSTICE JAMES B. MCKEAN, of Utah Territory, who has caused such consternation among the Mormons recently, formerly resided at Saratoga, and once represented that district in Congress. He was a brigadier-general of volunteers.

—UPON a question submitted to the attorney-general, "whether the United States pension agent is prohibited by law from being connected with a government contract?" that officer, after reviewing the statutes applicable to the case, is of the opinion that there is nothing in the statutes applying in this respect to United States pension agents.

—COMMISSIONER BURDETTE, of the general land office, in his annual report, recommends a consolidation of the homestead and pre-emption law, and also that Congress give validity to homestead entries granted Indians who had abandoned tribal relation under a decision of Secretary Cox, but which was practically reversed by Secretary Delano. He also suggests amendments to the homestead laws so as to invest this class with full rights of participation in their benefits, upon their severance of the tribal relation as a step forward in their civilization.

—THERE is a prospect of some interesting railroad litigation in New Jersey. The other day, about forty passengers on the 1:45 P. M. Erie train, from New York, were obliged to stand about half the way to Paterson, and consequently several of them refused to give up their tickets to the conductor unless he furnished them with seats; after they had got seats they insisted that they should not be obliged to pay their fare for the time and distance during which they had no seats. The conductor refused to accede to this proposition, and ejected the resisting passengers near Passaic. Mr. Joseph C. Todd, president of the Todd & Rafferty Manufacturing Company, was one of this party, and he has brought suit against the railway for $10,000. Mr. L. C. Blanning, a Philadelphia jeweler, and two residents of Paterson, have also decided to sue the Erie Railroad Company for damages.

—A CURIOUS CASE.—Connecticut has a mystery at Bridgeport, that is attracting much attention in the New England states. A young man named Lattin is in jail at the above named place, charged with the crime of murdering Ellen Lucas, a young woman with whom he had held intimate relations. She was found dead in a marsh, with her face in the water, but the physicians and chemists have as yet been unable to account for her death. She was not drowned, for her lungs were still filled with air; there was no mark of violence upon her person, save what some believed to be the effect of pressure upon the nostrils; but there were no sure indications that she had been strangled. One theory was that she had been killed by quick poison, and color was given to the idea by the discovery of sundry concoctions, including prussic acid, in a barn to which Lattin had had access, and testimony to the effect that he had purchased certain poisonous drugs. But the chemists have been unable to find in the stomach any traces of poison. Then it was surmised that she might have been struck on the head with a sand-bag, and the body was taken up, the head opened, and the brain cut into thin slices, but no injury there could be discovered. In fact, the doctors have been unable to find any injury that could have caused her death. Her wrists only show that she had been roughly handled by some one. The coroner's jury have found that the unfortunate girl came to her death at the hands of Lattin, and he is held for trial, but with no conclusive, or really circumstantial, evidence against him. Altogether, the case is a mysterious one, and public opinion is strongly against the accused. —[*Washington Chronicle.*

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, NOVEMBER 13, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

ERRATA.—An important typographical error occurred in the article on Seduction, in our issue of October 30th. The last word of the 8th line, p. 539, should read "indispensable," instead of "indisputable." The latter word conveys an entirely incorrect idea,—one at variance with the whole tenor of the note. The allegation of service may, of course, be disputed.

BY a typographical error the name of Judge Dewey, in the article in our last week's issue on the Jurisprudence of Massachusetts, was spelled Demey.

Another error of less importance occurred in making up the last page of our paper last week. The printer inadvertently left out the article from the Western Jurist, on Law Schools, to which we called attention editorially, as being published "elsewhere." We now insert it "elsewhere" in this number.

Speaking of errors reminds us that our brother of the Washington Law Reporter has a proof-reader who is not infallible, and therefore he has been obliged, like ourselves, to publish a table of errata. In correcting some errors which occurred in Justice Olin's opinion in the celebrated soap-factory case —Bates v. District of Columbia—we find the following: "On page 263, 2d column, 2d paragraph, after the word 'knock,' read 'in the head.'" A very material amendment. The printer knocked that sentence so badly in the head that it hadn't any head left.

Compensation of Lawyers—Champerty.

The Albany Law Journal, for September 26, animadverts severely on Voorhees v. McCartney, 51 N. Y. 387, decided by the New York Commission of Appeals. This case holds, according to the syllabus, that an attorney, who brings an action in the name of another, in which he is beneficially interested by virtue of an agreement by which he is to have a portion of the recovery as compensation for his services, is liable, like the plaintiff, for the defendant's costs, and that his liability has not been affected by the provision of the New York code (§ 303) legalizing such agreements. This liability was created by statute, 2 R. S. 616, section 44, which enacts, that in an action brought in the name of another, by an assignee of a right of action, or a person beneficially interested in the recovery, such assignee or person is liable for costs the same as the plaintiff.

In the course of this article, the editor of the Albany Law Journal makes some observations on the policy of prohibiting champertous agreements between attorney and client, which are worthy of attention. He says:

> Now, the old statute was a part of a system under which lawyers were viewed and treated very much as malefactors. The legislature and the public seemed to regard them as a class of reprehensible persons, who were not to be paid for their services like other people. If they were permitted to work, it was mainly for the public benefit and behoof, like the convicts in our prisons. It was meritorious to restrict their compensation to a meagre pittance. It was even esteemed by many a venial offence to cheat a lawyer out of his pay. Agreements between attorney and client in respect to the subject-matter of the litigation, were always construed as frauds upon the client. The public were to be protected against these ravening wolves by legislation, and if the costs of a suit could be charged upon the lawyer, it was a joke that made godly persons laugh. But when common sense and the code came in, we tried to change all that. We left lawyers at liberty to make contracts for their compensation like other persons. It is notorious that an immense amount of legal business is now transacted in this state, by the most reputable lawyers, under agreements, precisely like that impliedly censured by the court in Voorhees v. McCartney, although seldom, we hope, entered into under the same circumstances. It is an affectation at this day to frown upon this mode of doing legal business. Indeed, some of our courts have held, that the existence of such an agreement between attorney and client, in a particular case, cannot be proved on the trial in defence, because it is immaterial and may tend to prejudice the plaintiff's case with the jury. Cook v. New York Central Railroad Co., 5 Lans. 501. We can see nothing immoral or impolitic in such arrangements, and we can see no reason for mulcting the attorney in costs because he has chosen to run his risks of getting any compensation for his services in the suit. We think the legislature would do well to look to this matter at their next session, if the case of Voorhees v. McCartney really decides what the reporter seems to think.
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> The other decision is English. We refer to the action of the Benchers of the Middle Temple in expelling from their membership a barrister who stole some law books. We cite this case, not to condemn it, because we do not see how the benchers could have done otherwise, but to draw public attention to the facts which led to the commission of the crime. The simple truth was, this lawyer was starving for want of employment, and stole these books and sold them to buy bread for himself and another unfortunate in the same predicament. He was sent to prison for six months, and served out his term, and on his release his brethren who had expelled him from their fellowship, presented him with six hundred pounds sterling, and created a fund for the relief of poor barristers. But they could not give back to this unfortunate gentleman his honor. He was a victim to the ideas of professional compensation which prevail in England. A barrister may not solicit patronage; he must wait until an attorney brings it to him, and starve if it does not come. A lawyer cannot make an agreement that his compensation shall depend upon, be measured by, and be paid out of the recovery; that is champertous and immoral, and he must wait for responsible clients. Now is it not a little rediculous, not to say perfectly monstrous, that in the largest city and the most enlightened and wealthiest nation on the globe, a gentleman of education and culture, a member of the higher branch of the most influential of the learned professions, is reduced by fashion's caprice, and by the absurdity of the laws, to such an extremity, that he must starve, go to the alms-house, or steal? We applaud the humanity of our English brethren. We should have liked to contribute our mite to the fund for the relief of that most unfortunate lawyer. But we should like still better to be able to aid in bringing about a reform of their customs and their laws, so that a probability should exist that such a thing could never occur again.
>
> We hope our readers see the connection between these two cases. Legislation can never keep the relations between attorney and client pure. Lawyers and suitors must be left to deal with each other, like other persons of common sense and ordinary experience. Suitors will occasionally be fleeced by dishonest lawyers, but where one such case occurs, nineteen lawyers will be cheated by dishonest clients. There is a great deal too much of this sentimental nonsense in regard to the members of the learned professions. A physician must not advertise; a clergyman must not care for the amount of his salary; a lawyer must not have any pecuniary interest in the result of his client's cause. We had supposed that the sturdy sense of our profession, in this state at least, had weeded out this last idea. We knew it was legally extinct; we hoped it was morally defunct. But when a high judge stigmatizes the lawyers who accept retainers in the way to which we refer, as "speculators," and implies that they are "intolerable," we confess we fear the old folly is not quite dead. It is these ideas that lead to such tragedies as we have recorded in the case of the London barrister. They are "too good for human nature's daily food," at least for that portion of our profession who are still at the bar, and who expect from those of their number whom they elevate to the bench, and there maintain on comfortable salaries, the liberty to gain bread and not stones, fish and not serpents.

—HON. ROBERT A. HILL, Federal District Judge of Mississippi, has written a letter to one of the newspapers of that state, describing a trial of a negro boy, for an assault with intent to commit rape *on* a white girl, and congratulating the judge who tried the case, Hon. Orlando Davis, of the state circuit court, on the impartial manner in which the trial was conducted, and on the fact that a public example was made, such as would allay the public excitement incident to the commission of such an offence, and prevent public justice being vindicated by a mob.

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Spies and Informers.

We have read with much interest a pamphlet entitled "Remarks made before the Committee of Ways and Means, in Advocacy of Changes in the Customs-revenue Laws, proposed by the merchants of New York, Boston, Philadelphia and Baltimore (reprinted from the 'minutes,' with additions), by Cephas Brainerd, of New York." That portion of this argument which will have chief interest to the reflective reader, is where Mr. Brainerd proceeds to show that the best writers who have adverted to the subject, have condemned both the justice and the expediency of employing informers in the enforcement of penal laws. We cannot refrain from quoting the language in which he presents the views of several eminent writers:

"Lord Auckland declared himself most emphatically against it in his remarkable treatise. He says (Eden's Principles of Penal Law, 2d Ed., p. 322):

'The first step towards the punishment of offenders is their formal accusation. In all governments which have any mixture of political freedom, this accusation should, as in England, be public. Private informers are the proper instruments only of despotic governments. Every idea of liberty and security is lost, where the ends of justice are suffered to be sought by such means.'

"So, too, Bentham, who gives this reason for his condemnation (On Rewards, p. 161):

The danger lies in the temptation given to such officers to increase their emoluments by increasing the difficulties of those who need their services. The abuse is easily introduced.

"So Colquhoun, writing, out of the fullness of his wide experience as a London magistrate, says:

Many excellent rules are established by the legislature and the magistrates; but while it is seldom the interest of the depraved or dishonest part of these two classes to adhere to such rules, by what means is the execution to be insured, so as to operate as a complete protection to the public? Surely not by the operation of the law through the medium of common informers. Since, independent of the invidious nature of the office, experience has shown that the public good rarely enters into the considerations of persons of this description, who look merely to their own emolument, frequently holding up the penalties as a rod by which money is privately extorted, and the parties laid under contribution for the purpose of allowing them to continue in the practice of these abuses, which the engine used for this nefarious purpose was meant to prevent. Treatise on the Police of London, 1796, p. 191.

"And again (id., pp. 203–204) the same eminent author, after giving a schedule of the rewards offered for the detection and conviction of offenders, says:

These rewards apply to ten different offences, and ought, no doubt, to be a considerable spur to officers to do their duty; but it seems as if there is some radical error in the system. Since, however atrocious most of these offences are which have been selected at different periods by the legislature as objects of reward, it is extremely doubtful whether this measure has not, in some degree, tended to the increase of a multitude of smaller crimes which are pregnant with the greatest mischiefs to society. It is by deterring men from the commission of *smaller* crimes (says the Marquis Beccaria) that greater ones are prevented. * * * * * * * *

While rewards are limited to higher offences, and conviction is the indispensable condition upon which they are granted, it is much to be feared that lesser crimes are overlooked, and the public subjected, in many instances, to the intermediate depredations of a rogue, from his first starting upon the town until he shall be worth £40.

"Colquhoun, in the latest (6th) edition of his famous book, retains the condemnatory language just quoted, and adds the following suggestion as a substitute for the system paralleled by that we here assail (The Police of the Metropolis, p. 393):

By altering the system entirely, and leaving it in the hands of the judge who tries the offence, to determine what reward shall be allowed, with a power to grant or withold, or limit or increase the same according to circumstances connected with the trouble and risk of the parties, whether there is a conviction or not, a fairer measure of recompense would be dealt out, the public money would be more beneficially distributed, so as to excite general activity in checking every species of criminality.

"Beccaria expresses his conclusion as a philosopher, and his indignation as a man, in regard to the system of informers and rewards, in principle like that we now seek to overthrow, in these burning but truthful words (Essay on Crimes, Ch. 36; Ed. of 1767, p. 151):

At one time treachery is punished by the laws, at another encouraged. With one hand the legislator strengthens the ties of kindred and friendship, and with the other, rewards the violation of both. Always in contradiction with himself, now he invites the suspecting minds of men to mutual confidence, and now he plants distrust in every heart. To prevent one crime he gives birth to a thousand. Such are the expedients of weak nations, whose laws are like temporary repairs to a tottering fabric.

"Frederick Hill is the great modern English authority on this branch of penal science. He states the results of the best experience and thought to a very recent date, in the following extract (Vide, Crime: Its Amount, Causes and Remedies, 1853, p. 134–135):

But not only is the police in some places almost a nullity, and in others insufficient in number and too much separated in different parts, but the mode of remuneration, though improved, is still faulty, awaiting no doubt a further progress in public opinion. It is still too much directed to detection, and too little to prevention, thus reserving high rewards till great offences have been committed, instead of making all rewards simply dependent on the small amount of crime. So long as the police receive large premiums for the apprehension of great criminals, it is continually their interest (although many of them are no doubt too honorable to be so swayed) that great criminals should exist; their motive for the extinction of such offenders being scarcely greater than that of a poacher for the extinction of hares and pheasants, and great as is this objection to the practice of offering large rewards, it is not the greatest: for the terrible cases of "blood money" that have sometimes come to light, show that official villains have been found, under the stimulus of these rewards, to get up evidence against persons who were wholly innocent.

By way of climax to the effect produced by these quotations, Mr. Brainerd eloquently adds: "Was Dean Swift wrong when he said, 'informers are a detestable race of people'? Did Wilberforce—statesman as he was—surrender his temperate, gentle and charitable nature when he said that the practice of employing spies and informers 'was as injurious to the best interests of the country and the constitution as it was repugnant to every principle of morality and religion': Had the equable and humane spirit which characterized the whole life of Sir Samuel Romilly for once abandoned this unrivaled legislator when, while declining to say 'whether there may or may not possibly exist cases in which private treachery may be encouraged for the sake of discovering public guilt,' he desired to diminish the employment of spies and informers, for the purpose of removing 'a plague from the bosoms of the peaceful and well disposed inhabitants,' * * * 'and as an agreeable service to the God of truth'? Vide Romilly's Speeches, vol 2. pp. 307–309. Are the merchants who appear here, making a request, which is meekness itself when compared with these expressions, fitly characterized, as they have been by the special agent, as 'infernal thieves, and their representatives'? I think not."

To our mind the vital objection to the system of informers may be stated in a few words: The truth never injures an honest man. It is his shield—his *tutissimum refugium*. The more it is told concerning him, the brighter he shines in the estimation of honest men. It is only dishonest men who deal in falsehood and love darkness and mystery. If, therefore, informers told only the truth, the cry against them would come from the dishonest alone; and it is not to shield the dishonest that penal laws are instituted. But, unfortunately, informers do not always tell the truth; but on the other hand,

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there is too much reason to believe that, under the stimulus of the prospective rewards which constitute their incentive to exertion, they habitually pervert the truth, and act corruptly and oppressively. In illustrating his position, Mr. Brainerd has, as above shown, quoted from several writers familiar with the workings of the system in the British Empire. We are tempted to illustrate ours by another quotation, showing how the system worked in that great fabric of civilization on which have been reared the present states of Europe. It is thus stated by Gibbon, in describing the condition of the Roman Empire at the time of Constantine:

Two or three hundred *agents* or messengers were employed under the jurisdiction of the master of the offices, to announce the names of the annual consuls, and the edicts or victories of the emperors. They insensibly assumed the license of reporting whatever they could observe of the conduct either of magistrates or of private citizens; and were soon considered as the eyes of the monarch and the scourge of the people. Under the warm influence of a feeble reign, they multiplied to the incredible number of ten thousand, disdained the mild though frequent admonitions of the laws, and exercised in the profitable management of the posts, a rapacious and insolent oppression. These official spies, who regularly corresponded with the palace, were encouraged, by favor and reward, anxiously to watch the progress of every treasonable design, from the faint and latent symptoms of a disaffection, to the actual preparation of an open revolt. Their careless and criminal violation of truth and justice was covered by the consecrated mask of zeal; and they might securely aim their poisoned arrows at the breast, either of the guilty or the innocent, who had provoked their resentment, or refused to purchase their silence. A faithful subject of Syria, perhaps, or of Britain, was exposed to the danger, or at least to the dread, of being dragged in chains to the court of Milan or of Constantinople, to defend his life and fortune against the malicious charges of these privileged informers. The ordinary administration was conducted by those methods which extreme necessity can alone palliate; and the defects of evidence were diligently supplied by the use of torture.

Bankrupt Act—Number and Value of Creditors.

Most of the questions which, so far, appear to have arisen under the amendments of June 22, 1874, to the bankrupt act, relate to the number of petitioning creditors, and the proportion of the total indebtedness of the alleged bankrupt, represented by them, in compulsory cases. Most of these decisions are decisions of district judges, and are hence without authority outside the district in which they were rendered; but, nevertheless, by collecting and presenting, as we shall endeavor to do in this note, a brief synopsis of them, some little assistance may be rendered toward making the administration of the bankrupt law "uniform" "throughout the United States."

Section 39 of the bankrupt act, as amended by § 12 of the act of June 22, 1874, contains the following language: "And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court, forthwith, a full list of his creditors, with their places of residence, and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs."

It has been held that this provision applies to all cases commenced since December 1, 1873, in which at the time of the passage of this amendment (June 22, 1874), the petitions for adjudication remained to be acted upon, but it does not disturb judgments rendered or adjudications in force prior to the date of its taking effect. *Re* Obear and *Re* Thomas, 1 Central Law Journal, 362, Dillon, J.; s. c., 10 N. B. R. 153; *Re* Angell, 1 Central Law Journal, 363, Longyear, J.; s. c., 6 Chicago Legal News, 341; 10, N. B. R., 73; *Re* Raffauf, 6 Chicago Legal News, 341, Hopkins J.; s. c., 10 N. B. R. 69; s. c., *sub nom.* Raffaux, 1 Central Law Journal, 364, note; *Re* Rosenthal, 1 Central Law Journal, 364, Krekel, J.; s. c., 6 Chicago Legal News, 342; 10 N. B. R., 191; *Re* Pickering, 10 N. B. R. 208, Withey, J.; Barnett v. Hightower, 10 N. B. R 157, Hill, J.; *Re* Comstock, 6 Chicago Legal News, 413, Deady, J. Some of these cases go so far as to assert that it would have been beyond the power of congress to pass an act which should have the effect to disturb adjudications already made. *Re* Comstock, *supra*; *Re* Angell, *supra*; *Re* Raffauf, *supra*; *Re* Pickering, *supra*.

Before any of these decisions had been published, it was held by Mr. District Judge Blodgett, in *Re* Scammon, that in cases pending at the time when the act of 1874 took effect, the petitions must be amended so as to show that creditors of the requisite number and value have joined therein; but the question of the effect of the act upon prior adjudications was not considered. 1 Central Law Journal, 328; s. c., 10 N. B. R. 166. The same ruling was made by Mr. District Judge Blatchford in *Re* Scull, 1 Central Law Journal, 399; s. c., 10 Albany Law Journal, 214; 10 N. B. R. 165. But in this last case there had been no adjudication at the time of the passage of the act of 1874, although the petition had been filed before that time. In *Re* Joliet Iron and Steel Company, 10 N. B. R. 60; s. c., *sub nom. Re* Scammon, 6 Chicago Legal News, 328, Mr. District Judge Blodgett rules that in all petitions pending in involutary bankruptcy, commenced since December 1, 1873, where no adjudication had been had, the petitioner must file a sworn amendment to his petition alleging that the petitioners represent one-fourth in number and one-third in amount of the creditors of the bankrupt. Both in this case and in *Re* Scammon, the leaned judge holds that it is unnecessary that this allegation should be positive; it may be upon information and belief. In *Re* Hill, 10 N. B. R. 133, a petition in involuntary bankruptcy was filed since December 1, 1873, and on March 18, 1874, a memorandum was made by Blatchford, J., on the papers signed with his initials, "let an order, for adjudication be entered," but no action was taken by counsel on either side to have the order entered until after the 22d of June, 1874. *Held*, that an adjudication

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had not been made, and that such an order could not be entered unless the petition was made to conform to the requirements of the new law. A rule established by Mr. District Judge Hill, after fully considering this question in Barnett v. Hightower, *supra*, provides that all involuntary cases commenced before December 1, 1873, and not adjudicated on the 22d of June, 1874, may proceed as though the petition were amended so as to conform to the provisions of the above section, *unless objection is made by the defendant.* 10 N. B. R. 164; s. c., 1 Central Law Journal, 384. A contrary view was taken by Mr. District Judge Longyear, in *Re* Buchanan, 1 Central Law Journal, 456. And in *Re* Keeler, 10 N. B. R. 419, it was held by Mr. District Judge Blatchford, that the absence of the proper allegation as to the number and amount of petitioning creditors is not supplied by an admission in writing that the requisite number and amount have joined in the petition. Such an admission to be noticed by the court must be in writing; must be signed by the debtor, and his signature must be duly authenticated, and it must be verified by oath. Even then the court must be satisfied that the admission was made in good faith before it can adjudge that the requisite number and amount have petitioned. *Ibid.*

In *Re* Burch, 10 N. B. R. 150, it was ruled by Mr. District Judge Withey, that a *prima facie* case must be made by the petition as to the number and value of creditors, this being a material and substantial fact, before the court can acquire jurisdiction to grant an order to show cause. Therefore, when a petition was filed on the 25th day of June, 1874, three days after the amendatory act of 1874 took effect, and the petitioning creditor was at the time ignorant of the passage thereof, this ignorance did not excuse his failure to comply with the above requirement, and his petition was held not amendable, but was dismissed. But see *Re* Simmons, 1 Central Law Journal, 440, Longyear, J.; s. c., 10 N. B. R. 253; and *Re* Williams and McPheeters, 7 Chicago Legal New, 49, Woodruff, Circuit J.

If the debtor denies that the requisite number and value of creditors have joined in the petition, his denial must be verified. *Re* Stienman, 6 Chicago Legal News, 338, Blodgett, J.; *Re* Hymes, 10 N. B. R. 433, Blatchford, J. The list of his creditors filed by the debtor should be verified in like manner, by the oath of the debtor. *Ibid.* In this case, by a comparison of the list of creditors filed by the debtor, with the list of petitioning creditors, it appeared that the provable debts due the creditors who had petitioned, did not equal one-third of the aggregate provable debts due to such of the creditors of the debtor as held provable debts exceeding the sum of two hundred and fifty dollars, and a reference was made to the clerk to determine the issue. *Ibid.* The affirmative of such an issue is on the petitioning creditors. *Ibid.* The debtor must attend at the hearing before the clerk in such a case, and submit to an examination as to all matters pertinent to the issue. *Ibid.* The clerk must, in such a case, send written or printed notices by mail, postage pre-paid, to all of the creditors named in the list, at the addresses given in the list, of the time and place of reference, and its object, at least ten days before the hearing; such notice to contain a copy of the list, with names, places of residence and amounts. *Ibid.*

Where petitions were filed against an alleged debtor since December 1, 1873, and the debtor had made a denial, and had demanded a jury trial, and had since filed a demurrer, he was required to file a list of his creditors and the amount of their claims. Warren Savings Bank v. Palmer, 6 Chicago Legal News, 366, McCandless, J.; s. c., 10 N. B. R. 239. But in *Re* Scammon, 7 Chicago Legal News, 42, Mr. District Judge Blodgett holds, that if it appears that the requisite number and amount of creditors have not joined in the petition, the court will dismiss upon motion without requiring the debtor to file a schedule. "It would be intolerable," said the learned judge, "if any one or two creditors, upon either a real or pretended claim, could by a single allegation, in the words of the amendment, compel a business man to spread upon the records a statement of his liabilities. Such a fishing petition cannot be entertained under the act as amended." We cannot altogether concur in this sentiment. We cannot conceive what principle of public policy is subserved by shielding an insolvent debtor in concealing from those who have given him credit, and confided in him the true state of his liabilities. From the fact that one man has asked and received credit of another, the law ought to imply a promise on his part to render to his creditor a fair, open and truthful account of his condition when required, and nothing less than this can satisfy that honesty and good faith which should always subsist between debtor and creditor. Of course, if such a petition is a mere "fishing" petition, designed to trifle with the time and process of the court, it ought to be rejected, and its authors punished for a contempt. But, nevertheless, the truth wrongs no man. None but the dishonest man of business—he who has dealt fraudulently or designs to deal fraudulently with his creditors—can be interested in concealing from them the true state of his liabilities. The law—or at least equity—loves the truth, courts the light, and despises concealment as the companion of fraud; and while a court of justice should not permit itself to be trifled with, it can have no interest in keeping creditors in the dark as to the condition of their insolvent debtor.

In the same case it was also held that the court would hear affidavits and evidence offered by either party, and would order the person verifying the petition to be examined before the register.

After the requisite number of creditors have joined in the petition, a portion of them will not be permitted to withdraw so as to break the quorum; but it seems that the proceedings may be dismissed, if all join in the application. *Re* Heffron, 6 Chicago Legal News, 358; s. c., 10 N. B. R. 213.

The same section of the bankrupt act as amended, provides that "the petition of creditors under this section may be sufficiently verified by the oath of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath, or oaths of the attorney or attorneys, agent or agents, of such signers."

Under this provision it has been held, that where there are less than five signers to the petition, and it is verified by an *agent*, it is not necessary for such agent to state the *residence* of his principals as the foundation of his right to act in the premises. *Re* Simmons, 1 Central Law Journal, 440, Longyear, J.; s. c., 10 N. B. R. 253. Where several petitioners join in the petition in separate and distinct rights, each stands as a separate and distinct party to the litigation, so far as the right in which he prosecutes is concerned. It follows that a

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verification by or on behalf of each petitioner is required. *Ibid.* When a petition is filed, the court so far acquire jurisdiction, notwithstanding the insufficincy of the verification, that it may allow it to be amended. *Ibid.*

The same section as amended also contains the following language: "And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars, shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars, fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

An interesting exposition of this provision by Mr. District Judge Blatchford, will be found in *Re* Hymes, 10 N. B. R. 433. The views of the learned judge may be condensed as follows: In determining whether the requisite proportion of petitioning creditors have joined in the petition, such creditors only should be reckoned whose provable debts exceed two hundred and fifty dollars. And if the petitioning creditors whose provable debts exceed the sum aforesaid, constitute one-fourth in number of the creditors holding provable debts exceeding said sum, the requirment as to the number of petitioning creditors is satisfied. So where the petition is filed on behalf of creditors holding provable debts exceeding the sum of two hundred and fifty dollars, in order to ascertain whether the amount of the provable debts held by them is equal to one-third in amount, only the provable debts of creditors which exceed two hundred and fifty dollars must be reckoned. And the requirement of the statute is satisfied if the provable debts due to such petitioning creditors equals one-third of the provable debts due to creditors holding provable debts exceeding the sum of two hundred and fifty dollars. And it is not necessary that the amount of the provable debts of the petitioning creditors should be equal to one third of *all* the provable debts. The true construction of the above proviso, that "if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding said sum fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purpose aforesaid," requires that when creditors having debts of a less amount than two hundred and fifty dollars are reckoned at all, they must be reckoned for all purposes, and in such case the petitioners must constitute one-fourth in number of *all* creditors, and the amount of their provable debts must be equal to one-third of *all* the provable debts.

In *Re* Frost, 7 Chicago Legal News, 42, it is ruled by Mr. District Judge Blodgett, that only those creditors are to be counted whose debts are unconditionally provable. Those claiming liens or holding security cannot be reckoned.

—A SUIT has recently been tried in the United States District Court for the Eastern District of Philadelphia, before Mr. Circuit Judge McKennan, in which a check for $100 had been raised by the drawee to $2,100, and paid by the bank; the action being by the drawer of the check to recover of the bank the $2,000 improperly paid. Judge McKennan is reported to have charged the jury that if they believed, from the testimony and from an inspection of the check, that there was nothing unusual in its appearance, nothing which would have been sufficient to put a careful person upon his guard, then they should find for the defendants; if otherwise, their verdict should be for the plaintiffs. The paying tellers of several banks having testified that there was nothing in the appearance of the check, as raised, to excite suspicion, the jury rendered a verdict for the bank.

Federal Court Jurisdiction—Union Pacific Railroad Company.

UNITED STATES, ON RELATION OF HALL *et al.* v. UNION PACIFIC RAILROAD COMPANY.

[S. C., *ante*, 288.]

United States Circuit Court, District of Iowa, October Term, 1874.

Before Hon: JOHN F. DILLON, Circuit Judge,
and " JOHN LOVE, District Judge.

1. **Union Pacific Railroad—Jurisdiction—Mandamus—Service of Process.**—The Circuit Court of the United States for the District of Iowa, under the acts of Congress relating to the Union Pacific Railroad Company, has jurisdiction in *mandamus* to compel that company to operate its road as required by law, if any part of the road is in the district of Iowa; and under the act of June 20, 1874, service of process may be made upon the president or general superintendent of the company, found in the district of Iowa.

The alternative writ of mandamus awarded at the last term was served upon the president and general superintendent of the company at Council Bluffs, in this district.

The marshal's return on alternative writ of mandamus is as follows:

"This writ came into my hands on the 10th day of June, A. D., 1874, and on the same day I served the same on Sidney Dillon, president of the within-named defendant, the Union Pacific Railroad Company, at the transfer grounds of said company, in the city of Council Bluffs, county of Pottawattamie, Iowa, by delivering to him a true copy thereof, and offering to read to him the within writ, which he then and there waived, and on the same day I served the within writ on S. H. H. Clark, general superintendent of the within named defendant, the Union Pacific Railroad Company, by delivering to him a true copy thereof, and offering to read the original, which he then and there waived; all done at the transfer grounds of said Union Pacific Railroad Company, in the city of Council Bluffs, Pottawattamie county, Iowa."

The company made a special appearance, and excepted to the sufficiency of this service, and moved to quash the same.

In support of the motion, the following affidavit was filed:

A. J. Poppleton, being duly sworn, says, that for several years, last past he has been, and now is, the attorney of the Union Pacific Railroad Company, defendant in this action. That said corporation is created by, and organized under, a law of the United States; that, by a certain joint resolution of Congress, passed and approved April 10th, 1869, the stockholders of said company were authorized to establish their general office at such place as they might select at a meeting to be held in the city of Boston, April 22, 1869; that at such meeting said city of Boston was by said stockholders selected, and its general offices established in said city, where it has ever since remained. That in said city, in the state of Massachusetts, all the meetings of its board of directors are held, and its books and records kept, and that all its officers are residents of said city, except its president, who resides in the state of New York; that it has no other office or place where its legislative corporate power is exercised; that its managing office, where the power and authority of its managing agents, to-wit: Superintendent, auditor, cashier, general freight and ticket agents is exercised, is wielded, is in the city of Omaha and state of Nebraska, and it has no general managing office elsewhere; that the alleged service of the writ in this action was made on Sidney Dillon, president of said company, while casually traveling through the district of Iowa, he being at the same time a resident of the city and state of New York, and that defendant has and owns no railroad situated in the state of Iowa, except such portion of the iron track laid over and across its Missouri River Bridge and the approaches thereto as are East of the boundary line, between the states of Iowa and Nebraska.

That said S. H. H. Clark, general superintendent, upon whom

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said alleged service was also made, resides, and has his office at Omaha, Nebraska, and that neither the said Dillon, president, nor Clark, superintendent, neither reside or have an office in the state of Iowa.

A. J. POPPLETON.

Subscribed and sown to by A. J. Poppleton, before me, October 13th, 1874. GEORGE B. CORKWILL, Clerk.

John N. Rogers, for relators; *J. M. Woolworth*, and *A. J. Poppleton*, for R. R. Co.

DILLON, Circuit Judge, on overruling these exceptions, in orally delivering the judgment of the court, in substance said:

This is a proceeding instituted by certain persons residing in Council Bluffs, in this state, who claim that they are aggrieved by reason of an alleged failure of the Union Pacific Railroad Company to operate its road according to law.

The 15th section of the act of 1864, which was an act amending the original charter of this company—giving it additional subsidies and additional grants of land—by means of which in reality the road was subsequently constructed, provided that it should be the duty of the company to operate its road, so far as the government and the public were cencerned, as one continuous line.

In this case it is alleged that the company refuses to operate their road as a continuous line; that in fact they operate it as one continuous line as far only as the city of Omaha, and there break its continuity by the agency of a distinct and separate transfer from that point to the Iowa side. This is the complaint which the relators make, and which they allege to be in violation of the terms of the charter of the company and its duty to the public. 2 Dillon Cir. Court Rep., 527.

In 1873 Congress passed an act in these words: "The proper Circuit Court of the United States shall have jurisdiction to hear and determine all cases of mandamus to compel the said Union Pacific Railroad Company to operate its road as required by law." This was an act which was indispensable in order to give the federal court original jurisdiction in mandamus, and was passed for that purpose. 2 Dillon, 527. This proceeding heretofore came before us on two questions. The one was, "Whether private persons could move for the writ; that is, could institute these proceedings to compel the road to perform its public duty, or whether the proceeding must not be instituted by the attorney-general." We have decided at the last term, that the writ was well moved; that if private persons could show that they were interested in the operation of the road, they had a right to come into court under this act and call the company to account for failing to perform its public duty, to their injury, and thereupon award the alternative writ.

On the other question, whether the Circuit Court of the District of Iowa was the "*proper* circuit court" before which to bring this proceeding, we gave no opinion. The act of June, 1874, makes an addition to the 15th section of the act of July, 1864, and provides that there shall be added to it the following words: "Any officer or agent of the company who is authorized to construct the aforesaid road, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph lines under his control or which he is engaged in operating, for purposes of communication, travel and transportation, so far as the public and the government are concerned, as one continuous line, and without discrimination of any kind, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined and imprisoned.

This act makes it the personal duty of the officers of the road to operate it as one continuous line. Now, if it can be shown that the president of the road is not operating it as a continuous line, within the meaning of this act of Congress, then he is guilty and may be punished, and we do not think for the violation of the act in this respect he can be protected by any resolution of the board of directors. The law says: "You shall operate this road on one continuous line," and enjoins this duty upon the officers of the road. In the next sentence the phraseology changes: In case of failure or refusal of the Union Pacific railroad, or either of said branches to comply with the requirements of this act, and the act to which this is amendatory, an action against them may be brought in the District or Circuit Court of the United States, in the territory, district or circuit in which the road or any portion of it may be situated, for damages on account of such failure or refusal. The action must be brought in the court of some district in which some portion of the road of the defendants is situated.

Now, in this proceeding, it is alleged that a portion of the road which this company refuses to operate as one continuous line, is situated within the geographical limits of the state of Iowa. On this motion we must take this to be true. The act of 1874 provides, that if process in any suit is served upon any agent of the defendant found within the territory, district, or circuit in which such suit may be brought, such service shall be held by the court to be good and sufficient. In this case the alternative writ of mandamus was served upon the president and the general superinpendent of the company at Council Bluffs, in this state, and the question is, whether this is a sufficient service to give this court jurisdiction, assuming that some portion of the road of the defendant is in this district, and assuming that the road is not operated as required by law. It is of course to be regretted that the phraseology of the act is not so clear as to admit of no controversy; and yet, when we consider that it is our duty to carry out the intention of Congress, so far as we can learn it, it does seem to us that it admits of very little doubt that this is, upon the assumptions above mentioned, a proper circuit court.

The writ of mandamus may go to the corporation, to the corporate body and command it to perform its duty (granting that any part of the road is in this district), and if this writ, thus commanding this duty, is served upon the chief officer of the corporation, its president, or upon any officer who may be indicted and criminally punished, if he fails to do his duty in this respect, then it seems to us the court has jurisdiction over the company and its officers, by mandamus, to compel the performance of this duty. This writ may, perhaps, run also under the act of 1874, to the president of the company:—"You are hereby commanded to operate the road as one continuous line."

Under this act, this is a duty which he can and should perform. He can be criminally punished if he does not perform it, and it is no protection to him that the board of directors has ordered him to do something else. The writ of mandamus may be served upon him, and he is obliged to respond to it, whether it be regarded as a proceeding against him as an officer, or whether it be regarded as against the corporation.

The argument is this: The act of 1874 enjoins the duty to operate the road as one continuous line, upon the officers engaged in operating the road; if they refuse to do so they are made indictable.

The duty to be performed by them is one which rests upon the officers as well as the corporation; otherwise Congress would not have made it criminal for the officers to refuse to discharge it. It is their duty to obey the law; if they fail they may be proceeded against criminally, and the public duty may be enforced by mandamus, and this writ may be directed to the corporation and served as required by the act of June 20, 1874, or perhaps to the president or officers who are made subject to indictment under that act, and served upon them if found within the district. Whether any portion of the road of the company is within this district, and whether the transfer between Omaha and Council Bluffs, by means of the "Omaha Bridge Transfer," which is the subject of the relators' complaint, is in violation of the duty of the company or its officers, as enjoined by law, are questions which are not passed upon on the present motion.

And again, considering that the original charter of the company, as well as the act of March 3, 1873, provided no mode of service,

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and that the act of 1874 was designed to enforce the duty enjoined by the 15th section of the act of 1864, all these acts are to be construed as *in pari materia*, and thus regarded, any proceeding or suit to enforce the duty enjoined by the 15th section, may be instituted in the proper court, and the proper court, as prescribed by the act of 1874, is one in the district in which some part of the company's road is situated, and in any such proceeding or suit the process may be served upon the company's agents found in the district; and in this proceeding by mandamus, our judgment is, that service of the writ upon the president or any officer whose duty it is to see that the road is operated as required by law, is sufficient. Exceptions to service of alternative writ overruled.

LOVE, J., Concurred.

Negligence by Carriers—Loss of Goods by Flood.

VAUGHN v. NASHVILLE AND CHATTANOOGA RAILROAD COMPANY.

Supreme Court of Tennessee, Knoxville, September 26, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" THOS. J. FREEMAN,
" JOHN L. T. SNEED,

In an action against a railway company for damages for the non-delivery of goods entrusted to it as a carrier, where the defence is that the damage occurred through an extraordinary and unprecedented flood, it is competent to prove, that at the time and place of the flood, a portion of the track of *another* railway company near by, was unoccupied and not overflowed, and that the defendants' cars could have been transferred to said track, but that the use of said track was not tendered to the defendants by the company owning it, nor was its use requested by the defendants. If the transfer to the other track was fairly within their power in the use of such diligence, consistent with the surrounding circumstances and duties, and the same could have been obtained without trespassing on the rights of the other company, but by their consent, then it would have been the duty of the defendants to have so moved the car in which the goods in question were, and thus saved them from damage. And whether this could have been done was a question of fact for the jury.

FREEMAN, J., delivered the opinion of the court.

The plaintiff alleges the delivery of nineteen hundred yards of linen to the defendant, as common carrier, to be safely carried from Chattanooga, Tennessee, to Louisville, Ky., and then delivered by the defendant to L. G. Henry & Co., on account of plaintiff, and avers a failure so to deliver, and damages as a consequence to the amount of two thousand dollars. The defendant pleaded not guilty, and gave notice that on the trial of the cause it would insist in defence, that the grievance complained of resulted from an extraordinary rise in the Tennessee river.

The first question presented and urged by the defendants for reversal of the judgment, is the admission of testimony of one Ragsdale, the agent of the East T. & Georgia R. R. Company, to the effect that cars could be transferred from defendant's road to aid East Tennessee & Georgia road, by means of the track and switches, and that there was a portion of the track of said last road, that was not overflowed, near by, within the corporation of Chattanooga. He proved further, that a portion of this high track was not occupied at the time of the unprecedented flood which caused the damage complained of, but that said track was not tendered to the defendant, nor was its use requested by them. It is insisted this was within the principle of the case of David, decided at the September term, 1872, of this court. In that case it was held not error to exclude testimony showing that prudent business men in Chattanooga, upon the same height of ground as the railroad, lost goods by the flood. In other words, that the fact that other men lost goods, had no proper tendency to prove, or disprove, the question involved in the case, as to whether the defendants "had used the precaution and vigilance which the law imposed on them under the circumstances." This ruling was unquestionably correct, but we do not think the questions presented are the same. In this case the effort was not to show that others lost or saved their goods in Chattanooga by the flood, but to show that the defendants, by the precaution of moving the threatened car on to another road, conveniently situated, might have saved the goods from damage by the flood. The question is whether, in this view of the case, the evidence was admissible, and whether, if such was the fact, it was the duty of the company to so remove the car. It is insisted by defendant, that no such duty was imposed; that this would have been to require an extraordinary amount of diligence on the part of the railroad, not imposed by law.

The case of Empire Transportation Co. v. Wallace, 68 Penn. St. 302, is cited in support of this view of the case. The rule is there correctly laid down by Judge Sharswood, in reference to the duty of the carrier to transport the goods by the usual route, and within a reasonable time, when no time is specified in the contract. He adds: "He must use reasonable expedition, but is not bound to extraordinary exertions, or to incur expenses in order to surmount obstacles not caused by his own default, but by the weather or other act of Providence. Redf. on Carriers, 210, 220. This was an action for failure to carry oil shipped from Pennsylvania to Boston, by way of Philadelphia. The usual route was by water from the latter place, and defendants had the option to ship by rail or water; water communication was prevented, for the time, by ice, and it was insisted that defendants should have incurred, what at the time would have been an extraordinary expense, and shipped the oil by rail. The court held, under the above rule, that the company was not bound to ship by rail, as the court below had ruled. This ruling was correct, but that case is not the same as the one now under consideration. The question here is, whether, when the article shipped and agreed to be carried was suddenly exposed to an extraordinary peril, it was not reasonable diligence to remove it from that peril by transferring it to the convenient road above overflow, not for the purpose of transporting it to its destination by that route, but for its preservation from damage or destruction while in its possession We think the sound rule is, that if by the use of such active diligence, and of such means as would be suggested to, and within the knowledge and capacity of well informed and competent business men in such position, the article could have been saved, it was their duty to have used such means. If the transfer to the other track was fairly within their power, in the use of such diligence, consistent with the surrounding circumstances and duties, and the same could have been obtained without trespassing on the rights of the other company, but by their consent, then it would have been the duty of defendants to have so moved the car, and thus saved it from damage. This would have been a question of fact for the jury, under the instructions of the court. In this view of the case, we cannot say the facts shown were not competent to go to the jury on the question, whether the defendant had used reasonable efforts, under the circumstances, to preserve the goods from injury. This must be so, unless we hold, that the defendant could not be required to remove the goods from their own track or cars temporarily, but might keep them there, although threatened with destruction, when such removal could, by reasonable efforts and energy, have been effected, and this simply because, by their contract, they were only bound to transport, by the usual route, to the place of destination. We do not think such a rule can be fairly sustained, either on sound principle or authority. See Redfield on Carriers, Sec. 237, 304, 358.

In reference to several points of objection made in argument, and authorities referred to, we need but say, that any delay in the transportation of the goods, would clearly, on principle and authority, be excused and not create liability on the part of the company, when such delay was the result of providential causes, such as the freezing of the river, in the case from Pennsylvania, or loss of the company's bridges, in case referred to by Mr. Redfield. Sec. 304, 305. So the freshet in this case, and the falling of a rock on the road from Lookout Mountain, would have excused any delay occasioned

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by these causes. But then it was the duty of the company, as soon as might be after removal of the obstructions, to proceed in performance of their contract. This action is brought for failure to carry safely and deliver at all, as by the terms of their receipt they were bound to do. See Hadley v. Clarke, 8 Term Reports, 259; cited, Redfield on Carriers, Note 1, to p. 221. The temporary obstruction does not avoid the contract—only suspends the execution of it. Angell on Carriers, § 289.

Without examining in detail all the questions suggested in argument, after a critical examination of the charge of his honor, we think it laid down the rules of law, applicable to the questions involved, correctly. As to whether the evidence sustains the verdict, we have but to say, that the question was fairly submitted to the jury on the facts, and we see no cause to disturb it.

AFFIRM THE JUDGMENT.

Remedy in State Court against National Bank to Recover Penalty for taking Usurious Interest.

E. STEADMAN *et al.* v. E. F. REDFIELD & CO. AND THE FIRST NATIONAL BANK OF CHATTANOOGA.

Supreme Court of Tennessee, Knoxville, September Term, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK, } Judges.
" JOHN L. T. SNEED,
" THOMAS J. FREEMAN,

The act of Congress creating a system of national banks, fixes the rate of interest to be charged by the banks, and prescribes a penalty and a remedy for its recovery; and the Tennessee code, section 1995, provides, that where usury has been charged, a creditor of the party paying it may recover it back. The complainant alleges that the defendant—the bank—charged its co-defendant usury, and sought to recover under the code, as a creditor of the party paying the usury, the amount usuriously received. The court hold that the penalty and remedy prescribed by the act of Congress is not the exclusive remedy against a national bank in such case, and that a creditor is not thereby precluded from sueing the bank for usury received of a debtor, under the state laws.

MCFARLAND, J., delivered the opinion of the court.

This bill was filed under section 1955 of our code—the complainants alleging that they are judgment creditors of the defendants, E. F. Redfield & Co., and that in transaction with the First National Bank of Chattanooga, the bank had received from Redfield & Co. an amount of usury for the loan of money sufficient to pay complainants' judgments, and complainants seek by this bill to recover the same from the bank. Defence was first made by demurrer, which was overruled, and then by plea, which was held sufficient, and the bill dismissed. The defence is this: that the bank was organized under the acts of Congress establishing the system of national banks; that the act fixes the rate of interest to be charged by the bank to be the rate fixed by the laws of the state where the bank is situated, and the act of Congress further prescribes certain penalties and forfeitures for taking a greater rate of interest than is thus allowed to be charged, and among these penalties the right of a creditor of the borrower to sue and recover back the usury is not included. And it is maintained that this penalty and remedy is exclusive of all others, and that none other can be allowed.

The penalty prescribed by the act of Congress is double the amount of interest paid, to be recovered back by the person paying the same, or his legal representative, if sued for in two years.

The remedy given by our code, sec. 1955, is to recover back the *usury* paid, and this remedy is also given to a judgment creditor of the party paying it. The principle contended for, that when a penalty is prescribed by statute, and the remedy for its recovery is also given, that the penalty cannot be recovered in any other mode, is no doubt correct; and from this we may conclude, that the penalty prescribed in the act of Congress cannot be recovered by a creditor of the party paying the usury, as the remedy prescribed by the the act is only given to the party paying, or his legal representative.

It will be observed, however, that this bill does not seek to recover this penalty. The penalty fixed by the act of Congress is double the amount of the entire *interest* paid; this is in the nature of a fine, or punishment for the violation of the law, for it allows the party to recover more than he would otherwise be entitled to. This bill only seeks to recover back the usury, that is, the excess over the lawful interest. There is in this nothing in the nature of a penalty—it simply requires the bank to pay back the money to which it is not lawfully entitled, leaving it to retain all lawful interest.

To compel the party to do simple justice, has nothing in it in the nature of punishment. This recovery is allowed by the laws of the state, if they are applicable.

It may be conceded that where Congress has rightfully legislated upon a subject, a state legislature has no power to legislate in conflict therewith; and that the legislature of the state has no power to pass laws with special reference to national banks, upon the matters embraced in the acts of Congress. But it seems manifest "that a national bank must, in other respects, be subject to the general laws of the state where it is located; that their contracts are governed and construed by the state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state laws." Such is, in substance, the language of Justice Miller, delivering the opinion of the court, in The Bank v. Commonweath, 9 Wallace, 353.

As already said, the recovery here sought is no part of the punishment prescribed by the laws of our state. Our law makes *usury* indictable as a misdemeanor. Whether the penalty prescribed by the act of Congress in question would preclude an indictment under our state laws for the same offence, is a question not involved here. There is a class of cases where it has been held, that the same act constituted an offence against both governments, and is punishable by both. But we need not enter into a discussion of this subject; nor need we discuss what would be the effect of a recovery in a case of this character upon the right to enforce the penalty prescribed by the act of Congress. Ordinarily, a party guilty of usury could not escape punishment by refunding the usury, and so, we suppose, if he were compelled by law to refund it, the question of his punishment for the offence would not be thereby affected. Nor need we discuss what would be the effect upon the right of a creditor to recover, in a case of this character, if it should appear that the penalty prescribed by the act of Congress had been received; this is not averred, nor does it appear that the bank is now liable for the penalty, as the limitation of two years has probably elapsed.

We have not found, in the authorities furnished us, any satisfactory discussion of this question. While the language of some of the judges, in some of the cases, seems to bear upon the question, yet their language has reference to a different state of facts, and really different questions, and therefore they should not be regarded as deciding this question.

We are of the opinion that the act of Congress prescribing a penalty as a punishment for violating the law, was not intended to preclude the state courts from compelling the usurer to do simple justice, according to its own laws, by restoring the usury to the party from whom it was received, or his creditor, especially where it does not appear that the penalty has been enforced, or is now subject to be enforced. In this view, the plea was insufficient. The decree will be reversed, and the plea held insufficent. The cause is remanded for an answer, the bank paying the costs of this court.

REVERSED AND REMANDED.

—[*Nashville Com. Reporter.*

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Replevin for Promissory Note—Effect of Judgment—Res Judicata.

CHARLES B. WAITE v. J. D. TRIBLECOCK.

United States Circuit Court, District of Iowa, May Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge,
and " JOHN LOVE, District Judge.

Judgment in an undefended action of replevin for a note in favor of the maker, which action was brought upon the ground that the note had been obtained by fraud, and in which only the banker having the note for the collection of interest thereon was made a defendant, was, held under the circumstances, not to bar the owner of the note (an indorsee thereof for value before maturity) from maintaining an action thereon against the maker.

The defendant gave his negotiable note, secured by mortgage, for 20 per cent. of stock subscribed in the Great Western Insurance Company of Chicago; that being the *cash* payment required by the company. This note and mortgage were sold and assigned by the company to the complainant, a citizen of Illinois, before due, and as the court decided, for value. The note was sent by the complainant to one Ellis, a banker in Iowa, for collection of interest. While in the possession of the banker for that purpose, the defendant brought an action of *replevin* in the state court against the banker as defendant, for the note, and on the writ of replevin, obtained possession thereof. The ground of the replevin action was, that as the note had been obtained by fraud, the makers were entitled to its possession.

The present complainant did not appear to the replevin action, nor was he made, nor did he make, himself a party to it. Judgment was given in the replevin action for the plaintiffs therein. In the present bill to foreclose the mortgage, the defendant pleaded specially the judgment on the replevin action as a conclusive bar to the complainant's right to foreclose the mortgage.

Clark and *Harbert*, for the complainant; *H. H. Trimble*, for the defendant.

DILLON, Circuit Judge, in disposing of this question, said orally, in substance:

The special defence, that the plaintiff is concluded by the judgment in replevin in the state court, is not well founded in law.

The pleadings in that case go upon the idea that the Great Western Insurance Company was the owner of the notes, and that the defendant therein, Ellis, was the agent of the company. The findings in the judgment of the state court as to Waite, the present complainant, are outside of the issues and void. Waite was the owner of the note, and the indorsement on the note so disclosed, and if he was to be bound, should have been made a party to the replevin action. Besides, his claim of ownership to the notes was known to the plaintiff in replevin long before the cause was tried, and they refused to make Waite a party.

Ellis was in the interest of the plaintiffs in that suit, and no defence in fact was made, and there was no trial on the merits as respects Waite, the real owner. Jones was employed as an attorney in the replevin suit by the insurance company, and not by Waite.

Whether the validity of the note could have been tried in an action of replevin in the manner sought, had the real owner been a party, need not be decided. The action of replevin is not one *in rem*, and to give jurisdiction over the person, he must be a party. Ellis sustained no such relation to the note or to Waite as to make the judgment against him which he did not defend for Waite, conclusive on him. It is *res inter alios acta* as to Waite.

LOVE, J., concurs.

—IN the case of United States v. Ryan, United States Circuit Court, District of Arkansas, the indictment in one of its courts, charges that Ryan, who was a revenue officer of the United States, took a bribe from F. A. Hobbs. On demurrer, Caldwell, J., held that this use of initial letters for given and middle names, did not make the indictment demurrable. This decision was in construction of the act of June 1st, 1872 (Stats. at Large for 1871–2, chap. 255, sec. 8), and will be the rule of practice in that court.

[Correspondence.]

Liability of Express Companies for Goods Lost in Railroad Accidents—Judge Ballard's Recent Decision.

EDITORS CENTRAL LAW JOURNAL:—The opinion of Judge Ballard in the case of the Bank of Kentucky v. Adams Express Company, delivered in the Circuit Court of the United States (District of Kentucky), is reviewed in your CENTRAL LAW JOURNAL, of October 1st, 1874, pp. 498–500. The importance of the question involved, renders it proper in the profession to subject the opinion to a re-examination of the principles and authorities upon which it relies. It has attracted much legal attention, and has provoked many comments, but none more suggestive than those of your correspondent in the review referred to.

Agreeing as I do with the decision, I will endeavor to point out what I conceive to be the misapprehension of the learned correspondent as to the principles announced by the court, and then to invoke authorities, which, though differing with those cited by the able reviewer, must convince him that he has read but one side of the question, and that he has overlooked those cases which are decisive in a federal court. Your correspondent, in his letter of October 1st, has not quoted the language of the court which he undertakes to criticise, but has inferred a statement of principles which is nowhere to be found in the opinion. I will quote from the review: "The bank sued for the money upon the theory that the fire occurred through the negligence of the defendant, or of some one else, whose negligence was imputed to the defendant, and claimed on the trial that the evidence showed negligence on the part of the railroad company, and that the defendant was liable to the the plaintiff for a loss occasioned by such negligence. But the court instructed the jury, that they should disregard the evidence on the question of negligence of the railroad company, holding that in such case the defendant is only responsible for the negligence of itself and its employees." To sustain this view of the case, the learned judge assumes, that the express company is but an "*ordinary bailee for hire*," is only bound to ordinary diligence of itself or its servants, and as the railroad company was not its servant, it was in no way responsible for the negligence of those who controlled the railroad and its carriages. The whole opinion is based upon these propositions, and is made up of illustrations based upon them. "Now the principle inferred here as underlying the opinion of the court is, that the express company '*is but an ordinary bailee for hire*,' and is only bound to ordinary diligence; whereas the court distinctly held in the very first instruction given, "that the Southern Express Company and the Adams Express are common carriers. What Judge Ballard decided is, that the Adams Express Company was a common carrier, and as such liable for the safety of the values intrusted to it for transportation; that it was not liable for the loss of this package of money, because this loss was caused by fire, and by the express contract it was not to be responsible for loss by fire. If a common carrier may, by express contract with the consignor, limit, modify, or reduce his common law liability, then the Adams Express Company had a right, by express contract, to limit its common law liability. If it be lawful for a common carrier to contract against his common law liability for loss by fire, then the Adams' Express Company had a right, by express contract, to limit its common law liability for loss by fire of this package. The express contract against the defendant's liability for loss by fire was made in this case, and it was a lawful contract, such as it is now everywhere admitted common carriers may make. Grace v. Adams, etc., 100 Mass. 505; Holford v. Adams, 2 Duer, 480; York Co. v. Ill. Central R. R., 3 Wallace 107. The position taken by Judge Ballard, therefore, is not the position assumed by your learned correspondent to have been taken. The principle decided by Judge Ballard is this: That a common carrier may, by express contract with the shipper, limit, modify or reduce his common law liability; that an express con-

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tract against his common law liability for loss by fire is lawful, and when such a contract is made, and a loss by fire occurs, the common carrier is not liable under his common law liability as a common carrier, but is liable only as an ordinary bailee for hire. The Adams Express Company is a common carrier; it made an express contract with the shipper of this money, not to be liable for its loss by fire as a common carrier; this package was lost by fire, therefore this common carrier was, for the loss from this particular cause, not liable as a common carrier, but being a bailee for hire, it was liable as an ordinary bailee for hire would be. Let us try this position by principle and authority. The general liability of the carrier, independently of any special argreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident—in other words, the act of God or the public enemy. Suppose, therefore, a loss were to happen from the act of God or the public enemy. The common carrier being the bailee for hire in possession, would for that loss not be liable, unless his liability could be grounded on his duties as a bailee for hire; that is, on his duty not negligently to expose the goods to the overwhelming causes of destruction. The gist of the action in such a case would not be his common law contract of carrier, but his negligence as a bailee. When in the case supposed the carrier has shown the destruction of the goods by the act of God or the public enemy, it is not also necessary for him to show that he exercised great diligence, and that he was not negligent, but the burden of proof shifts to the shipper, and he must aver and show negligence, and there place the carrier's liability upon the ground upon which an ordinary bailee for hire would be liable. We have already seen that a common carrier may, by special agreement, restrict his common law liability. The law as it now stands, therefore, may be formulated thus: "A common carrier is chargeable as an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident, that is to say, the act of God or the public enemy, or from causes against the liability for which a special agreement has been made." If, therefore, a loss happened from the act of God or the public enemy, or from causes against the liability for which a special agreement has been made, the ground of recovery against the bailee is not the common law contract of the carrier's insurance, but the negligence of the bailee for hire, and when this is the ground it must be averred and proven by the owner. In New Jersey Steam Navigation Company v. Merchants' Bank, 6 Howard, 385, the recovery is distinctly placed upon the ground of "great want of care, and which amounts to gross negligence on the part of the respondent in the stowage of the cotton," and the principle here set forth perspicuously recognized. "The respondents having succeeded in restricting their liability as carriers, by the special agreement, the burden of proving that the loss was occasioned by the want of care, or by gross negligence, lies on the libellants, which would be otherwise in the absence of such restriction." Ibid. 384.

In Clark, etc. v. Barnwell *et al.*, libel for damages to 24 boxes of cotton thread, the supreme court, by Justice Nelson, say: "For as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular stipulations of the parties, offer an excuse for the nonperformance of the contract after the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading, and even where evidence has been thus given, bringing the particular loss and damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; further, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty."

Hence it is, that although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him, (12 Howard 280); and this doctrine so clearly laid down by Justice Nelson, is re-affirmed in Transportation Company v. Downer, 11th Wallace, 133, and the authority cited by your correspondent, of Graham v. Davis, 4 Ohio State 363, was relied on in the argument, and overturned by the decision of the supreme court.

So, that however there may be a conflict of authorities in the states upon this branch of the inquiry, the decisions of the Supreme Court of the United States are decisive of the question, when that question comes to be tried in a federal court. To argue, as your learned correspondent does, that the Adams Express Company is liable notwithstanding its special contract in this case, because it is liable for its employee, the Nashville Railroad Company, which, by the breaking of its bridge, caused the fire and the loss, is to loose sight of the point first made. I agree, and Judge Ballard admits in his opinion, that the express company, as a common carrier without special agreement limiting its liability, would be responsible for the loss by the Nashville Railroad Company, which it employed. But as an ordinary bailee for hire, which, respecting the loss by fire it had become by the special agreement, it is liable only for its own negligence, or that of its servants or agents. The express company was not negligent in transporting the package of money over the Louisville and Nashville Railroad, because that was contemplated by both parties, and was therefore authorized. It was not negligent in breaking the bridge, because it did not break it—it was not negligent in suffering it to break by its agents or servants, because the Nashville Railroad was neither its agent nor its servant.

In the case of Buckland *et al.* v. Adams Express Company, the court holds the company liable, because, under the evidence in the case, there was no special agreement to limit the carrier's common law liability, and they hold the common carrier liable as such for his sub-contractor. The decision of the court explicitly rests upon this ground. I quote from the opinion:

"On a consideration of the facts stated, it does not appear to us that the plaintiffs ever did agree that the merchandize in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manufactory, when the package was delivered to defendant's agent. It is not stated that the plaintiffs, or either of them, ever read the paper containing the alleged regulations, or one similar to it." 97 Mass. 132. And, without quoting from the other cases relied on for the contrary view, they will be found to rest upon the same ground, or to have ignored the distinction I have attempted to trace between a common carrier without special agreement, and a common carrier who has limited his responsibility to that of an ordinary bailee for hire. It remains only to examine the grounds upon which an ordinary bailee for hire is held responsible for damage caused by others. The matter is so well stated in Norton v. Wiswall, 26 Barbour. 620, that I will quote: "I am not able to see how any person can be made responsible for a particular transaction, or for the consequences flowing from it, unless he has been in some way personally engaged in it, or instrumental in bringing it about, or the relation between him and the person who inflicts the injury complained of, be that of partner, or master and servant, or some other involving the principle of agency. Where one is the master or principal of another, he is responsible for his acts within

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the scope of his employment, because he has conferred authority upon the latter to do the act, and because he has the power and the legal right to control his conduct. Where one is the partner of another, he is liable for his acts within the scope of his partnership, because he has agreed to be so, and because the very nature and object of this relation imply that each acts within the authority and assent of the other. But where the parties stand towards each other simply in the light of contracting parties, having no relation towards each other which draws into operation the principle of agency, the rule does not apply."

I contend, therefore, that the express company is not liable for this particular loss, except as a forwarder or an ordinary bailee for hire would be, that is, for ordinary diligence in selecting proper means for the transportation of the goods. Brown v. Denison, 2 Wend. 593.

To sum up, I hold that the contract between the Bank of Kentucky and the Adams Express Company, is this: The express company undertook to carry this package of money, and to be responsible for its safety as a common carrier, but for the loss by fire the company expressly stipulated, that it would not be liable as a common carrier, but would only assume the liability of an ordinary bailee for hire. The package was destroyed by fire; the company was not guilty of negligence in selecting the L. & N. R. R., and the neglect in the breaking of the bridge was not the neglect of the company, or of its agents or servants. The railroad was an independent contractor, and not the agent or servant of the Adams Express Company, therefore the Adams Express Company was not negligent itself, or by its agents or servants, and is, therefore, not liable under its contract in this case. LEX.

Relative Importance of Case-Law.

English Case-Law may be divided for the purposes of the present enquiry into reported and unreported decisions.

As to the reported decisions, a distinction has been made regarding the value to be attached to different reports of the same case, and particularly as to whether or not the decision has appeared in what are known as the regular reports. Again, as to reported decisions, a further subdivision may be made, based upon the difference in the tribunals where the decision has been given, as for instance in Chambers, at *nisi prius*, in banc or in appeal.

Dealing first and briefly with unreported decisions, they are generally the refuge of the hard-pressed counsel, who, finding nothing to justify his position, adopts the expedient of invoking the shadowy authority of some traditional case "just in point." These sort of authorities have been jocularly called "*pocket-pistol law*," and the citation of them is hardly justified even by the necessities of counsel. The judicial estimate of such authorities is well indicated in the observations of the Master of the Rolls, in Knight v. Boyer, 23 Beav. 627. Referring to an unreported decision which had been cited, he remarks: "This case is not reported either in print or manuscript, but the case is cited from the proceedings in the cause filed in the chancery office. It is extremely difficult to rest safely on a case not reported by any competent person, when the grounds of the decision are to be picked out of the facts appearing on the recorded proceedings alone, when, if the case had been reported, it might have been found that, in truth, some other matter than that supposed was the principal cause of the dismissal of the bill. If the case had been seriously argued it would probably have been reported."

Next, as to the so-called unauthorized reports, the rule is now pretty well established that no judge will refuse to refer to, and act upon, a case simply because it does not appear in the regular reports. The decisions reported in the Law Journal, Law Times and Weekly Reporter, in advance of the regular series, are, and have long been, of great value to the profession. Indeed, in many cases, it has been matter of observation from the bench, that a report in the serials has elucidated the more obscure report of the same case in the official reports. In Francome v. Francome, 11 Jur. N. S. 123, Lord Chancellor Westbury observed: "I do not decline to follow the case cited because it is reported in the unauthorized reports. 18 Jur. 1051. It is of such materials that the law of England is made up, and I should be denying myself much valuable assistance in ascertaining what the law is, if I were to refuse to receive the citation of cases reported by barristers in those useful publications." See also, per Stuart, V. C., in S. C. 11 L. T. N. S. 666. In a recent decision of the full court of chancery, in this province, Bank of Montreal v. McFaul, 17 Gr. 234, the majority of the court gave effect to a decision reported only in the Weekly Reporter (Defries v. Smith, 10 W. R. 189), though the chancellor declined to follow it, and dissented from the judgment of the court. In Iansen v. Paxton, 23 U. C. C. P. 457, Richards, C. J., observes: "The Law Journal reports have generally been favourably spoken of, both by the profession and the bench."

We notice that the present master of the rolls, Sir George Jessel, has said that the Weekly Notes are not intended for citation as authorities, and he has refused to allow them to be cited before him. Attorney-General v. Cockermouth Board, 22 W. R. 620. But surely they are of worth at least equal to the Notes of Cases, which are frequently referred to in maritime and ecclesiastical causes, and their value as *pro tempore* guides, till the fuller reports appear, should not be overlooked.

Coming next to the regularly reported cases, perhaps those lowest and of least authority are *nisi prius* decisions. In many cases these rulings and holdings are necessarily given on the spur of the moment, and before publication require the careful pruning and consideration which Campbell gave to his reports. They are also useful when accompanied by the elaborate system of commentary, which Foster and Finlason append to the cases reported by them. But the judges themselves are not well satisfied with such cases being reported, and do not deem them of much value when cited before them *in banc*, as will appear from the few quotations which follow:

"As to the *nisi prius* cases, it would have been much better for the law if the crude opinions of judges at *nisi prius* had never been allowed to be quoted to those who are sitting *in banc*:" per Best, J., in Rowe v. Young, 2 B. & B. 185. "Very likely one's first thoughts at *nisi prius* may be wrong, and I am extremely sorry they are ever reported; and still more so that they are ever mentioned again:" per Bayley, J., in 1 Chit. R. 121. "A sad use is made of these *nisi prius* cases:" Gibbs, C. J., in Tompkins v. Wiltshire, 1 Marsh. 116. See per Best, C. J., in Johnson v. Lawson, 2 Bing. 86. "Buck v. Stacey, 2 C. & P. 465, has been approved of by eminent judges, and so lifted out of the sphere of a mere *nisi prius* decision:" per Lold Chelmsford, C., in Calcraft v. Thompson, 15 W. R. 387.

[To be continued.]

—[*Canada Law Journal.*

[Correspondence.]

A New Solution of the Railroad Question.

EDITORS CENTRAL LAW JOURNAL:—In the CENTRAL LAW JOURNAL for October 23, there is an article headed "A New Solution of the Railroad Question," into which is copied the argument of the editor of the Western Jurist, in favor of the exercise of the right of eminent domain over railroads, and in favor of individuals. The proposal is as follows: "Let any person who desires to run an engine, or a car or a train of cars, call into exercise this power of eminent domain, against or upon the railroad company; and, by the assessment of a jury, subject to revision by the courts, condemn the right of way over the railroad for his engine, car, or train." The plan might succeed as a practical measure, although it seems to me to be full of difficulty. An experienced railroad superintendent, however, would have an opinion on that point so much better than mine, because based upon knowledge and experience, which I have not, that I shall not trouble you with any remarks upon it. But there are some legal difficulties in the way which I imagine would make this private

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train jump the track without performing the first journey, under this new right of eminent domain.

In the first place, the right of eminent domain can be exercised in favor of the public only, and not of an individual. Secondly, the acquisition of the right could not, by any method known to the law, expand into a power over station agents, telegraph operators, etc., without which the right would not be available. There are other difficulties, but, if these be real, they are as effectual as a battalion.

What is the right of eminent domain, and whence is it derived? It is the natural right which the sovereign has, *ex necessitate rei*, and for the purpose of maintaining the public welfare and preserving the existence of the state, to take private property for public use. This is, in substance, the definition given by Grotius, Puffendorf, and other writers on public law. Kent states it as "the power in the legislature to take private property for necessary and useful *public* purposes. Gardner v. Newburgh, 2 Johns. Ch. 165. I confess I do not see how this right can expand so as togive to any individual for his convenience, pleasure or profit, the rights which have heretofore been confined to the community at large, as an aggregate, and for the public welfare only. But, suppose a man should get the right to run a train on a railroad, how can it be run without the assistance of much of the personnel of the road; and how can that aid be condemned? In the old world, soldiers are quartered on families; and it is likely, from the progress we have made in breaking down private, civil and political rights, that we shall come to this by and by; but it does not seem to be very easy to compel a railroad company to entertain its rivals and to lend its officers to them. I cannot but believe that the attempt to compel railroad companies to accept for their services the compensation which the mob of gentlemen who compose some of our legislatures may have generosity enough to award them, will be decided by the court of last resort to be as illegal as it is unjust; and I do not see that this new right of eminent domain is a whit less objectionable in either regard. T. GEORGE.

Denver, Colorado.

REMARKS.—We do not perceive any legal difficulties in the way, such as the above correspondent suggests. It is true that the right of eminent domain can be exercised in favor of the public only, and not merely in favor of individuals; but the scheme proposed involves an exercise of this right in favor of the public, and not in favor of individuals exclusively. When an individual or corporation *represents the public*, then the right may be exercised in his behalf, for the benefit of the public. The first illustration of the right of eminent domain given by Chancellor Kent, is: "If a common highway be out of repair, *a passenger* may lawfully go through an adjoining private enclosure." 2 Kent Com. 338. But a "passenger" is but an individual." Nevertheless he represents the whole public, and his rights in such a case are the rights of the state, the nation, the sovereign. Therefore, it was held in Texas in a reported case which we cannot now quote, that a negro slave might lawfully drive his master's wagon over a citizen's land, where the road was impassable. The slave represented the master, and the master represented the public. The land over which all our railroads are built was condemned and taken from private land-owners, and given to private corporations, through the exercise of the right of eminent domain. Upon what ground was this done? The railroad corporation proposed to become a general carrier for the public, and the use for which it desired the land was hence a *public* use. In other words it represented the public. Precisely in this position will be the private train-owner in the case supposed. He represents the public. He proposes to become a general public carrier; and in this respect, represents the public in a much more enlarged and beneficial sense than a corporation which holds the rights of the public in an iron grasp. Or, if he carries simply for himself, and not for the public, then he represents the public in precisely the same sense as Chancellor Kent's "passenger" represents it upon a common highway. The exercise of the right of eminent domain proposed by the able editor of the Western Jurist, in the article above referred to, means simply that a government which could condemn the property of individuals to make a *public way* under the exclusive control of a corporation, can now condemn the property of that corporation to make a *common highway*, under its own control.

The objection that "the acquisition of the right could not, by any method known to the law, expand into a power over station agents, telegraph operators, etc," seems to us equally destitute of force. Whilst it is a familiar principle that the paramount authority of the government extends not only over all the property, but also over the persons and services of its citizens, yet the control of station agents, and telegraph operators would not be an incident of the right of eminent domain, but of the general *police power*, which in every government must reside somewhere, and which in our government resides either in the states or in federal union, accordingly as it has been apportioned by the federal constitution. If this power resides in the general government (and we are inclined to think it does), it is an incident of its power to regulate commerce between the states. But until exercised by the general government, it clearly may be exercised by the states, and we see no *legal* difficulties in the way of calling it into full and beneficial use. We imagine that it would not be necessary to "condemn," as our learned correspondent suggests, any of the *personnel* of the road. All that would be condemned, would be the road, the side-tracks and buildings—the real estate. The private train-owners would furnish their own train-men; and the general superintendent, train-dispatchers, switchmen, etc., would be agents of the government.

Entertaining these views, we ask pardon for suggesting that the train of our learned correspondent has already jumped the track. Every thoughtful person must see how vain and idle is the attempt to limit in advance, by nice legal barriers, the exercise of the right of eminent domain. Had this right been hedged in by legal precedents, our great railroads could never have been built In our government the right has but two limits, and they are of the most general character. 1. The *use* for which the property of the citizen can alone be taken, must be a *public* use. 2. It cannot in any event be lawfully taken without *just compensation*. The right itself is as broad as the public necessities in which it is founded, and as variant as the changing exigencies of society.

Law Schools.

For the last two or three months we have noticed a succession of articles in the CENTRAL LAW JOURNAL, and also in the Albany Law Journal, in manifest hostility to law schools. This hostility, we are bound to believe, is unconsciously entertained and not intended to be expressed; because the editor of the last named, says, it is an error to suppose "that the discussion means hostility to the law schools, and the editor of the first named, in his issue of the 28 ult., says:

"The opposition is not to law schools, but to too rapid graduation. Or, if it is found impracticable for law schools to lengthen their course of study, then the protest is against admitting their graduates to the bar on the faith of their diplomas, without further examination.

"We do not wish to be understood as attempting to lecture the law schools on this subject, while passing over in silence the conduct of the courts. We have good reason to believe that the conduct of many of the courts in the West and South, with regard to admitting candidates to the bar, has been remiss in the last degree. We are glad to be able to testify that the federal courts at St. Louis, and the circuit court of Saint Louis county, are conspicuous exceptions to this rule. But the painful fact is forced upon us that, as a general thing, the examination by judges, or by committees of the bar, of candidates for admittance to the bar, is a mere sham. We know of instances where a basket of champagne, or even a bottle of whiskey, has secured a favorable report, and where candidates have been admitted who have never read law a week, and who were even ignorant of the names of the leading elementary writers on the law. This state of things, which we believe is not new, but has existed in many quarters for years, is a scandal and a reproach to the legal profession. It inevitably enforces upon men of sense the conclusion that a profession which thus admits Tom, Dick and Harry to its honors, has very little honor, and is unworthy either of the confidence or respect of the public."

"Now, when it is remembered that both of the journals named have been making their war upon law schools on the alleged ground that the term of study required by them, which is practically but the equivalent of a single year, it is too short to qualify a student for the bar, the admission as to the course pursued and the practical results under the old system, which they advocate, are truly very refreshing. And just such results as are above stated, by our esteemeed co-laborer in legal reform, were very often, if not generally realized in the State of New York, when the *rule* existed there in its greatest length, for which our Albany brother expresses his preference by saying, "the best pre-requisite to admission to the bar is a sufficient *term* of study."

The idea of a *term* of study has generally prevailed in this country for the last century, and in Great Britain for the last centuries, and that idea has wrought for us just the results so faithfully portrayed by our cotemporary in the above extract, and such results are the natural and legitimate fruits of the idea underlying the practice. It is essentially unjust and unequal, because one student by reason of previous advantages, superior talent, and greater industry, will accomplish more, when left to himself (as students in law offices are), in one year than others will accomplish in three years. A *term* of study is not requisite for admission to our colleges, for a certificate to teach, for the right to practice medicine, or to engage in any other business of life. Why, then, establish a term of study as requisite to entering upon the practice of the law? The fact is, that a term of study, and the study of law with a practitioner, have both been fully and effectually tried and found wanting. They are giving away, as they should, to something else, and that something else, which is now on trial, is the law school, and unless this new method is carefully nurtured and guarded, it too may be found wanting.

What we wish to do, is to foster and nourish our law schools, to encourage

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and aid them, to carefully guard and elevate them so that the fullest advantage may be derived from them. To this end, we would advise every student at law to attend them; we would, as soon as practicable, have their course extended so as to embrace the studies, requiring at least two full years to fairly accomplish them; we would require a thorough and critical public and oral, examination (as well as a written one), occupying days, and made by a committee of recognized and competent *lawyers*, and not *mere* practitioners, and that the students should satisfactorily pass, before graduation; we would also, at the earliest practicable day, require a course of study previous to admission to the law schools, and that the standard fixed had been attained, should be demonstrated in an examination by a committee therefor, properly constituted; and we would constantly struggle to elevate this standard as well as the standard of legal attainments. Such a course would surely improve the aggregate of the profession, even if it reduced its number. The objection, sometimes raised to law schools, that a student cannot learn the *practice* of the law there, is fully met by the fact that they do (or may), there learn the *principles* of the practice, and that, ordinarily, a sufficient time intervenes between the admission to the bar and the obtaining of business, to enable them to learn by observation in the courts the *mere* practice. The experience of ages has demonstrated that the *place* to learn is in the *schools*—and this demonstrated fact will be found to apply with equal truth and force to the *law* as to any other science or elementary truth.—[*Western Jurist.*

Notes and Queries.

We ask the attention of our readers to the following queries. Our engagements have prevented us from giving them any attention:

I. PRACTICE—APPEAL FROM JUSTICE OF THE PEACE—CERTIORARI.

EAU CLAIRE, WIS., Oct. 28, 1874.

EDITORS CENTRAL LAW JOURNAL:—G. brought suit against B. in justice court, and the cause having been adjourned beyond ninety days, B. appeared only for the purpose of moving that the action be dismissed; and on the motion being denied, left; whereupon judgment was had against him. B. then brought a common law writ of *certiorari* to reverse the the judgment. While the writ was pending, and before hearing, B. appealed the case from justice to circuit court, as provided by statute. Afterwards, the writ was heard and the judgment in justice court affirmed. Appeal is still pending.

Quære.—Does the judgment on the writ prevent the appeal from being heard? Is the case finally disposed of by that judgment? What will be done with the appeal? And finally, does the taking of the appeal waive the defect cited by the writ, so as to make the writ and proceedings under it void? If so, is the judgment on the writ a void judgment also? Would like a reply with authorities through the journal. Yours truly,

A READER OF THE JOURNAL.

II. BANKRUPTCY—POWER TO COMPEL NON-RESIDENT BANKRUPT TO SUBMIT TO EXAMINATION.

MINNEAPOLIS, MINN., Oct. 26, 1874.

EDITORS CENTRAL LAW JOURNAL:—The following question is one that has become somewhat interesting in our district, and I submit it to you for an answer in your valuable journal:

A., within the last year, filed his voluntary petition, upon which he was subsequently declared a bankrupt, and an assignee appointed, etc. After the filing of the petition A. removed from the district in which such petition was filed, and has also as since remained away and refused to appear before the register of said district and submit to an examination, for the reason that he is out of the district, and cannot be compelled to appear.

Question.—Is there any way in which he can be compelled to appear before such register—for the purpose of an examination relative to his business, etc., and prior to his filing of such petition? If not, has the court any jurisdiction to compel him to appear before a register, or any person in the district in which he now lives, for the purpose of such examination?

It will be readly seen, that unless the court has power to do one or the other of these things, then the real object of the bankrupt law may be defeated.

An answer to this, I think, will be of some interest to the profession in general. I am very respectfully, W. E. H.

III. PURCHASE OF LEASED PROPERTY.

BLOOMINGTON, ILL., Nov. 7, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. and B. were partners as coal merchants. They were the owners of two sets of scales and coal sheds, for the handling and disposing of coal shipped to their order. These scales and sheds were constructed, by agreement, upon land belonging to the R. R. Company, and are therefore personal property. A. of the above firm, sold and conveyed to C., by sealed instrument, an undivided *one-half* of said scales and coal sheds, nothing being said as to the delivery or possession of said property. C. thereupon immediately formed a partnership with B., the remaining partner, for continuing the business of coal merchants. Within a few days after entering into this partnership, C. bought B.'s interest in the above mentioned property and business, and should now have had full control and possession of said property and business, but for one other circumstance. Prior to the purchase made of A., and entirely unknown by C., A. and B. had leased to the firm of S. and S. the above described property, which lease does not expire until six months after the sales made to C. S. and S. have possession of the property, and, of course, will not give it up. Can C. recover in an action of covenant (or in the state of Illinois, in assumpsit), against A., damages for the non-delivery of possession of said property. C. learned of the contract with S. and S. after he purchased of A., but before he bought B.'s interest.

Should like a reply through the JOURNAL. C. D. M.

Book Notices.

LIVES OF THE LORD CHANCELLORS OF ENGLAND. By LORD CAMPBELL. New Edition. Edited by John A. Mallory, of the New York bar. Illustrated. New York: James Cockcroft & Co. For Sale by Soule, Thomas & Wentworth, St. Louis.

We have before adverted to this illustrated edition of Lord Campbell's celebrated work as the best edition which has ever appeared in this country. Since our previous notice, Vols. 3, 4 and 5, have been issued. Vol. 3 includes, *inter alia*, the life of Lord Bacon, and Lord Clarendon, with portraits of each; Vol. 4 gives the life of Lord Jeffreys, and that of the highest model of English judges and statesmen,—Lord Somers, with a portrait, while Vol. 5 concludes the life of Somers, and gives those of Cowper, Macclesfield and King. The remaining volumes will appear in a short time, and we unreservedly recommend this edition to our readers. Every lawyer is a better lawyer by reading these interesting biographies, which trace the history of the English law which is in truth like English and American Institutions, a *growth*, and it can best be learned by studying it historically.

CAUSES CELEBRES. TRIAL OF QUEEN CAROLINE. Three Vols. New York: James Cockcroft & Co. 1874. For Sale by Soule, Thomas & Wentworth, St. Louis.

The famous trial of Queen Caroline is one of the most dramatic, and at the same time, one of the most instructive in English history. It occurred under one of the chancellorships of Lord Eldon, and among the counsel for the government was Gifford, afterwards Lord Gifford, and Master of the Rolls; Copley, afterwards Lord Lyndhurst, Chancellor of England, and the Celebrated Parke, afterwards Lord Wensleydale, and a distinguished judge in the court of Exchequer.

The array of counsel for the Queen was, if possible, yet more eminent. It was headed by Brougham, and included Denman, afterwards Lord Chief Justice of England, Wilde, afterwards Lord Truro and chancellor, and Lushington, afterwards famous for his decisions in the high court of admiralty. The history of this trial will prove quite as interesting to the general as to the professional reader. The latter will quite agree with Lord Campbell, that the "law of evidence has been much enriched by the decisions in the Queen's case," while all intelligent readers cannot fail to be struck with admiration at the skill displayed in the examination of the witnesses by the counsel, and particularly at the intrepid, glowing, indignant eloquence of Brougham and Denman. If we except, possibly, some of the speeches of Erskine, whom we regard as the greatest master of frorensic eloquence that ever spoke the English tongue, the speeches in defence of the Queen undoubtedly may be classed as among the greatest examples of the skill and eloquence of the bar.

This is an elegant edition, printed on tinted paper, is put at a low price, and we warmly commend these volumes to our readers.

LAW OF FIRE INSURANCE. By HENRY FLANDERS. Second Edition. Philadelphia: Claxton, Remsen & Haffelfinger. 1874. pp. 668.

The profession are quite well acquainted with this work through the first edition. It is confined to Fire Insurance, and this we regard as a merit, for although the different kinds of insurance are in many respects similar, and therefore susceptible of combined treatment, yet the dissimilarity in important particulars, as well as the great accumulation of material, makes a separate and distinct discussion desirable. This work is not so elaborate and full as many. It aims to state succinctly the *principles* of the cases without going into detail and exhaustive illustration. In this respect it is like Byles on Bills, and it bears about the same relation to some more elaborate works on the same subject as Byles does to Parsons.

The preference of the body of the profession is for the more practical works, which give in the notes the substance of leading cases and illustrations and critical discussions and comparisons of adjudications; and yet it is strictly to the busy practitioner and the tired judge, to see the law on a given point neatly summed up or stated by the author with a mere citation of the cases upon

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which the text is based, if the author be one in whose ability and carefulness he feels that he can rely. The second edition contains many new cases, and with some omissions, generally of minor consequence, brings the law of Fire Insurance fully down to date.

Summary of our Exchanges.

The Legal Intelligencer, for November 6, contains some interesting decisions. The following are by the Supreme Court of Pennsylvania: Taney v. Long: The undue influence which would be sufficient to destroy a will must be something more than mere importunate persuasions.

Commonwealth v. Trout: A decree or judgment may only be impeached in a collateral proceeding for fraud or collusion.

Hepburn v. Mans: In covenant, a plaintiff may maintain several actions for different instalments. Attachment of a debt does not prevent the recovery of judgment; it only suspends execution.

Chambersburg Woolen Co. v. Chambersburg Manufacturing, etc. Association: The capital stock of a corporation is a trust fund for the payment of its debts, and, therefore, a sale, by an insolvent corporation, of its real estate to a stockholder for stock, makes such purchaser liable for its value in cash to the corporation's creditors.

McFerran v. Mont Alto Iron Company: Clear proof of contract of purchase, the quantity of land sold, payment of purchase-money, and long continued possession, meet the requirements of the statute of frauds.

It also publishes a very full opinion of Mr. Justice Strong (with whom McKennan, Circuit Judge, concurred), in the matter of Jay Cooke & Co., bankrupts. The following is the syllabus: After a bankrupt's estate has been placed in the hands of a trustee, under the direction of a committee of creditors, by virtue of the 43d section of the bankrupt act, the court cannot, in the absence of fraud, call a meeting of creditors to control the committee's action.

The Chicago Legal News, for November 7, publishes an interesting decision of Mr. Circuit Judge Drummond, under § 39 of the bankrupt act, as amended. The case is *Re* Williams and McPheeters. The petition was filed on the 22d of June, the day of the passage of the amendment to the bankrupt law, and one-fourth in number and one-third in value of the creditors were not parties to it. It was afterwards, with the consent of the court, amended, and the required number of creditors became parties to it. *Held*, that it was competent for the court to permit the amendment to be made, and when made, that it related back to the commencement of the proceedings in bankruptcy, and gave effect to the action of the court. It was also held that the bankrupt court having jurisdiction of the case, possessed authority to protect the debtor from arrest in a state court. The learned judge said: "The amendment should be reasonably construed, and if possible, so as not to destroy, or even impair, any proceedings which had been already commenced, or which might be commenced in good faith, and in ignorance of the passage of the amendment on that particular day, the 22d of June." A similar question came before Mr. District Judge Withey in *Re* Burch, 10 N. B. R. 150, and a different view was taken. In that case the petition was filed on the 25th of June, the third day after the passage of the amendatory act, but before the petitioner had been advised of its passage. It was held that the petition could not be amended so as to make the allegations required by the 39th section, as amended, with reference to the number and value of creditors; that those allegations not having been made in the first instance, the court had no jurisdiction, and the petition was accordingly dismissed.

The Legal News shows its enterprise in publishing Tilton v. Beecher, Criminal Court of Brooklyn, N. Y., in which Neilson, J., considers the question whether a defendant in an action of tort may require a bill of particulars, and refuses the application.

It also publishes a Kentucky case, Spratley v. Mutual Benefit Life Ins. Co., which discusses the effect of the war on southern policies of life insurance.

The Washington Law Reporter, for October 27, publishes the case of the District of Columbia v. Herlihy, Supreme Court of the District of Columbia, General Term. In this case an information in a criminal case charged the defendant with keeping a tippling house "at house No. 1601 Q. street," in the city of Washington, and, on the trial of the cause before a jury, it was proven by the witnesses for the prosecution that defendant committed the offence at No. 1601 12th street. The attorney for the district then asked permission of the court to amend the information by striking out the house, number and street laid in such information, which was allowed, the defendant excepting. *Held*, that such amendment could not be made at the trial of the cause; that where a criminal information is required by statute to be under oath, it cannot be amended at the trial of the cause in any manner affecting the charge against the defendant; that the act of assembly, providing that technical or clerical errors may be amended at the trial, extends only to formal or ministerial mistakes.

It also publishes Campbell v. American Popular Life Insurance Company, same court, with the following syllabus: A person obtaining a policy of life insurance may agree that the surgeon-in-chief of the company shall decide whether one of the conditions upon which the policy issued has been complied with, and his decision will be binding.

Where one of the conditions in the policy is that the insurance money is to be paid, if, in the opinion of the surgeon-in-chief of the company, the party insured did not die of intemperance, nor by any disease produced or aggravated by intemperance, it was held that this was a valid condition precedent, and that its performance must be averred or its non-performance accounted for.

If, however, the surgeon is also a stockholder whose dividends are affected by the payment of claims, and the fact of such interest was concealed by the company from the party insuring at the time the policy was made and accepted, it is a sufficient excuse for the non-performance of such condition.

The Washington Law Reporter, for November 3, reports the case of Hoss v. Wilson, Supreme Court of the District of Columbia, with the following syllabus:

The plaintiff entered into a contract by which he agreed to employ the defendants in the prosecution of a number of claims against the United States, which he held as agent for other persons, and he was to have one-third and the defendants two-thirds of the fees. It was then stipulated, "that in the cases of T. J. Coyan, Nicholas Culliton and P. Moran, the fees shall be equally divided between the parties hereto." *Held*, that as to the cases here specifically mentioned, the agreement was independent, and not affected by the stipulation in relation to other cases.

It is no defence to a bill charging defendants with having collected the claims specified in the agreement, and praying for a discovery and an account, to set up that plaintiff had made false representations at the time of entering into the contract, as to the amount and character of the other claims which he would probably procure, and that he had failed to obtain other cases for the defendants to prosecute.

When a case involves both discovery and account, it is within the jurisdiction of a court of equity.

Also the interesting case of Mitchell v. Seitz, same court, expounding the Married Woman's Property Act of the District of Columbia. The syllabus is as follows:

1. Where a married woman acquired title to real estate which was paid for by money belonging to her husband, she cannot hold said property as against his creditors.

2. Where a purchase of real estate is made in the name of a married woman, and there is no proof that she has separate means or funds, and the husband is carrying on a successful business and not paying his debts, the presumption is that the purchase was made by funds which he had furnished.

3. The earnings of a married woman are still the property of the husband notwithstanding the act of Congress permitting married women to obtain and hold property in this district.

The Pittsburgh Legal Journal, for November 4, reports *Re* Andrews & Jones bankrupts, in which the sum of one hundred dollars was allowed solicitors of involuntary bankrupts as reasonable compensation for preparing their individual and partnership schedules.

It also publishes a report of a charge of Presiding Judge Hampton to a jury, in Atvater v. Wood, which was an action for injuring plaintiff's land, by excavating a sand-pit, so that some of plaintiff's land caved into it, which sand the defendant generously carted off and sold. The case is said to have been affirmed by the supreme court.

The American Law Times Reports, contains a number of interesting decisions. Those which we have not already noticed as appearing in the weekly law periodicals, have the following head-notes:

Indianapolis and St. Louis Railroad Co. v. Galbreath (to appear in 63 Ill.):

In an action against a railroad company, to recover damages alleged to have been sustained by the plaintiff, through the carelessness and negligence of defendant's servants and agents in running a train of cars upon their track, it appeared that while, in the night time, the plaintiff was walking on the track in a village, at a place where the same was so used, without objection, by all classes of persons, he was overtaken and struck by an engine without any headlight, running at a high rate of speed, there being no bell rung, or whistle sounded to indicate the approach of the train, and the plaintiff hearing or seeing nothing of it until he was struck. *Held*, that the negligence of the plaintiff in walking on the track, if it was negligence, was but slight when compared with the gross and criminal negligence of the defendant in so running a "dark train," at a high rate of speed through the village, without signalling its approach.

Merrifield v. City of Worchester (to appear in 110 Mass.):

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If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business, as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction, or unreasonable use of the sewers, or to the negligence or other fault of the city, in the care or management of them.

Murphy v. The Commonwealth (to appear in 24 Grattan):

1. The act of March 30, 1871, Sess. Acts 1870–1871, p. 332, does not give justices of the peace jurisdiction to try a case of felony; and the conviction and punishment of a party by a justice for an assault and battery will not bar a prosecution for wounding with intent to kill, by the same act for which he was punished by the justice.

2. If the accused has been indicted and convicted for a mere assault and battery in the county court having jurisdiction of such offence generally, the conviction will not be a bar to an indictment for a felony, in the perpetration of which the assault and battery was committed.

3. On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made, was asked if he did not tell his wife that the prisoner acted only in his own defence. 1. The answer to the question may tend to criminate himself, and the testimony is inadmissible. 2. It required him to state a communication supposed to have been made by him to his wife, which, if made, was a confidential communication, and which he was not bound to disclose.

4. Where a question is put to a witness which he answers, and which relates to a collateral matter not connected with the subject of the prosecution, his answer to that question is conclusive, and cannot be contradicted.

5. In this case, after the witness was asked the question whether he did not state to his wife that the defendant had acted only in his own defence, and he had answered the question denying that he had done so, the wife of the witness was introduced to prove the statement was made to her. She is not a competent witness to prove it, though at the time it was alleged to have been made, they were living apart from each other, but not divorced.

6. A man is taken to intend that which he does, or which is the natural and necessary consequence of his own act. Therefore, if the prisoner wounded the prosecutor, by the deliberate use of an instrument likely to produce death under the circumstances, the presumption of the law is that he intended the consequences that resulted from said use of said deadly instrument.

7. Malice may be inferred from the deliberate use of a deadly weapon, in the absence of proof to the contrary.

8. Where there are two counts in an indictment for a felony, and there is a general finding by the jury of "guilty," if either count is good, it is sufficient.

Ford v. Fitchburg Railroad Co. (to appear in 110 Mass.):

One employed by a railroad corporation to drive a locomotive engine over its road, may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents. One employed by a railroad corporation to drive a locomotive engine over its road, is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men, and procure assistance, whenever any defect was detected in an engine that would make it in his judgment unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe.

Hayner v. Smith (to appear in 63 Ill.):

1. Since the act of 1861, in a suit to recover rent under a lease executed by a married woman on her own separate property, it is error to join her husband as plaintiff in the action.

2. Where a lessee is, by his lessor, wrongfully evicted from a portion of the demised premises, he is thereby excused from the payment of any of the rent, although he remains in possession of the remaining portion of the premises to the end of the term.

3. But, to constitute an eviction, there must be more than a mere trespass by the landlord. There must be something of a grave and permanent character done by the landlord with the intention of depriving the tenant of the enjoyment of the premises—the question of eviction or no eviction depending upon the circumstances, and being a matter for the jury to decide.

4. Some acts of interference by the landlord with the tenant's enjoyment of the premises may be mere acts of tresspass, or may amount to an eviction, the question whether they partake of the latter character depending upon the intention with which they are done—if clearly indicating an intention on the landlord's part that the tenant should no longer continue to hold the premises, they would constitute an eviction.

Minturn v. Smith, Circuit Court of the United States, District of California, Sawyer, Circuit Judge, Mr. Justice Field concurring:

1. A general statute authorizes a tax-collector for state and county taxes, to execute a deed upon a tax-sale, and further provides that such deeds shall be *prima facie* evidence of certain facts recited therein, and conclusive evidence of the regularity of the proceedings in all other respects. A subsequent statute provides that a town tax in a certain town shall be assessed and collected at the same time, and in the same manner, as provided by said general act, and confers upon the town treasurer all the powers exercised by the tax collector of the state and county taxes under the general act, but makes no provision as to the effect of the tax deed executed by the town treasurer. *Held*, that such deed will not be *prima facie* evidence of the regularity of the prior proceedings.

2. A tax deed which the statute does not make *prima facie* evidence of the regularity of the assessment and sale, does not cast a cloud upon the title.

3. An injunction will not be granted to restrain the collection of a tax, when the deed issued upon a sale for taxes would not cloud the title.

The Legal Gazette, for October 30, continues to publish decisions of the Supreme Court of the United States. These decisions appear to be but slightly in advance of the current volumes of Wallace's Reports, and are therefore almost destitute of value to the subscribers to those reports. Thus Bartholow v. Bean, published in the present number of the Gazette, was published by us several months ago, and is reported in 18 Wallace, 635, which has been for some time in the hands of the profession. Kitchen v. Rayburn Packet Co. v. Sickels, and Burke v. Miltonburger are the other cases which it prints in this number.

The Legal Gazette, for November 6, publishes Head v. The University, Supreme Court of the United States, October Term, 1873, with the following syllabus:

Where, in a university of learning belonging to the state, and which the state was in the habit of governing through curators appointed by itself (such as the University of Missouri), a person was appointed by the curators a professor and librarian for six years from the date of his appointment, "*subject to law*," *held*, that the legislature could vacate his office, appoint new curators, and without fault on the part of the professor assigned, order a new election of a professor to the same professorship, and of a librarian, before the expiration of the six years.

Also Butt v. Ellett, same court, with the following head-notes:

1. Although an instrument which purports to mortgage a crop, the seed of which has not yet been sown, cannot at the time operate as a mortgage of the crop, yet when the seed of the crop intended to be mortgaged, has been sown and the crop grows, a lien attaches.

2. When property which the owner has leased is sold at sheriff's sale, on execution against the owner, the sheriff's deed conveys the reversion and the rent follows as an incident.

3. Accordingly, where a lessee of a cotton plantation, made in January, 1857, in order to secure the rent, mortgaged the crop of that year. *Held*, that although the seed of that crop had not yet been sown, a purchaser of the land at sheriff's sale, could charge as trustee of it for him, a person to whom the tenant had transferred the crop, after it had grown and was gathered, such purchaser having taken with notice of the landlord's mortgage.

Also Aicardi v. State, with the following syllabus:

Whether the legislature of a state has authority, under the constitution of the state, to pass a particular statute; what is the true interpretation of any statute passed by it for a purpose specified, and what acts will be justified under the statute, are matters which lie exclusively within the determination of the highest court of the state, whose judgment is final.

Also *Re* Jay Cooke & Co., which we have noticed above in the Legal Intelligencer.

Also Clarke v. Delaware & Hudson Canal Co., Supreme Court of Rhode Island, in which the following points are ruled:

1. A case can be removed from a state court to the United States court, even after a trial has been had and the jury disagreed.

2. The cause should be removed as of the date when the motion for removal was made.

—We learn from a private source which is authentic, that the question of revising the general orders in bankruptcy has been referred by the judges of the supreme court to a committee of members of the court. The question involves much consideration, and it is not likely the committee will report until after New Year; and it is also probable that no final action will be had by the court until next spring.

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Legal News and Notes.

—THE Daily Register, in a recent article, enumerates the following living authors at the New York bar:

Austin Abbott, Benj. V. Abbott, T. G. Shearman, A. A. Redfield, Geo. Ticknor Curtis, Charles Crary, Henry Whittaker, R. D. Benedict, E. C. Benedict, W. J. Haskett, D. S. Riddle, A. R. Dyett, Horace Andrews, Chas. Francis Stone, Clarence A. Seward, Amos G. Hull, J. H. Hubbard, Geo. H. Yeaman, David Dudley Field, Montgomery H. Throop, Joseph D. Fay, Dorman B. Eaton, R. S. Guernsey, Jas. W. Gerard, Jr., Henry C. Adams, John Townshend, N. Howard, Jr., William Tracy, Geo. Bliss, Jr., H. D. Sedgwick, Joshua M. Van Cott, Isaac Dayton, Bernard Boelker, G. F. Langbein, J. C. J. Langbein, S. H. Turnbull, Stephen D. Law, A. W. Gazzam, R. H. Moses, Jr., Thorndike Saunders, H. C. Ulman, Judges Blatchford, C. P. Daly, Monell, McAdam, Lawrence, Geo. Shea, M. B. Field; ex-Judges T. W. Clerke, C. K. Smith, Henry E. Davies, Henry Hilton, Samuel Jones, J. C. Spencer Murray Huffman; ex-Surrogate Gideon J. Tucker.

—ON Thursday, October 15th, the Court of Arbitration, which was authorized by an act of the New York legislature, in April last, was formally opened, at the rooms of the New York Chamber of Commerce. The jurisdiction of this court is limited to the Chamber of Commerce of New York city, any member of that body having the right to call another member before the court by a "summons," who shall be deemed to have consented to the trial of the case unless he files an "objection to jurisdiction." Non-members of the Chamber may bring a case before the court by a "submission." Expenses, except in case of a re-hearing, will be borne by the Chamber as a body. Submission to the court is thus made a voluntary matter, but after going before it parties are to be bound by its action, and there is no appeal, as the act now stands. The idea is to provide a tribunal for a speedy and inexpensive method of deciding disagreements without the necessity of enduring the law's delay; the idea is an old one in Europe, where it has been found very successful in practice, and the results of the experiment here will be watched with great interest.—[*The Financier*.

—KULLMAN, who attempted to assassinate Bismarck, has been tried, convicted and sentenced. He made a cool and circumstantial confession. He endeavored to kill Bismarck because the latter threatened the Church with ruin. This left the court nothing to do but to determine the question of his criminal accountability. On this point medical testimony was taken. Dr. Reinecke testified that he did not consider Kullman a religious or political fanatic, nor that he possessed a natural predisposition to crime; neither was he a common murderer. His powers of comprehension of right and wrong are unimpared; but on the other hand, he inherited a deficiency of moral strength. His maternal grandfather committed suicide, his mother died deranged, and his father was an habitual drnnkard. These facts, Dr. Reinecke thinks, are calculated to produce in Kullman a want of independence in forming opinions, susceptibility to external impressions, coldness of heart, vanity and tendency to violence. He is therefore of opinion that although Kullman may be considered an accountable being, his nature nevertheless possesses a hereditary morbid disposition calculated to affect his free will. Herr Hubrich, director of a lunatic asylum, deposed that while the prisoner was very deficient in moral sense, yet his free will was so triflingly affected that there was scarcely any ground for mitigation.

Testimony was then taken as to the religious influences to which he had been subjected. The prisoner then related the story of his life. The president of the court summed up the medical testimony to the effect, that at the time of the assassination, as well as at present, Kullman was accountable for his acts to but a limited degree. Kullman was found guilty as charged in the indictment, and sentenced to imprisonment for fourteen years in the house of correction, and ten years' suspension of his civil rights, and to remain under surveillance for life. These statements are given by us as they appear in the telegraphic report. It appears to have been a jury trial. It appears to have been conducted with a dignity and decency that would put to shame many such trials in America and in France. The man was evidently sane, the sentence just and not too severe, considering the nature of the crime. That part of it which places him under surveillance for life seems eminently proper. Such men ought to be watched in every government which cares for the lives of its citizens. But what strikes us most, is the broad range of the evidence which went over the man's whole life—in such striking contrast with the narrow and exclusionary rules adhered to with such bigotry by the courts of the common law.

—THE Albany Law Journal reminds us that William Cullen Bryant, whose eightieth birthday was celebrated on the 3d instant, was once a legal practitioner, and represented the plaintiff in the case of Bloss v. Tobey, 2 Pick. 320. This reminds us that Noah Webster, whose story about the lawyer's bull goring the farmer's ox, called forth some animadversions from the same journal a few months ago, was also a legal practitioner in his younger days, and at one ime a judge. In his story about the bull and the ox, he aptly portrayed human nature, which is the same, whether it develop itself through the character of a lawyer or any other. It may not be out of place to note that General Sherman once tried to practice law, at Leavenworth, Kansas, it is said; but in his first case was so overwhelmed by the low arts and vile rhetoric of a shyster, that he threw up the business in disgust. He probably entertains an opinion of lawyers very like that of the great lexicographer.

—MR. SERGEANT COX recently read a paper before Repression of Crime Section of the Social Science Congress, at Glasgow, in which he argued in favor of cumulative sentences in cases of inveterate criminals. He sums up his views, as follows:

"1. The object of punishment is, first, to deter the offender from repeating the offence, by fear of the consequences; secondly, to deter others from offending by the knowledge of the pain they will incur if they do so.

"2. For this purpose the law should affix to all offences, below a certain high class of crimes, a scale of penalties increasing at a fixed ratio with every repetition of the same offence.

"3. The law should also impose some increase of sentence upon a conviction for any offence of the same nature, as, for instance—in larceny, for any crime in the nature of dishonesty; in assault, for any offense involving violence, and so forth. (This the law has already partially accomplished.)

"4. In all cases there should be vested in the court a large discretion for mitigation of punishment, and here I would suggest whether it would not be desirable to make some change in the present practice of sentences so as to require the judge to say to this effect: 'I now pronounce the sentence of the law, which for your offence is (naming the statutory penalty). But by virtue of the power given to me to mitigate that sentence, for the reasons I now state to you, I reduce your punishment for that offence to,' etc. Much benefit would accrue from such a repeated publication of the punishment attached by the law to offences, and no small advantage would be secured by the judge being thus required to state publicly his reasons for its mitigation.

"5. One of the strongest recommendations for the adoption of a scale of cumulative punishments, is that it precisely apportions the remedy to the disease."

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

Voluntary Bankruptcy—Vacating Proceedings on Account of Insanity.—In *re* Alonzo Murphy, 10 N. B. R. No. 1, the following opinion was delivered by Mr. District Judge Trigg: Creditors of Alonzo Murphy file a petition against him, asking his adjudication in involuntary bankruptcy, sometime in the year 1872. The order to show cause was served on him, and, on his default to answer, he was adjudicated a bankrupt, and his property turned over to an assignee. The property in the hands of the assignee has never been distributed among the creditors. Alonzo Murphy now comes in with a petition, supported by affidavits, showing that he was *non compos mentis* at the time the debts of petitioning creditors were created, as well as at the time of the institution of proceedings, and the adjudication of bankruptcy, and until a very recent period. Under this state of facts, I cannot refuse the application to set the default and subsequent adjudication aside, and to allow Alonzo Murphy to show cause why he should not be adjudicated a bankrupt.

NOTE.—A jury trial was subsequently had, and a verdict of insanity at the time of the adjudication of the lands. It is not pretended that there is found any express reservation in either, or all, of these.

Admiralty—Salvage—Pilotage—Ambiguous Signals.—In The Racer, 30 L. T. N. S. 904, the Admiralty Court of the Cinque Ports decided a very interesting question relative to salvage. It appeared that a signal was made by the Racer; the signal was a Union Jack with a portion of the ensign torn away and hoisted above her topgallant-yard. The Stag sent a boat to the Racer, and one of the crew went on board and helped run her into the nearest port. Sir R. Phillimore, who delivered the opinion, said the signal raised by the Racer was an ambiguous one, and would be construed according to the condition of the vessel when boarded. And on the question whether the service rendered was purely pilotage or partook of the nature of salvage, the judge was of opinion that it was the latter, as the condition of the Racer was such that her master thought it best to put into the nearest port for repairs. For other cases bearing on the subject of ambiguous signals, see The Heding, Spinks, E. C. C., and Adm. 21; The Felix, id., note; The Little Joe, Lush. 88; The Enterprise, 2 Hagg. Adm. Rep. 178, note.—[*Albany Law Journal*.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, NOVEMBER 20, 1874.

SUBSCRIPTION:
$8 PER ANNUM, in Advance

STATE EXEMPTIONS AND THE BANKRUPT LAW.—The recent decision of Mr. Chief Justice Waite and Mr. Circuit Judge Bond, in the United States Circuit Court for the Eastern District of Virginia, in *Re* Deckert, holding that the act of Congress of March 3, 1873 (17 Stat., 577), amendatory of the bankrupt law, which declares that the amount of exemptions allowed by the bankrupt act "shall be the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871," is unconstitutional, because it violates the principle of *uniformity* required by the constitution, art. 1, § 8, seems to have been opposed to the views of several of the district judges. It affirms *Re* Dillard, decided in the same court by Mr. Circuit Judge Bond, but denies the principle of *Re* Jordan, 8 N. B. R. 180, Dick, J.; of Kean v. White, 8 N. B. R. 367, Rives, J.; and of *Re* Smith, 8 N. B. R. 401, Erskine, J. This last case presents a very full and able discussion of the question, and should be read in connection with *Re* Deckert, as perhaps the best presentation of the opposing view. In *Re* Willis A. Jordan, 10 N. B. R. 427 (determined since the publication of *Re* Deckert), Mr. District Judge Erskine adheres to his former view; and this view is strengthened by *Re* Beckerford, 1 Dillon, C. C. 45 (1870), in which Mr. Justice Miller and Mr. District Judge Krekel ruled that the fourteenth section of the original act of 1867, which adopted the state exemption laws in force in 1864 as the measure of property to be exempted in proceedings in bankruptcy, was uniform in its operation among the states, and was therefore constitutional.

CRIMINAL RESPONSIBILITY FOR RAILWAY NEGLIGENCE.—We find the following observations in our able contemporary, the Railroad Gazette:

Punishment for neglect is provided for in the French railroad laws, as well as for malicious causing of accidents, and even for threatening to cause one. Article 19 of the law on railroad police of July 15, 1845, says: "Whoever, through lack of skill, imprudence, inattention, negligence, or disobedience of the laws and regulations, shall have involuntarily caused on a railroad, or in the stations, an accident which shall have occasioned wounds, shall be punished with imprisonment for from eight days to six months, and with a fine of from fifty to a thousand francs. If the accident has caused the death of one or several persons, the imprisonment shall be from six months to five years, and the fine from three hundred to a thousand francs." Article 20 of the same law says: "Every engineman or brakeman who shall have abandoned his post during the running of a train, shall be punished with imprisonment from six months to two years." This is worse than dismissal, which some trainmen think very hard. The first article provides a punishment which seems impossible in this country under existing laws. It will be remembered that the conductor and engineman of the coal train on the Chicago & Alton Railroad who by running contrary to orders caused the terrible Lemont collision, killing about twenty persons and wounding as many more, could not be punished. The conductor was indicted for manslaughter, but, having been out on bail for nearly a year, on coming to trial was found "not guilty," there being of course no shadow of suspicion that he had intended any harm by the act which put his own life in extreme danger. This is a case of which many will feel justified in saying: "They do these things better in France."

The above writer is entirely mistaken when he supposes that drivers of railway trains can negligently kill passengers or co-employees and that "punishment is impossible under existing laws." The law is very old, very well settled, and very familiar to every lawyer, that if one person kills another through negligence in the prosecution of any lawful employment, it is either murder or manslaughter, according to the degree of the negligence involved. Foster Cr. Law, 262-3; 1 Hall P. C., 472-6; 1 East P. C., 262-4; 4 Bla. Com. 192; 2 Whart. Cr. L. 7th Ed., §§ 1002 *et seq.* These principles have been applied to railroad accidents produced by negligence in several cases, American and English. 2 Whart. Cr. Law, § 1010 *a*. We do not mention this as a matter of news or even of interest to lawyers, but because it would be a public misfortune if the impression should get out among the drivers of railway trains that they can kill passengers or co-employees through the negligent running of their trains, and yet escape punishment. If the conductor and engineman of the coal train which caused the Lemont disaster were guilty, and yet went unpunished, it was not the fault of the law, but of the manner in which it was administered. There is doubtless need of legislation in some states, making those guilty of negligence or impropriety in running railway trains amenable to punishment where persons are *injured* through such negligence, but not killed; but when death has resulted, the law is good enough if it is only administered.

Carriers—Loss of Goods on Connecting Line.

The case of The Chicago and Northwestern Railroad Co. v. The Northern Line Packet Co., 7 Chicago Legal News, 34 Supreme Court of Illinois, Walker, J., is an interesting one. One Emanuel Solen delivered to the Chicago and Northwestern Railroad Company several packages of goods to be shipped to Lee Summit Station, Jackson county, Missouri. One of the packages was lost, and the owner obtained a judgment for the value of the same for $1128, and afterwards compromised for $750. The Chicago and Northwestern Railroad Company then brought suit against the Northern Line Packet Company, to whom they had delivered the goods, instead of the Hannibal & St. Joseph Railroad Company, by whom the goods were in fact lost. The bill of lading given by the Northern Line Packet Company to the Chicago & Northwestern Railroad Company, contained the ordinary stipulation, "that they will convey the goods without delay from Fulton to Hannibal, and deliver them to the Hannibal & St. Joseph railroad, as consignees, he or they paying freight for the goods." It was *held* that the action could not be maintained, but that the plaintiffs must resort to the Hannibal & St. Joseph Railroad Company, the carrier which neglected its duty.

The main question in the case is discussed by the court as follows:

The question arises whether appellees [the Northern Line Packet Company], by force of the duty devolving on them as common carriers, become liable for the neglect of duty by the other carriers into whose hands the goods would go after leaving theirs, notwithstanding this agreement contained in the bill of lading. In the case Illinois Central Railroad Company v. Franklinburg, 54 Illinois, 88, it was said, that in adopting a rule where goods are lost by one carrier in a line of carriers composed of several, that it was more just to hold the carrier, to whom the goods are delivered by the consignor liable, than to require him to spend time and money in searching for the carrier who produced the loss, and to bring suit for the injury in a distant state; that the intermediate roads should be considered the agents of the road first receiving

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the goods, as they have facilities not possessed by a consignor of tracing out the losses of property thus shipped; and that all have or can have running connections with each other, and the company first receiving the goods should be liable to the consignor. It is not intimated in that case that the owner or consignor may sue and recover of any carrier through whose hands the goods would have to pass, but the carrier first receiving them or the carrier who has neglected his duty. On the other hand, there is a strong implication that the consignor must sue either the first carrier or the carrier committing the wrong. And we are not willing to carry the rule beyond that extent, and must confine it within that limit. If the remote carriers are the agents, or are to be considered as such, of the carrier first receiving the property for transportation, and the goods are lost or damaged by another in the line, the first carrier having been compelled to adjust the loss, if he sues to recover it back he must proceed against the carrier who has occasioned the loss. He has or can have the means of readily finding where it occurred. Nor can a person, as a general rule, sue any agent of his but the person who has omitted the duty or perpetrated the wrong. He has no election to sue an agent who has performed his entire duty, and have him to sue another agent who is guilty of a failure to perform his duty, and has produced the injury to the principal. From these considerations it follows that appellees are not liable for the loss.

Ante-Nuptial Incontinence and Venereal Disease —Is it Ground for Divorce?

The Monthly Western Jurist (Bloomington, Ill.) for September, contains an interesting and forcibly written article by a writer signing himself W. F. T., under the above head, in which the writer takes ground that this question should be answered in the affirmative, although the law has answered it in the negative. He tells us "the student will be astonished to find the soil of the departments of the law almost totally barren of this question," and that in considering it, "we must be guided more by reason and analogy than by authenties." He then proceeds to argue that when either party is afflicted with a syphilitic disease at the time of the marriage, it should be avoided, (1) on the ground of *impotency*, (2) on the ground of *fraud*, and (3) on the ground of *cruelty*. We are inclined to think, without reference to what the courts may have decided, that a proper view of the marriage relation—of the duty of the marital partners towards each other, and towards the state, would result in the annulment of such a marriage on either of the two grounds first named; but that it might require a more liberal view of what is understood by legal cruelty, to annul it on that ground. But viewing it as a question, not of what the law is, but of what it should be, we should be in favor of annulling such marriages on the higher ground that they are likely to result in the procreation of diseased offsprings, and therefore that it is *against public policy* to permit them to stand. We therefore quite concur with this writer, when he says:

As to the marriage, there are three parties: the man, the woman, and society. So to the divorce there are the same three—the court sitting to protect society. The court should see that it is reasonable and proper—*conducive* to the interests of society, to domestic harmony, and the good of the parties. * * * The end of marriage is the procreation and perpetuation of the human race. All must be subservient to this. The state has the right to and must govern these relations, for every one is born into the state without his consent, to become a part of the great civil body. Hence the relation of state to the *status* of those who thrust offspring upon its mercies and claim its protection. The marriage relation underlies, and is the base of the very existence of the state. The state then, by its laws, has the inherent right to demand purity and integrity in the marriage; to the end that her citizens should not spread foul and contaminating diseases, or thrust upon it, offspring to be shunned as a leper. The state should be the guardian of its own interests. Hence we argue that *the state should furnish the power to separate* a man and woman, should either desire it, when that union is liable to generate or spread syphilitic disease.

The reader must not, however, expect to find in the article we are considering a *legal* argument upon the question. The writer is evidently a doctor and not a lawyer. He sometimes cites authors without giving the volume and page, and courts without giving the case, and in one case (in France) he even cites the argument of counsel. Nevertheless his paper is a forcible and valuable argument on a question which deserves the earnest attention of courts and legislatures.

Homicide—Insanity—Mania a Potu.

In Stuart v. The State, Supreme Court of Tennessee, December Term, 1871 (Nashville Com. Reporter, October 22), the defendant had killed his wife under circumstances of great atrocity, during the period of depression that followed a night's debauch. The defence was, that he was laboring under the delusion consequent upon a condition of *mania a potu*, at the time he did the killing, and was hence not accountable. There was medical testimony at the trial, based on a hypothetical state of facts, tending to show that the prisoner, at the time of the killing, was insane. The circuit judge charged the jury in substance that the law presumed the prisoner, if over fourteen years of age, to be of sound mind, and that the burden was upon him to introduce proof of his insanity, and to create a reasonable and well-founded doubt of his sanity, to entitle him to an acquittal. This instruction was objected to on the ground that it failed to mention and define the particular type of insanity under which the defendant was alleged to have been laboring. The supreme court, however, sustained it as sufficient. McFarland, J., in delivering the opinion of the court, said:

The judge, in his charge, does not use the words *mania a potu*, *delerium tremens*, or other similar language, but uses the words "unsoundness of mind" or insanity. The jury were instructed, that to relieve the prisoner it was sufficient to show this unsoundness of mind, or create a reasonable doubt of the prisoner's sanity; and this was sufficient whether the disease be permanent or temporary, and whether caused by the voluntary use of ardent spirits or otherwise. We do not think it essential that the judge should have specially defined the various classes or types of insanity. It is the unsoundness of mind that excuses the act; according to the proof, *mania a potu* is a disease in which the mind is unsound. The language of the charge is comprehensive enough to embrace the particular class of insanity indicated by the proof. It says: "The 'unsoundness of mind' may be temporary, caused by the use of ardent spirits." This is what physicians call *mania a potu* or *delerium tremens*, and if the proof made out a case of *mania a potu*, it made out a case of mental unsoundness. We think, in this, there was no error.

The next objection is that the jury were told that the prisoner must be regarded as of sound mind, if he knew the act was wrong, and knew the consequences—in other words if he knew right from wrong. Upon this question there is to be found a great deal of refinement and subtlety of reasoning. Upon mere abstract theory, there is scarcely to be found any such thing as absolute sanity. It is seldom, if ever, a person can be found not subject to some peculiarity or obliquity of intellect, that may be, according to these abstract principles, classed among some of the almost infinite forms of partial insanity.

But this doctrine is altogether too refined to be applied in the practical administration of the criminal law. We must have some standard more practical in its character. All persons possessing a "sound memory and discretion," in the language of our criminal code, should be held responsible for their criminal acts; and a "sound memory and discretion" must be understood in its practical and not in the abstract sense. Blackstone says, "lunatics or infants are incapable of committing any crime, unless in such cases where they show a consciousness of doing wrong, and, of course, a discretion or discernment between good and evil."

This language is quoted with approval in Dove v. The State, 3 Heiskell, 370. In Rogers v. Com. 7 Metcalf, 500, Chief Justice Shaw said: "A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, a knowledge and consciousness that the act he is doing is wrong and criminal and will subject him to punishment. In order to be responsible, he must have sufficient power and memory to recollect the relation in which

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he stands to others, and in which others stand to him; that the act he is doing is contrary to the plainest dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act, he will do wrong and receive punishment—such partial insanity is not sufficient to exempt him from responsibility for ctiminal acts." "If then" (he continues, referring to the case then before him), "it is proved to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be whether the disease existed to so high a degree that, for the time being, it overwhelmed the reason, conscience and judgment, and whether the prisoner committing the homicide acted from an irresistible and uncontrolable impulse; if so, then it was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of the mind directing it."

We quote this language in full, both because it is a clear and forcible statement of a sound rule, and also because it is the authority mainly relied on by the prisoner's counsel. The circuit judge, in the present case, was not so full and elaborate in his statement, but his language is very comprehensive.

It will be seen from the opinion of Judge Shaw above quoted, that the substance and essence of the rule he lays down is, that the accused must have capacity to enable him to distinguish between right and wrong in regard to the particular act, a "consciousness that he was doing wrong, and that he would be punished for it." Here the circuit judge said, in substance, the accused must know that the act was wrong—that is, he must know and be conscious that this particular act was wrong; further, that he must know the consequences. One of the consequences was his punishment. So the language of the judge, though very brief, is comprehensive, and we think as well adapted to the comprehension and understanding of a jury as a more elaborate statement would have been. The facts in proof upon the part of the defence do not tend to establish that the prisoner was laboring under any particular delusion, but simply that he was laboring under *mania a potu* or *delirium tremens*.

Bankrupt Act—Winding up Estate by a Committee—Creditors and Trustees.

In Re JAY COOKE & CO.

United States Circuit Court, Eastern District of Pennsylvania.

1. **Power of Court to Order Meeting of Creditors after Estate has been Placed in the Hands of a Committee.**—A committee of the creditors of a bankrupt having been choosen under the provisions of section forty-third of the bankrupt act, and also a trustee appointed by them, and this action having been confirmed by the district court; *Held*, that there is no longer any power in that court to order a meeting of creditor for the purposes mentioned in sections twenty-seven and twenty-eight of the act, and that such meeting, if called, would have no authority to resolve and direct as contemplated in those sections.

2. **Control of Court over Committee.**—If the committee of creditors exercise their discretion *mala fide*, they may be controlled by the court, but in the absence of fraud, their direction to the trustee must be conclusive.

Opinion of the court by Mr. Justice STRONG, delivered October 29th, 1874. MCKENNEN, Cir. J., concurring.

This is an application made by the trustee and committee chosen and appointed under the forty-third section of the bankrupt act, as well as by some of the creditors of the bankrupts, for a review of an order of the district court directing a second meeting of creditors for the purposes stated in the twenty-seventh and twenty-eighth sections of the act.

Several objections have been made to the order, only one of which do we propose now to notice. It is, that three-fourths in value of the creditors whose claims have been proved, having determined that the estate shall be wound up in the manner prescribed by the forty-third section, and their resolution having been confirmed by the district court, there is no longer any power in that court to order a meeting of creditors for the purposes mentioned in the twenty-seventh and twenty-eighth sections of the bankrupt act, and that such meeting, if called, would have no authority to resolve and direct as contemplated in those sections.

The bankrupt act of 1867 has very plainly provided two very different systems for winding up, settling, and distributing the estates of bankrupts. The first, and the ordinary one, is that presented by the twenty-seventh and twenty-eighth sections, applicable to all cases when the greater part of the creditors in number or in value, who have proved their debts, at their first meeting choose an assignee or assignees, or where the district judge or the register appoints one or more assignees. In such cases the twenty-seventh section requires that a general meeting of the creditors be called at the expiration of three months from the adjudication of bankruptcy, or earlier if the court so direct, and requires the assignee to report to the meeting, as well as to the court, an account of his receipts and payments. The assignee is also required to submit to the meeting the schedule of the bankrupts, creditors, and property as amended, and a statement of the whole estate of the bankrupts as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. The section further enacts, that at such meeting the majority in value of the creditors present shall determine whether any and what part of the proceeds of the estate, after certain deductions, shall be divided among the creditors, with a proviso, that unless at least one-half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine, and in case a dividend is ordered, the assignee is required to pay it under the direction of the court.

By the twenty-eighth section provision is made for a second and third meeting of the creditors, with like powers, and it is enacted, that at the third meeting called by the court, a final dividend shall be declared, unless an action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, it is required to be divided in manner aforesaid.

It is further directed, that after the third meeting of the creditors no further meeting shall be called, unless ordered by the court; and it is enacted that if at any time there shall be in the hands of the assignee any outstanding debts or other property due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order.

Thus it appears that under these provisions very large powers over the winding up, settlement, and distribution of a bankrupt's estate are given to the district court and to a majority in value of the creditors who may be present at a general meeting, or, in case a majority in value are not present at the meeting, to the assignee.

But the forty-third section of the act prescribed another system, the obvious purposes of which were to arrest the ordinary mode of proceeding to wind up, settle, and distribute a bankrupt's estates, to suspend some of the powers conferred upon the district court, and to confer upon representatives of the creditors authority not to be exercised by the general body. The system was extraordinary. It was borrowed from a system which has previously existed in Scotland and in England, which had for its object the withdrawal of the bankrupt's estate from the courts in certain cases, and placing its administration in the charge of the bankrupt himself, or in that of the chosen representative of the creditors.

An examination of the provisions of that section shows very clearly that such was its object, and that the powers conferred thereby are inconsistent with the continued existence of the powers given by the twenty-seventh and twenty-eighth sections. It is entitled "of superseding the bankrupt proceedings by arrangement." It is true proceedings under it are declared to be proceedings in bankruptcy, but the ordinary proceedings are superseded by it, and a different system is substituted.

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It enacts that "if at the first meeting of creditors, or at any meeting of creditors, to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three-fourths in value of the creditors whose claims have been proved, shall determine and resolve that it is for the interest of the general body of creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolutions to the court, and to nominate one or more trustees to take and hold and distribute the estate under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interest of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing by or on behalf of three-fourths in value of all the creditors whose claims have been proved, of a consent that the estate be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee, if one has been appointed, is required to convey all the property and estate of the bankrupt to the trustee nominated, who thenceforth shall hold it with all the powers and rights which the bankrupt would have had if no proceedings in bankruptcy had been taken, or as the assignee would have had were no such resolution passed, and with all the rights and powers of assignees in bankruptcy.

The section also declares that the consent of the three-fourths in value of all the creditors whose claims have been proved, when filed, and the proceedings thereunder, shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved as if he had proved it, and the trustee is directed to proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors. Still further, it is enacted, that the bankrupt shall have the like right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustee, as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the sections of the act proceeding the forty-third.

This last provision, if it were the only one, would leave no doubt in our minds that the manner of winding up, settling, and distributing the estate was intended to be different from that contemplated by the twenty-seventh and twenty-eighth sections of the act. And if this is not so, the forty-third section has accomplished no practical results.

If, when three-fourths in value of the creditors who have proved their debts, have resolved that the estate shall be wound up, settled, and distributed under the direction, not of the court, or the general body of the creditors, but of a committee chosen by them, and their resolution has been confirmed by the court, and when consent to such an administration has been filed, either the court, or a general meeting of the creditors, can control the discretion thus vested in the committee; if a general meeting of creditors composed of one-half in value may determine what part of the estate shall be divided, and when divided shall be made, how does the manner of administering the estate differ in substance from the ordinary manner prescribed in the twenty-seventh and twenty-eighth sections? What becomes of the power of the committee to direct the settlement and distribution? Moreover, it is worthy of observation that three-fourths in value of the creditors are required for the adoption of the resolution, and only one-half in value are required by the twenty-seventh section to constitute a creditor's meeting compent to exercise the powers described in that section. May a majority of the creditors in value, present at such a meeting, annul or override the action of the trustee and committee chosen by three-fourths? If so, how can it be said that the creditors who did not sign the consent that the estate should be wound up, settled, and distributed according to the terms of the resolution adopted by three-fourths and confirmed by the court, are bound by the consent and proceedings thereunder, as the statute declares they shall be?

The question when a dividend shall be made, and what portion of the estate in the trustee's hands shall be divided at any particular time, as well as what sums shall be retained to provide for all undetermined claims not proved, other expenses and contingencies, are questions relating directly to the settlement and distribution of the estate. By directing that over the settlement and distribution the creditor's committee shall have the direction, the statute, in our opinion, has withdrawn control over them from every other power, and to that extent has superseded the ordinary proceedings in bankruptcy. And this, we think, was not without reason. The ordinary proceedings are intended to be summary. It is intended by them to conclude the settlement and distribution with the utmost dispatch. Thus the twenty-eighth section requires a second meeting of creditors to be called at the expiration of six months from the adjudication of bankruptcy, or earlier, and at a third meeting, when a final dividend is to be declared, unless an action at law or a suit in equity be pending, or other estate come to the hands of the assignee, in which case he is required to convert it into money, as soon as may be, and within two months after such conversion the money is directed to be divided. And it is provided that if at any time there shall be in the hands of the assignee any outstanding debts or other property which cannot be collected and received by him without unreasonable delay or expense, he may sell such debts or property under the direction of the court. It was such hurried settlement of the estate that was regarded as prejudicial in some cases to the interests of the creditors.

For this reason, both in the Scotch and English law, provision was made for administering bankrupt estates in some cases by the creditors themselves, or by the bankrupt under their direction. And for the same reason the forty-third section of our act was enacted, by which the power to direct was given to certain representatives of the creditors; that is, to a committee chosen by them.

No doubt if that committee exercise their discretion *mala fide* they may be controlled, but in the absence of fraud their direction to the trustee must be conclusive. Certainly the discretion vested in them cannot be controlled by any meeting of the creditors called after their appointment.

Holding such opinions, we feel constrained to reverse the order of the district court, which directed a second meeting of the creditors of the bankrupts for the purposes mentioned in the twenty-seventh and twenty-eighth sections of the bankrupt act.

The order of the district court is REVERSED.

—[*Legal Gazette.*

Donation of Property to Secure Location of Railroad.

UNION PACIFIC RAILROAD COMPANY v. THOMAS C. DURANT.

United States Circuit Court, District of Nebraska, October Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.

The acting president and active manager of a railroad company, by an oppressive exercise of his powers, procured donations of property to be made to him in trust for the railroad company: *Held*, that his action was illegal, and that it affected the company, and that the effect was that he held the property in trust for the donors and not the company.

In Equity: on final hearing. The case made by complainant, in its bill, is substantially this: That in the month of November, 1863, the Union Pacific Railroad Company, having been incorporated and organized, and being about to commence the con-

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struction of its road, and having already commenced surveys in Nebraska, at or in the vicinity of Omaha, for the purpose of ascertaining the best point for the location of its eastern terminus, and the most practicable route thence westward, certain citizens of Omaha proposed to Peter A. Dey, the engineer in charge of sale surveys, to convey to T. C. Durant—at the date of such proposal the president and acting manager of the corporation—for its use, certain tracts of land and certain lots therein described. "Said conveyance to be made conditional upon the location of the said eastern terminus within one and a quarter miles of Farnam street, thence running west from said point towards the Platte valley;" that such proposal was accepted, and the conditions performed, and that, after the performance thereof, the several parties being satisfied therewith, and being willing to convey according to their agreement, offered to make such conveyances, and such conveyances were accordingly made; but, by the express direction of Durant, his name was inserted therein as grantee and "trustee," and the said conveyances recited the receipt of the consideration thereof in full, as being "in consideration of the location of the eastern terminus of the Union Pacific Railroad at Omaha, within one and a quarter miles of Farnam street, thence running west from said point to the Platte valley;" that it was the intention of the donors to convey in trust, and that Durant took said lands and lots in trust for the corporation, it having furnished the consideration therefor, and still so holds the same, but has refused, upon request, to convey to the rightful owner.

The theory of the bill is, that the lots and lands thus conveyed to Durant as "trustee," were so conveyed in trust for the complainant, and the prayer of bill is that Durant be compelled to execute the trust and convey the property to the Union Pacific Railroad Company.

The conveyances run to "Thomas C. Durant, trustee," but for whom or what he is thus trustee is not stated in the instruments, and the lots and lands do not, in most instances, adjoin the company's road, and are not necessary for its use and operation.

The substance of the answer is, that the corporation did not make the surveys for, or fix the location of the eastern terminus or westward route of the road, but that the surveys were made at Durant's individual expense, and under his individual management and direction; that the proposed donation was intended to be made to him individually, in order to secure his influence with the president and with the corporation in establishing the terminus and route westward; that, while it is true that the word "trustee" was inserted in said deeds, solely at his own instance, it was so inserted to declare a trust in favor of the grantors, in case of non-performance of the conditions of the agreement; that a portion of the lands so conveyed to him he has conveyed to the corporation, because they were necessary to its use, but that the residue he still holds; that the sole consideration of said conveyances was the location of the eastern terminus within one and a quarter miles of Farnam street, and the approval of the route westward by the president, in whom alone was vested the power to fix the terminus of or locate the route; that the condition of the contract was never complied with, and that therefore there has been a reversion to the grantors, for whom he holds, and who should be made parties to the suit, but are not.

The lots and tracts of land in controversy are numerous and of great value.

A. J. Poppleton & E. Wakely, for the complainant. *J. M. Woolworth*, for the defendant.

DILLON, Circuit Judge.—The cause is before the court on final hearing. I do not purpose to refer to the voluminous proofs in detail, but to give the conclusion reached and briefly the grounds of it. The conveyances were made to the defendant as "trustee." As the instruments were drawn in this form at the defendant's suggestion, and as no mistake or accident in framing them is claimed, it is plain that he does not hold the property for himself in his own right. The deeds estop him to set up such a claim, and the proofs, *aliunde*, show that no consideration for the conveyances moved from or were furnished by him individually.

An attempt was made in the proofs to show that the property was demanded and received by him to reimburse him for the expenses of surveys prior to the completed organization of the company, but this attempt failed. It clearly appears that these expenses were made good to the defendant by the company. It is indisputable, then, that the defendant holds the property *in trust*, and the only question now to be decided is whether he holds it for the complainant by such a trust that it can enforce. As between himself and the railroad company, of which at the date of the transactions in question the defendant was the acting president and active manager, there is no doubt, upon the proofs, that this property was taken by him in trust for it.

The exact point upon which the cause hinges, is whether the company's right to this property is such that a court of equity will, at its instance, enforce the trust by decreeing the defendant to convey the property to it.

The history of the transaction shows that the property was unfairly obtained by the defendant acting for the company—obtained under circumstances which a court of equity cannot sanction.

The subscription paper is dated November 23d, 1863, and in it the subscribers "agree to convey to T. C. Durant the lots and lands severally described over their respective signatures, for the purpose of securing the location of the eastern terminus of the Pacific road at Omaha City; said conveyances had to be made conditional upon the location of said terminus within one and one-quarter miles of Farnam street, thence running west from said point toward the Platte valley, and to provide that in case of the failure of such location said lots and lands are to revert to and become re-invested in the several grantors."

The act of July 1, 1862 (sec. 14), authorized the president to fix the terminus, and the same had been fixed by him on the 17th day of November, 1863, and his action was fully known when the subscription paper of the 23d day of that month was drawn and circulated. After this paper had been subscribed, another executive order, on March 7, 1864, was made, fixing the eastern terminus on the western boundary of the state of Iowa, opposite section ten of the township in which Omaha is situate. From Farnam street to the nearest part of section ten is a mile and *three*-quarters. The subscribers to the agreement stipulated for a location of the eastern terminus within one mile and *a quarter* of that street. When all of the deeds were made to the defendant as trustee, the legal terminus as thus fixed was known to everybody, but the business terminus, that is, the actual terminus, had been fixed by the company within about a half mile of Farnam street. The deeds to the defendant as trustee, none of which are dated earlier than December, 1864, recite that they are made "in consideration of the location of the eastern terminus of the Union Pacific Railroad Company at Omaha, within one and a quarter miles of Farnam street, thence running west from said point to the Platte Valley," and contain no clause as to reverter. It thus appears, with reasonable certainty, that all parties had in view the securing of the actual or business terminus, and not merely the legal terminus. The other matter to be secured, was that the road should run westwardly from Omaha, that is, not to a rival place—Florence on the north, or Bellevue on the south, so as to leave "Omaha on a switch," as one of the witnesses phrases it, and although the route of the road was somewhat changed, it was not changed in the interest of either of those places, or to the detriment of Omaha.

Assuming, though not deciding, that the company has the capacity *in law* to acquire and take property like that in question, not on line of its road nor shown to be necessary for its operations, I should be of the opinion, that if the subscriptions under the contract of November 23d, 1863, were fairly obtained for a lawful purpose, the defendant would be bound to convey the property to the company.

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And in this view the whole case lies within the enquiry, was the property fairly or lawfully obtained? In my judgment it was not. There is no satisfactory evidence that this property was demanded by the company, or by Mr. Durant, acting for it, to reimburse it for the additional expense which a terminus at Omaha, instead of Bellevue or Florence, would involve. Besides, after March 7, 1864, it was impossible for the company, if acting in good faith, not to construct and operate its road to Omaha, and it was after this date that all of the deeds to the defendant were made. Whether an agreement to donate lands in consideration of the location of the depot or business terminus of a railroad can be supported in law, we need not enquire. See Fuller v. Dame, 18 Pick. 472; Pacific Railroad Company v. Seely, 45 Mo. 212. I am not prepared to say, that if a company has by law a discretion to adopt its own line and to go to any point its interest might suggest, and it is induced by offers of pecuniary advantages to adopt a more expensive line to another terminus, that such a transaction would necessarily be against public policy, or fall within the principles of the cases above cited. The facts of this cause present no such question, and I do not enter upon its consideration, or give any opinion concerning it.

How these subscriptions were obtained, appears from the testimony; and they seem to have been extorted from the subscribers by reason of the powers which the law had conferred upon the company to be exercised for the public good and not oppressively. The origin of the demand upon the people of Omaha clearly appears from the testimony of Mr. Dey, the confidential employee of Mr. Durant, and subsequently of the company, and who is a gentleman of high character. He testified that "the demand for these lands came from Mr. Durant." Mr. Dey thereupon caused Mr. Durant's demand to be communicated to leading citizens of Omaha. He says: "I did not circulate the paper [of November 23], but was in constant communication with those that did circulate it, and made many suggestions to them with the view to aid them in getting the subscriptions filled out." He is asked "for what purpose the lots and land were to be applied," etc., and his answer is: "The demand for those lands came from me, and the purpose avowed was to influence parties that might be of service to the road and of service in making Omaha the terminal point. Durant said he must have the deeds made to himself as trustee, that he might dispose of the lands without being answerable to any party, and that I stated to Mr. Aug. Kountz (an active citizen in circulating the papers of November 23, 1863) and other parties who were instrumental in procuring the donations." Again Mr. Dey testifies, "I wish to be understood as saying that one of the reasons avowed (why the citizens must give property) was that their donation could be used for that purpose," i. e., "to influence parties who might be of service in making Omaha the terminal point. I avowed that the parties controlling this matter [to-wit, Mr. Durant] had the power to procure such donations of lands as they wanted at the terminus of the road, and they expected to use it, and that I conceived it to be the policy of Omaha to donate what was asked of them. Mr. Durant at that time controlled the whole matter." Mr. Durant was absent and Mr. Dey was his representative. Public meetings were held, and the citizens given to understand that they must donate lots and lands liberally, or else Bellevue or Florence might secure the prize of the terminus; and when the subscriptions were made it is evident that it was done out of fear that Mr. Durant would, or might, otherwise use his power against Omaha, and that these donations (which one subscriber considered a species of "black-mail," another as a "corruption fund") would have the effect to conciliate his favor and secure his influence.

If Mr. Durant intended to use this property to corrupt the official action of others, it was obtained for an unlawful purpose. If he demanded the property not for this purpose, but because he had the power and intended to exercise it, his action is oppressive and cannot be permitted to stand. And as the company in this suit seeks the fruits of Mr. Durant's acts, they are affected through him with the vice of Mr. Durant's conduct.

My judgment is that the subscriptions to the paper of November 23, 1863, pursuant to which the conveyances, were subsequently executed to the defendant, as trustee, were secured by an illegal and oppressive exercise and use of the powers which belonged to the defendant's position as the acting president and active, and at that time almost the sole manager of the company, and consequently a court of equity will hold the defendant as trustee for the donors, although he may have intended to take the lands and lots as trustee for the company. Accordingly a decree will be entered dismissing the bill, except as to the tracts coveyed to him by Enos Lowe, and which he admits in his answer to be held by him in trust for the complainant. DECREE ACCORDINGLY.

Compulsory Bankruptcy—Verification of Petition.

IN THE MATTER OF ROSENFIELDS, ALLEGED BANKRUPT.

United States District Court, Eastern District of Michigan, October 19, 1871.

1. **Verification.**—A verification of a petition for adjudication is such only as to persons named in the body of it; and is not such as to a person whose name is omitted, although signed by him.

2. ——. **By Agent.**—Proof of agency, and of express authority, to do the particular acts of signing and verifying the petition by the agent's own oath or otherwise, is essential to the issuing of an order to show cause.

3. ——. ——. **Supplementary Affidavits as to Agent's Authority.**—In a case free from other difficulties, supplementary proof may, in the discretion of the court, be received, *nunc pro tunc*, to establish the authority of the agent to sign and verify the petition.

4. **One of Several Petitioning Creditors Repudiating the Proceedings.**—A creditor voluntarily joining with others in a petition for adjudication to make up the requisite number and amount, cannot afterwards defeat the proceedings by withdrawing his consent. But when the name of a creditor has been joined with others for such purposes, without his knowledge or consent, he may repudiate the proceedings; and if he does so, the petition will be dismissed as to him.

5. **Jurisdiction.**—Under the act of June 22, 1874, the allegation in a petition for adjudication, as to number and amount, is an allegation of a jurisdictional fact; and such allegation as to a certain number and amount, is not an allegation as to a less number and amount.

6. ——. **Amendments.**—Amendments can be allowed only where the court has jurisdiction, and it has none of a petition for adjudication which does not contain a clear, explicit and consistent allegation as to the proportionate number of creditors petitioning, and amount of debts represented by them.

7. **Deposition of Acts of Bankruptcy.**—The deposition of acts of bankruptcy, in order to authorize the making of an order to show cause, must be such as constitutes legal testimony,

On motion to vacate the order to show cause.

Mr. Don M. Dickinson, respondent's solicitor, for the motion; *Messrs. Pond & Brown*, opposed.

LONGYEAR, J.—The petition purports to be by twenty creditors in number, all non-residents of the district, and it contains an allegation that the petitioners constitute more than one-fourth in number of the creditors, and that they represent one-third of the entire indebtedness of the alleged bankrupts.

Three of the petitioners purport to sign the petition, each by a member of their respective firms; the others all purport to sign by agent—one by A. E. Stevens, eleven by Max Lilienthal and five by Albert Austin. The verification purports to be by and on behalf of all the petitioners, but the name of Aaron Teller, who signed the petition on behalf of Teller Bros., as a member of the firm, although appended to the verification, is not named in the body of it as one of the persons to whom the oath was administered. There was, therefore, no verification as to Teller Brothers, and as that firm constituted one of the first five signers, the petition was not sufficiently verified as required by section 39, as amended by the act of June 22, 1874.

The persons who signed and verified the petition as agents, produced no proof of their agency, or of any authority whatever in the premises, by their own oaths, or otherwise; and the order to

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show cause was issued in the entire absence of any such proof. This court has always required strict proof of agency, and of express authority, to do the particular act of signing and verifying the petition. I believe this has been the uniform practice in all the bankruptcy courts. In this court such proof has been allowed to be made by the oath of the agent or attorney so signing and verifying; but it has always been held essential to the issuing of the order to show cause. The act of June 22, 1874, has wrought no change in that respect. Therefore, at the time the order to show cause issued, the petition was not duly verified by any of the petitioning creditors, except the two on whose behalf a member of the firm signed and verified.

Pending the consideration of the motion, the solicitors for the petitioning creditors produced, and asked leave to file, *nunc pro tunc*, as supplemental to the verification of the petition by the three agents, their respective affidavits, as proof of their authority in the premises at the time of signing and verifying. The solicitor for the respondents objected, and at the same time produced and asked leave to file the affidavit of David Hirsch, of the firm of D. Hirsch & Co., one of the firms named in the petition as petitioning creditors, and whose name is signed to the petition by Max Lilienthal, as their agent, and on whose behalf said Lilienthal purports to verify the petition, absolutely and unqualifiedly denying that the firm of D. Hirsch & Co. had authorized said Lilienthal, or any other person, so to use the name of the firm; and that the same was done without their knowledge or consent.

I entertain no doubt that the court may, in its discretion, receive supplementary affidavits in support of the order to show cause, when they tend to prove the authority of the agents at the time they signed and verified the petition, and that the court would do so in a case free from other difficulties. But in the present case there are other difficulties, and such as seem to the court insurmountable. In the first place there is the lack of any verification at all, by or on behalf of the petitioning creditors, Teller Brothers, one of the first five signers, as already noticed. Besides this, I find, on examination of the papers, that there was an entire lack of proof of debt on the part of two of the petitioning creditors, viz.: D. Hirsch & Co. and James M. Bissell. There is a proof of debt in favor of Josiah M. Bissell, but none of James M. Bissell, and Josiah M. Bissell is not a petitioning creditor.

On the authority of the decision of this court in *re* Simmons (10 N. B. R. 254; 1 Cent. Law Jour. 440), it would be competent to allow the petition to stand over, and the verification on the part of Teller Brothers and the lacking proofs of debt to be supplied, and a new order to show cause to issue. This court holds such a course always competent where the petition itself is free from essential or radical defects. But in the light of the affidavit of David Hirsch, before referred to, unfortunately, perhaps, for the other petitioning creditors, such is not the case here.

When a creditor has once joined with others in a petition for adjudication in order to make up the requisite number and amount, it is, of course, not competent for him to defeat the proceedings by afterwards withdrawing his consent. But such is not the case here. In the present case D. Hirsch & Co. did not join with the others, and of course the proof of debt, etc., as to them, cannot be supplied. They never became petitioning creditors in any sense, and the petition stands as one by twenty creditors, when only nineteen actually joined in it. It is true Max Lilienthal, who signed and verified the petition, as agent for D. Hirsch & Co., swears in his supplemental affidavit that he was anthorized by them to do so, but the affidavit of the creditor himself is of the greater weight, especially where, as in this case, the swearing by the agent, all through, seems to have been done in a careless, loose and unsatisfactory manner.

Clearly, the petition must be dismissed as to D. Hirsch & Co., and if permitted to stand at all, it must be on the petition of the remaining nineteen. But can it, as such, be permitted to stand? The allegation that the petitioning creditors, and the debts represented by them, constitute one-fourth in number and one-third in amount, is an allegation of an essential jurisdictional fact; and an allegation of that fact as to twenty is to not an allegation of it as to any less number. The requirement of the act is, that the petition shall be "of one or more of the creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable." The allegations of the petitioners are, "and that aggregate of your petition [ers'] demands, as they are informed and believe, constitute one-third of the debts so provable," etc., "and on information and belief that your petitioners constitute more than one-fourth of all the creditors," etc. It may be said, inasmuch as the allegation is that the twenty constitute *more* than one-fourth in number, nineteen must constitute *at least* one-fourth. Whether or not the court would indulge in any such speculation to sustain the petition in any case, is unnecessary to determine in the present case, because in order to sustain the petition it must be extended to both amount and number, and that cannot be done in view of the working of the petition as to the amount. The courts have gone to the utmost limit of liberality in accepting the allegation as to number and amount on information and belief merely, and in not requiring any proof to sustain the allegation as a prerequisite to an order to show cause, and instead of extending that limit, a reasonable strictness within it must be required. No amendment in this regard can be allowed; because, in order to allow amendments, the court must have jurisdiction, and there is none without a clear, explicit and consistent allegation as to the proportionate number of creditors petitioning and amount of debts represented by them.

The deposition of acts of bankruptcy was also criticised by respondent's counsel as being loose and vague in its statements of facts, and as dealing largely in conclusions and hearsay. On a perusal of it, I am satisfied the criticisms of counsel are not entirely without foundation; but in view of the conclusion already arrived at, it is unnecessary to determine whether or not it was sufficient. The deposition of acts of bankruptcy must be such as constitutes legal testimony; its statements must be of facts, and not the mere conclusions of the witness; and, as a general rule they must be of the witness' own knowledge, and not mere hearsay; and they must be stated with such clearness as to leave no doubt as to their meaning.

The disposition which the court feels compelled to make of the petition, makes it necessary also to grant the motion of respondents to quash the provisional warrant, which is done, without further remark upon the merits of that motion, than that the showing upon which the warrant was allowed is obnoxious to the same infirmities hinted at as to all the proceedings in the matter.

It results that the petition and all orders, processes and proceedings thereunder, must be dismissed, vacated and altogether held for naught; that the respondents be discharged from arrest, and their bail from liability; and the property, books and effects seized by the marshal, under the provisional warrant, must be delivered up; but without prejudice to new proceedings.

Taxation of National Bank Shares.

FIRST NATIONAL BANK v. DOUGLAS COUNTY.

United States District Court, District of Nebraska, November Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.

Under the legislation of Nebraska, shares in National Banks may be taxed, and the tax enforced by distraint against the property of the bank.

J. M. Woolworth, for the plaintiff; *J. C. Cowin* and *J. M. Thurston*, for defendant.

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DILLON, Circuit Judge.—This is a bill by the First National Bank of Omaha to restrain the collection of a tax assessed and levied under the revenue laws of the state, for the year 1873, upon the shares of the shareholders in the bank, and which tax, it is alleged, the collector is about to collect by entering the banking-house of the plaintiff and seizing its property.

The bill avers that the capital of the plaintiff is $200,000, and that this amount is wholly invested in bonds, issued by the United States; the stock is divided into shares of $100 each, and are valued for taxation at that sum.

The object of this bill is to have the whole tax declared void, and to restrain its collection.

The pincipal ground for the relief asked, is, that the act of the legislature of the state, passed February 27th, 1873, which provides for the taxation of shares in national banks, is void, for non-compliance with the conditions upon which, under the acts of Congress, such taxation by the state, or under its authority, is permissible.

The third section of this act is in these words:

"The stockholders of *every national bank* located in this state, *or of any bank incorporated under the laws of this state*, shall be assessed and taxed on the *value of their shares of stock* therein, in the precinct where such bank is located, whether the stockholders reside in such place or not. Such shares shall be listed and assessed with regard to the ownership thereof, subject, however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this state, in the county or precinct where such bank is located. The shares of capital stock of national banks not located in this state, held in this state, shall not be required to be listed under the provisions of this act. Each national bank shall furnish to the assessor a full and correct list of the names and residence of its stockholders, and the number of shares held by each, and the assessor shall report the same to the county clerk in his assessment return. The taxes against such shares shall be levied against the holder of the same, in the list of personal property, and shall be *paid by the bank*."

The revenue law of the state further provides that the value of stock in corporations shall be taxed, and that "in assessing the value of such stock, the actual value in cash of all the property that is represented shall be considered, and no deduction shall be made in such valuation by reason of debts owing by said corporation, unless, as in other cases, such deductions be made from the item of money and credits listed by said corportion."

The plaintiff contends that the act of February 27, 1873, is void, and no tax can be lawfully levied thereunder, because:

1. The act does not provide that the tax imposed on the shares shall not exceed the rate imposed upon the shares of banks organized under the authority of the state.

2. The act in effect provides for the taxation of the *capital* of the national bank, and not of *shares* in the hands of the stockholders thereof, forasmuch as thereunder, the valuation of the entire property of the bank is to be first ascertained, and the bank itself is to pay the taxes—the name of the stock holders being used merely to give to the proceedings the color of a tax upon the shareholder's interest.

The act of Congress, in express terms, allows the states to impose taxes upon the shares of national banks, and the only substantial limitation upon the power of the states is that they shall not subject these shares to taxation to an amount greater than they assess upon their own banks, or upon moneyed capital in the hands of their own citizens.

The first objection above stated to the state enactment is not well taken. The act provides in terms that the stockholders in all banks, state and national, shall be assessed and taxed on *the value of their shares therein*.

This is equivalent to a provision that there shall be no discrimination in favor of the state banks, and against the national banks; and it is not necessary that there should be added a clause that the tax imposed on the shares in national banks shall not exceed that imposed on shares in state banks.

It is next urged as an objection to the state legislation above mentioned, that it in effect provides for a tax upon the *capital* instead of the *shares* of the banks, and that as the capital of the plaintiff is invested in United States securities, which are exempt from taxation, the taxation under the law of the state is illegal. By recurring to the act of the state, it will be seen that it does not undertake to tax capital, but only shares, and that this mode is prescribed for shares in both classes of banks.

It is settled by the decisions of the Supreme Court of the United States, that, as respects the power to tax there is a distinction between capital and share; and that the shares may be taxed, although the entire capital of the bank is invested in United States bonds, and that in the valuation of such shares for taxation, such valuation is not illegal because the assessing officers have not deducted the value conferred upon the shares by the non-taxable United States securities owned by the bank. Van Allen v. Assessors, 3 Wall. 573; People *ex rel.* Duer v. Tax Commrs., 6 Am. Law Reg. 467. Lionberger v. Rouse, 9 Wall. 470.

These decisions are decisive against the objection we are now considering to the act of the state. It does not attempt to discriminate against the national banks, but provides one and the same mode for ascertaining the value of shares in the stock of all corporations, and more than this, the legislation of Congress does not require. Lionberger v. Rouse, *supra*.

The bill does not state that the valuation of the shares in the plaintiff's bank is in excess of their actual value, nor that the valuation of the shares in the State Bank of Nebraska is less than their real value, and states no fact showing that the taxation, which the plaintiff seeks to avoid, is in fact excessive or disproportionate. It is therefore destitute of any substantial equity.

It is alleged, on information and belief, that the capital of the banking partnership of Caldwell, Hamilton & Co., has not been assessed for taxation, but it is not stated that this has been intentionally done, nor does the bill negative that this may have been an accidental omission, and hence states no case entitling the plaintiff to relief against the payment of the taxes in question.

It is, however, insisted that the bank cannot be made liable in respect to the taxes on the shares, and that the collector ought to be restrained from making distress of the property of the bank. But the act of the state in terms provides that the taxes on the shares "shall be paid by the bank," and it is competent to make such a provision. National Bank v. Commonwealth, 9 Wall. 354; Lionberger v. Rouse, *supra*. Undoubtedly the bank could be made liable to pay such taxes by suit, and no reason is seen why the collection may not be enforced by distraint in the same manner as other taxes are collected. The demurrer to the bill is sustained and the bill dismissed. DECREE ACCORDINGLY.

Liability of Municipal Corporation for Failing to Keep Streets in Repair.

COLEMAN B. BROWN v. THE MAYOR, COUNCILMEN AND CITIZENS OF GLASGOW.

Supreme Court of Missouri, July Term, 1874.

Present, Hon. WASH ADAMS, " DAVID WAGNER, " WM. B. NAPTON, " H. M. VORIES, " T. A. SHERWOOD, } Judges.

1. **Damages — Municipalities — Failure to Repair Streets—Measure of Liability.**—City authorities are bound to keep in repair only such streets and parts of streets as are necessary for the convenience and use of the traveling public, and where, at the point of accident, the street was abundantly wide and well repaired to enable per-

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sons, with the exercise of ordinary care; to avoid the injury, the city will not be responsible merely from the existence of a defect in the untraveled portion of the street.

Error to Howard Circuit Court.

Mayor & Pitts, for defendant in error.

Turner & Caples and W. H. Lewis, for plaintiffs in error, cited Bassett v. St Joseph, 53 Mo. 290.

SHERWOOD, J.' delivered the opinion of the court

On the trial of this cause, the evidence tended to show that as plaintiff's wagon and team were being driven into the city of Glasgow, the team becoming frightened by persons riding up behind it and making a noise, commenced running away, whereupon the driver jumped out, leaving four women passengers in the wagon; that the horses then ran down the street towards the Missouri river, and, after running about five squares, ran into a hole or gully on the side of the street, causing thereby the death of one of the horses and serious injury to the other, as well as considerable damage to the wagon and harness; that the hole or gully was not in the traveled portion of the street; that the part of the street where the hole was, could not be traveled, but that opposite the place where the accident occurred, the street was fifty-five feet wide, and the traveled portion thereof was thirty feet in width, and was in such condition that wagons and teams could, without any difficulty, safely travel along free from any danger in consequence of the existence of the hole or gully referred to, if ordinary care were used in driving them. Evidence also was adduced as to the amount of the damage sustained.

Upon this alleged state of facts, the plaintiff sought a recovery from the corporate authorities of the city, and the jury, under the instructions of the court, rendered a verdict in favor of the plaintiff.

The instructions given on his behalf, were to the following effect: that the defendants were required to keep the streets of the city in a proper state of repair, so that such streets should be reasonably safe for travel; and any neglect in this particular, resulting in injury, would render them liable to the plaintiff to the extent of such injury, unless it were occasioned by the negligence or carelessness of plaintiff or his agent.

And the defendants were refused instructions, which told the jury, in substance, that plaintiff, before he could recover, must prove that the alleged injury was occasioned alone by the alleged defect in the street, without any fault, neglect, and mismanagement on the part of himself or his driver; and if that street was safe and in good order, of a sufficient width to have been traveled safely with ordinary care and prudence, and the damage was occasioned by the plaintiff's team getting from under the control of the driver, and running away outside of the usually traveled portion of the street, to the spot where the accident took place, the defendants were not liable.

In a case recently decided by this court, that of Bassett v. The City of St. Joseph (53 Mo. 290), the subject of the liability of cities in respect to keeping their streets in repair, is fully discussed, and many of the authorities reviewed and commented upon, and it is there held that the city is not "required or bound to keep all of his streets in good repair under all circumstances. She is only bound to keep such streets, and such parts of streets in repair as are necessary for the convenience and use of the traveling public. * * * There are streets or parts of streets in many cities, which are not at present necessary for the convenience of the public, which will be brought into use by the growth of the city, or there may be streets that have more width than is necessary for the present use or the requirements of travel. All that is required in such cases is, that the city see that as the streets are required for use, they shall be placed in a reasonably safe condition for the convenience of travel."

In Titus v. Inhabitants of Northbridge (97 Mass. 258), where there there was a defect in the highway, which the town was bound to repair, and a horse, by reason of fright or otherwise, becoming actually uncontrollable, ran until he came to the above mentioned defect, and an injury was thereby occasioned, it was held that the town was not liable for the injury, unless it further appeared that such injury would have resulted irrespective of the question whether the driver had lost control of the horse or not. And this case, although in conflict with the decisions in some other states, seems to me to enunciate the better doctrine. For it would certainly be a most unreasonable demand to require the corporate authorities of a city not only to provide safe and commodious streets for ordinary purposes of travel, but to provide thoroughfares of such ample dimensions and such matchless grade, that accidents, even from runaway teams, would be absolute impossibilities.

In the case at bar the evidence conclusively shows, that the thoroughfare on which the accident occurred was of sufficient width for all the travel usual thereon, and that the exercise of only an ordinary amount of care would have prevented any injury, notwithstanding the defects which existed in the untraveled portion of the street; and that the injury which occurred to plaintiff, was not the result of defect in the street *per se*, but of the driver losing or rather abandoning control of the horses.

For these reasons the instructions given on behalf of the plaintiff, although abstractly correct, should have been refused as having no applicability to the facts adduced in evidence.

On the contrary, the instructions asked by defendants should have been given; as not only did they state the law correctly, as laid down in the authorities I have cited, but they exactly fitted the case established by the testimony.

The judgment must be reversed and the cause remanded; all the judges concur. JUDGMENT REVERSED.

Notes and Queries.

I. APPEAL FROM SATISFIED JUDGMENT.

MONTGOMERY, ALA., Nov. 4, 1874.

EDITORS CENTRAL LAW JOURNAL:—In response to your request, I will state that the case I referred to in my communication, published in your "Notes and Queries," of the 30th of Oct. (p. 547), is that of Sharp v. May, decided at a late term of our supreme court, and not yet reported. It will appear in the 49th or 50th Ala. Very truly yours,

R. D. RUGELEY.

I. CAN A MUNICIPAL CORPORATION BE EMPOWERED TO ALTER ITS OWN CHARTER?

HOUSTON, TEXAS, Sept. 21, 1874.

EDITORS CENTRAL LAW JOURNAL.—The constitution of the state of Texas is silent upon the subject of corporations, excepting this provision, supplied by an amendment ratified in January, A. D., 1874:

"The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:— * * * * , incorporating cities or towns, or changing or amending the charter of any city or village, * * *. In all cases where a general law can be made applicable, no special law shall be enacted."

At the same session of the legislature, January, 1874, the following act was passed:

An act to provide for the amendment of town and city charters.

SECTION 1.—Be it enacted by the legislature of the state of Texas, that whenever in the judgment of the board of aldermen of any incorporated town or city, it becomes necessary or desirable to amend the charter of said town or city, the said board of aldermen shall prepare suitable amendments to said charter, and submit said amendments to a vote of the qualified electors in said town or city; *provided*, that in no instance where the incorporated limits of any town or city shall be extended as herein provided, shall it be lawful to tax the person or property embraced in said extension, to pay the then existing corporation debt, unless the same is agreed to by a two-third votes of the tax-payers embraced in said extension.

SEC. 2.—That said amendments shall be printed and posted in said city or town, or published in some newspaper in the county where said town or city shall be situated, for thirty days anterior to the day designated for taking a vote thereon.

SEC. 3.—Should a majority of the votes cast be in favor of said amendments, then and in that event said amendments shall be considered ratified and adopted, and shall be considered and held to be a part of the organic law of said city or town.

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SEC. 4.—That no amendments shall be proposed or submitted by any board of aldermen which shall contravene, or be repugnant to the constitution or statute laws of this state.

SEC. 5.—That the election contemplated by this act shall be conducted in all respects as other elections for municipal officers in said city or town are by law required to be conducted.

Is the foregoing act valid? Can the legislature authorize municipal corporations to amend or alter their own charters? G. & S.

ANSWER.—The legislature may authorize a city to extend its boundaries, on a vote of the people, if there is no special restriction in the constitution. Such legislation is quite common in the states of this country. But an act authorizing a municipal corporation to alter its charter at will, subject only to the constitution and law of the states, strikes us as novel; and we invite discussion on the question.

III. APPEALS FROM JUSTICES OF THE PEACE—CERTIORARI.

We are glad that C. D. M. has taken the trouble to answer the query of "A Reader of the Journal," which appeared in our last issue. We are inclined to think that his answer presents the only correct view of the question. It certainly presents the matter in a clear light. Now will some of our readers do C. D. M. the favor of answering his query, which appeared in our last number?

BLOOMINGTON, ILLS., Nov. 17, 1874.

EDITORS CENTRAL LAW JOURNAL:—In answer to *quære* No. 1, page 574 of the JOURNAL, regarding the effect of a judgment upon a writ of *certiorari*, it may be said:

1. At common law, the office of a writ of *certiorari*, is to correct errors of law apparent on admitted or established facts, and is never resorted to for the purpose of settling disputed facts. Groeve v. Burwell, 1 Ld. Raymond, 471, 580; State v. Hendson, 3 Vroom (N. J.) 365.

2. At common law, circuit courts have power to award writs of *certiorari* only when there is no other method provided for directly reviewing the proceedings of the inferior court. Hence, it is not proper to grant a writ of *certiorari* if an appeal would lie. The People v. Williamson, 13 Ill. 660; Doolittle v. G. C. & U. R., 14 Ill. 381; C. & A. R. R. v. Whipple, 22 Ill. 105.

I take it, then, that the appeal in the case put was improperly taken, and would be dismissed on motion. From the fact that a writ of *certiorari* was awarded, it is evident that in the opinion of the superior court no appeal would lie. More than that, the justice of the peace had no jurisdiction in the case after having been served with the writ, the effect of which is to stop all further proceedings in the cause, and transfer the entire jurisdiction to the higher court. Hence, he had no power to grant an appeal. The defendant admits all the facts in the case by applying for a writ of *certiorari*, and must abide by the law as decided in the superior court. Many of the states have, by statute, modified and changed the law in regard to *certiorari*, which can be determined only by examining the statutes. C. D. M.

Summary of our Exchanges.

The Nashville Commercial Reporter, for November 10, prints in its law department, the case of Miller v. Knight, in which the Supreme Court of Tennessee, ruled the following points:

1. The taking of a deed of trust by the holder of a note, *prima facie*, is an additional or collateral security, and does not prevent the holder of the note from suing both the principal and surety, and therefore does not operate to discharge the surety, although taken without the consent of the surety, unless it is otherwise expressly agreed.

2. The surety called on the holder and urged him to avail himself of the benefits of a deed of trust and file the claim; the holder replied that the surety need not trouble himself about the note, that he had it secured. Afterwards the principal to the note became insolvent, and the holder brought suits on the note against the surety, who filed his bill, and prayed to be discharged: *Held*, that the surety was not discharged on this state of facts.

In the opinion of the court, the following cases are cited: United States v. Hodge, 6 Howard, U. S. 75; Hill v. Bostick, 10 Yerg. 410; and Carpenter v. King, 9 Metcf. 511. The court also cites one or two other cases, but not by name—a vicious and reprehensible practice.

In Mayor and Aldermen of Memphis v. Woodward, determined in the same court, and reported in the same number of the same journal, it appeared that Woodward was elected physician to the city hospital of Memphis, gave bond and took the prescribed oath. Lynch, his predecessor, enjoined him and the city officers from interfering with the office. This bill was dismissed and Woodward was declared to be the officer *de jure*. In the meantime the city paid the salary of the office to Lynch. After the bill was dismissed Woodward sued the city for the amount of his salary. The court *held*, that notwithstanding Lynch discharged all the duties of the office, and the city was enjoined from paying Woodward the salary pending the bill, yet as Woodward was lawfully entitled to the possession and emoluments of the office he was entitled to recover against the city the amount of his salary. The following cases are cited in the opinion: Dodd v. Windsor, 2 Sneed, 673; Pearce v. Hawkins, 2 Swann, 89, and People v. Tann, 3 Barb. 193.

The same number of the same journal, contains the following interesting note of a case recently decided by the same court at Knoxville:

Where a bill sought by attachment and injunction, to reach funds in the hands of the tax collector and treasurer of a municipal corporation, and to subject those funds to the satisfaction of a judgment against the corporation, on which execution had been returned *nulla bona*, upon the ground that at the time the taxes were assessed the objects of the assessment were specified, *one* of which was that of paying the outstanding indebtedness of the corporation, and that the taxes collected for this object (the amount of which was not stated), constituted a trust fund and were being misapplied by the corporate authorities in paying the salaries of officers, etc., it was held that the allegations of the bill did not authorize the issuance of an attachment or an injunction. That so far as the bill sought to reach or interfere with taxes assessed and collected for the purposes of the municipal government, it was contrary to public policy, and could not be maintained as a garnishment bill. That the only ground upon which the bill could be maintained would be that the tax collector had funds in his hands which belonged specifically to the complainants, which funds he was fraudulently misapplying. That the bill failed to make such a case as would authorize the interposition of the court without interfering with, and obstructing the city government. Moore & Marsh v. The Mayor and Aldermen of Chattanooga.

The Legal Intelligencer, for November 13, publishes an important constitutional case—Woods v. The Secretary of the Commonwealth, in which it is held, according to the syllabus, that the constitutional convention of 1872–3 had not the power to adopt a constitution without its ratification by the people at an election.

Its other matter is selected.

The same case is published in the Legal Gazette of the same, date with the following syllabus and note:

The court affirmed the decree of the court below, because the adoption of the new constitution of Pennsylvania by the people, since the decree, "forbids an enquiry into the merits of this case;" but lest by affirming it, sanction might be given to the doctrines enunciated in the opinion of the court below, *the court held:*

1. A constitutional convention has no inherent rights. It exercises powers only, and only such as the people delegate to it in the mode prescribed by law.

2. To impute absolute powers to a convention of mere delegates, from a vote on the simple question of calling it, is an assumption without a just basis, against the security, the interest and the welfare of the people, which no body of men have a right to make.

3. The legislature may restrict the powers of a constitutional convention.

[The case of Wells *et al.* v. Bain *et al.*, adverted to and the arguments therein contained, reiterated. The opinion in that case, and of the court below in this case will be found reported at length in 5 Legal Gazette, 397 and 400.—ED. GAZETTE.]

The Legal Gazette also publishes Williams v. Bankhead, Supreme Court of the United States, October term, 1874, with the following head-notes:

1. The bare title of a cause at the head of one or two orders of court—these being the only parts of a record in a concurrent proceeding sent here—in which orders the defendant is stated to be G. M. "*et al.*," is not sufficient to show that a partner of G. M., to-wit, one J. B.—not anywhere named in any portion of the record sent—was a defendant and party to the proceeding.

2. Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund, and liable by a decree to have it wholly swept from him, is an indispensable party.

3. The general rules in equity relative to parties and the qualification to the rules stated.

It also prints the case of The Cashier of the First National Bank, etc., v. Mayer, in which the following points were ruled by the common pleas of Westmoreland county, Pennsylvania:

1. A national bank may take judgment upon a note payable to the order of its cashier, in the name of the cashier only.

2. The taking by a national bank of a judgment-note running six months, and entering it up as a judgment, is not taking "other than personal security for the money."

It also prints the recently adopted amendments to the Constitution of New York.

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The Albany Law Journal, for November 14, has some Ideas about Jury Trial. The editor does not believe that the proper way to improve juries is by abolishing them. He does not believe what Don Jose Ramon Saavedra, a learned (?) ecclesiastic of Santiago, Chili, has lately asserted, that trial by jury is derived from the inquisition. But the most sensible thing which he does believe is that "no juror ought to be tolerated in disclosing the votes of the jury in case of disagreement. It is against public policy to permit it." We say amen to this, and go further; we believe that no juror ought to be tolerated in disclosing what has transpired in the jury-room, whether there has been a disagreement or not. We believe that in addition to the oath now taken by jurors, each one should take an oath similar to that taken by the members of a court martial, and which might run as follows: "Neither will you disclose or discover the vote or opinion of yourself or of any other member of the jury, unless required to give evidence thereof by a court of justice in due course of law."

This number of the Albany Law Journal also gives a third instalment of the article on the Lateral and Subjacent Support of Lands, from Mr. Wood's forthcoming work on Nuisances. It also prints an opinion of the New York Commission of Appeals, Earle, Commissioner, in McCafferty v. Railroad Co., holding that a railroad company is not responsible for injuries caused by blasting done by their sub-contractors.

The Chicago Legal News, for November 14, publishes a long opinion of the United States Circuit Court, Northern District of Illinois, on the right of a consolidated railway company, existing under charters granted by several states, to file a bill in the federal courts, and the power of a court of equity to name the place, prescribe the terms, and define the manner of one railroad crossing another.

Also a long opinion of Scott, J., Supreme Court of Illinois, in McKendree v. Tooke, a bill for specific performance of an executory contract to convey land. The opinion discusses when and under what circumstances a court of equity will decree a specific performance of a contract, when a vendee, in order to save his rights, must tender performance, when and how a contract may be forfeited, and the effect of giving a wrongful declaration of forfeiture by a vendor on failure of the vendee to make the first payment.

Also an opinion of the Supreme Court of Illinois in Starkweather v. American Bible Society, holding that the American Bible Society, a corporation created and existing under the laws of the state of New York, is not capable of taking a devise of real estate in Illinois. The court cites approvingly its former decision, reported 6 Legal News, 43, that a foreign corporation cannot hold lands in Illinois beyond what is reasonably necessary for the transaction of the business for which it was created; that a corporation created in another state for the purpose of buying and selling lands, cannot come to this state and pursue the business for which the corporation was created; that conveyances to it of lands in this state were void and failed to pass title to the corporation. The editor of the Legal News says of this opinion that it "will affect heavy property interests. The appellees and other similar societies hold valuable lands under devises of this character. The question arises, can foreign corporations loan money in this state and take real estate security, and upon default of payment, take steps to enforce payment by sale of such real estate? We should say, in the light of these decisions, that such corporations can not become the purchasers of real estate to secure even the payment of a debt except as authorized by our statutes."

It also publishes an opinion of Mr. District Judge Treat of the United States District Court for the Eastern District of Missouri, in *Re* S. H. Richardson, delivered on the 9th instant, holding that a bankrupt is entitled to exemptions out of partnership assets. This ruling appears to be founded in the more enlightened and liberal view of the meaning and policy of the bankrupt act; but the decisions on the question are variant.

It concludes with a *per curiam* opinion of the Supreme Court of Pennsylvania, in Brotherline v. Swires, on a question of fraud in a judicial sale. The editor of the Legal News says "there is more of the spread-eagle in this opinion than we ever saw in a judicial opinion of its length. It reads like the speech of a young man who has just entered college." We think so, but we have several laid up for future use, which beats this all to pieces. We shall, however, scissor out this, and put it in our box of curiosities.

The Washington Law Reporter, for November 10, publishes the case o Fallon v. The Chronicle Publishing Company, Supreme Court, District of Columbia, General Term:

The plaintiff, who was a newspaper carrier, alleged that a former proprietor of the Daily Morning Chronicle agreed to give him the exclusive right to sell and deliver that paper on a certian route in Washington, that such owner sold out to another person, and that defendant has succeeded to the ownership of the paper, and that he renewed the contract with both. He alleged performance, but claimed that defendant broke the contract by refusing to deliver to him any more papers. *Held*, that the plaintiff could not maintain an action on said contract, for the reason that it is void for uncertainty and want of mutuality, also for the reason that it is not alleged to be in writing or to be performed within a year, and is therefore void within the 4th section of the statute of frauds.

Also Gallaudet v. Sykes, same court, with the following syllabus:

1. A bill of exchange on three months, was drawn in New York upon S. in the city of Washington, and by him accepted for the accommodation of the drawer, and returned to such drawer in N. Y., where he negotiated it, upon an agreement that the person making the discount should retain a sum greatly beyond the rate of interest allowed by the laws of that state; it was held that the validity of the contract was to be determined by reference to the statute of N. Y., which declared a contract void when usurious, and that consequently the bill now in suit was void for that reason.

2. An acceptance is to be deemed a contract of the place where it is made; but where it is solely for the accommodation of the drawer, it is not a contract capable of being enforced until the paper is transferred to a holder for a valuable consideration, and that is to be regarded as the place of the contract, especially when no other place of performance is mentioned.

The Pacific Law Reporter, for November 3, publishes without a syllabus a very interesting opinion of Mr. District Judge Hoffman, of the Federal District Court of California, in Dibblee v. Ship Invincible, being a libel in admiralty against the ship, etc., for damages sustained by the injury which happened to a quantity of wine which had been placed on board said ship and stored in the deck-house by direction of the consignor, but which had suffered loss on the voyage to the extent of fifty-seven per cent. by "blowage," and "breakage," in consequence of the master having negligently omitted to ventilate the apartment in which it was stored. The court discusses the weight of evidence, and also the rule of law which charges the master of a vessel with diligence it preserving the cargo from damage during the voyage.

The same journal publishes several opinions of the Supreme Court of California, among them People v. Soto, in which it was held that in an indictment charging the animal stolen to be a cow, testimony is admissible to show that it was a heifer, and it will not be held to be a variance between proof and allegation.

The court (Crockett, J., delivering the opinion) discuss this question as follows:

"In the principal dictionary of our language, a heifer is defined to be a 'young cow.' It is true that under statutes very similar to ours, there are several decisions in the English courts, and some in the American courts, which would appear to sustain the proposition of the defendant's counsel. But the rule there was that penal statutes must be strictly construed, and nothing was left to implication. But this rule has been abolished in this state by the Penal Code, the fourth section of which provides that 'the rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.' Tested by this rule of construction, it is evident, we think, that in making it a felony to steal a cow, the legislature intended to include under that designation a heifer also, which is but a young cow. The statute enumerates by particular designation cows, bulls, steers, and calves; and it cannot reasonably be inferred that it was intended to exclude heifers, but rather that it was the intention to designate them as cows."

The American Law Record, for November, re-prints from the Law Magazine and Review a long and curious historical sketch of the office of Sergeant at Law. It also reports the very long case of Holterhoff v. Mutual Benefit Life Insurance Association, Superior Court of Cincinnati, General Term, June, 1874. This case is one of great interest in connection with the law of life insurance, the question involved relating to a warranty in the application for the policy that the insured was a man of temperate habits. The discussion is very elaborate, even the syllabus being too long for our limited space. The case was before the same court on a previous occasion, 2 Cin. Sup. Ct. R. 379.

The same journal also reports Schroeder v. Kisselbach, same court, with the following syllabus:

"Where an action is brought by a plaintiff upon an account, one item of which is for $1,930.78, for the price of a stock of goods sold and delivered to the defendant at the cost price thereof; and the defendant by way of counterclaim, sets up, among other items claimed in an account, one for $2,409.11, a balance due on a former account; and it appears that the defendant received the stock of goods in part payment for this item, and for which goods the plaintiff executed to the defendant a bill of sale under seal, acknowledg

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ing the receipt of $2,000 for the goods—all of which the defendant admits, but claims that he was only to allow the plaintiff as much for the goods as he might be able to realize net by their sale, which he claims was only $650.68; and then sets up that the price was fixed at $2.000 to hinder delay and defraud the other creditors of the plaintiff, he having himself made use of the bill of sale, and the former $2,409.11 indebtedness to successfully replevy the goods from plaintiff's creditors who had attached them. Held, that sale of and payment for the goods were fully executed by both parties, and defendant was properly estopped under the charge of the court from denying the price of the goods as fixed by the bill of sale. The form of the action being upon an implied executory promise to pay the cash value of the item, must yield to the actual nature and substance of the transaction, and the account will be held to indicate simply all the property and money the plaintiff furnished to the defendant during the whole time covered by the transactions stated in it, and this item to have been paid by the cancellation of so much of the item charged by the defendant against the plaintiff."

The American Law Register, for November, has an article on Special Agency, by Josiah H. Bissell, Esq., of Chicago.

It also contains several well-selected cases. The following summary, which we take from its cover, will sufficiently indicate their contents:

New York Commission of Appeals.—Eaton v. Del., etc., R. R. Co.—Railroad—Negligence—Person riding without payment of fare in the caboose of a coal-train, is not a passenger—Business of railroads—Manager of freight or coal-train, though called conductor, has not powers of a conductor of a passenger train to create the relation of carrier and passenger between the company and a person coming on such train. Opinion by Dwight, Commissioner, with note.

Supreme Court of New Jersey.—Columbia Ins. Co. v. Kinyon—Insurance—Contract in another state from that of the company valid, and will be enforced, unless prohibited by positive law—Comity between the states—Regulation of foreign insurance companies—Registration for revenue purposes. Opinion by Van Syckel, J.

Supreme Court of Michigan.—Hamilton v. The People—Criminal law—Public holiday—Continuance of examination to, and proceeding on 22d February, when that day is non-juridical—Misjoinder of counts—Evidence to show motive in the accused—Co-defendant in a criminal case, turning state's evidence waives his privilege of refusing to answer—Waiver extends to his counsel and all professional communications—Character—Repudiation for veracity—Province of jury. Opinion by Campbell, J.

Supreme Court of Iowa.—Morrow v. Wood—Parent and child—Authority of school teacher to punish pupil—Where conflicting orders are given to the child by its parent and the school teacher, the former must prevail, and the latter has no right to compel obedience by corporal punishment—Public school where course of study is prescribed by law. Opinion by Cole, J.

United States Circuit Court, Wisconsin.—McFarland v. Goodman—Bankruptcy—Deed fraudulent as to creditors being set aside, the title reverts to the grantor and passes from him to his assignee, subject to all the usual rights of homestead exemption, etc., as if the deed had never been made—Voluntary joining by wife in deed afterwards set aside as in fraud of creditors does not prevent her on such setting aside from claiming dower or homestead in the land. Opinion by Hopkins, J.

Legal News and Notes.

—THE amendments recently proposed to the New York constitution appear to have been adopted by good majorities.

—JOHN ADRIANCE, a member of the New York bar, committed suicide the other day while in a temporary fit of insanity, by cutting his throat with a razor.

—GOVERNOR FOOTE, in his reminiscences, paints the following pen-picture of the celebrated Judge Martin, whose decisions adorn so many of the early reports of Louisiana:

—POSTMASTER GENERAL JEWELL is threatened with a suit for damages by the attorney of the Erie railway, who was debarred from practice before the postoffice department by his action.

—THE comptroller of Florida recently addressed the following question to the attorney-general of that state: "Are national banks, chartered by the United States, liable to pay state license?" This question Mr. Attorney-general Cocke answered in the negative, citing the following cases:

Van Allen v. The Assessor, 3 Wallace, 573; National Bank v. The Commonwealth, 9 Wallace, 353; Lionberger v. Rouse, id, 468; McCullock v. Maryland, 4 Wheaton, 316.

—POSTMASTER GENERAL JEWELL will issue instructions to postmasters throughout the country, in a very short time, in explanation of their duties under the new postal law in carrying out that section of it in reference to the receipt of newspapers, periodicals, etc., and affixing of the new stamp gotten up for such mail matter.

—ANSEL STEVENS, who recently sued the Grand Trunk R. R. at Portland, for injuries received while traveling on a free pass, recovers damages for $12,833. The pass provided that the company should not be responsible for any harm that might befall the holder, and his journey was in the interests of the road. He, however, was on a Pullman car, and had paid for his berth. The decision, which is given by the United States Circuit Court, seems to set at naught an agreement in black and white, but it coincides with decisions in similar cases in one or two western courts.—[*Chicago Railway Review.*

—THE Daily Register enumerates the following prominent New York lawyers, who have died within the past fifteen years:

George Wood, William Curtis Noyes, James T. Brady, John Van Buren, Francis B. Cutting, Daniel Lord, Jr., James W. Gerard, Judge Edmonds, Solomon G. Hull, Judge Bonney, Alexander W. Bradford, Judge Slosson, Marshall S. Bidwell, Judge Dean, James R. Whiting, Townsend Scudder, Thomas C. T. Buckley, Jeremiah Larocque, Daniel S. Dickinson, C. M. Keller, Hugh Maxwell, who had retired many years before.

—THE Iowa Supreme Court has recently decided an important case growing out of the Chicago fire. Blederick & Miller shipped goods, *via* Merchants' Dispatch, to Davenport, which arrived at Chicago the night of Oct. 9, 1871, at the depot of the Rock Island R. Co. They were transferred from the cars to the depot, but not formally delivered to the railroad company. They were burned up when the city was burned. Suit was brought in the Scott County Circuit Court for the value of the goods. The defendants set up that their liability ceased when they placed the goods in the warehouse of the Rock Island Co.; that they only contracted to deliver the goods at Chicago. The plaintiffs claimed it was the duty of defendants to see that the goods were formally delivered to the railroad company, and placed in proper condition to go to their destination, and that their liability did not cease until the goods arrived at the point of destination. The circuit court held the defendants liable, and the supreme court sustained the court below.

"Judge Martin was a Frenchman by birth. He migrated to the United States in the days of his early manhood, resided for several years in North Carolina, and afterward located in Louisiana, where in a few years he was elevated to the bench, which he subsequently continued to adorn for many years. He was a man of most majestic stature, and had a face and head that alike indicated the high intellectual powers which he undoubtedly possessed, and that calm impartiality and conscientious regard for justice which rendered him an object of universal respect and confidence. His published opinions bear evidence of his extraordinary merits as a judicial functionary, and are justly regarded as of the highest authority in every state of the Union, especially upon questions of commercial law, or those involving the principles of the civil law system of jurisprudence. Judge Martin was for many years of his life in a state of total blindness; but he still remained upon the bench, where he continued to discharge his duties with steady industry, with unremitting zeal, and with a quiet, dignified, and patient demeanor which it was indeed most delightful to behold."

—THE compulsory education law, which goes into effect in the state of New York on the 1st of January next, requires every person having the control or charge of any child between the ages of eight and fourteen years, to see that such child has fourteen week's schooling each year, eight weeks of which must be consecutive. The penalty for not doing this, is one dollar for the first offence and five dollars for each week of neglect afterward, up to thirteen weeks in any one year; making a total of penalties per year, in each case, $66. The money thus collected is to be added to the school fund of the school district in which the offences occurred. If a child does not attend school as the law prescribes, he is to be deemed an habitual truant, taken charge of by the school authorities, and sent to a truant school. It is also provided that no person or company is allowed to employ any child between the ages of eight and fourteen years, in any business whatever, during the school hours of any school day in the public school in the city or district where such child is, unless such child has had, in the year immediately preceding such employment, fourteen week's schooling; and at the time of employing such child the employer must receive from the child a certificate of the teacher or school trustee certifying to such schooling. The duty of enforcing this law is imposed upon the trustees of school districts and public schools, and presidents of union school districts; or, in case there are no such officers, upon such officers as the board of education of the city or town may designate. The revised statutes make the neglect of this duty a misdemeanor, punishable by a fine of not more than $250 for each offence.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, NOVEMBER 27, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

COMPOSITIONS IN BANKRURPTCY—VARYING TERMS OF.—Mr. District Judge Blatchford has recently rendered an interesting decision in the case of Reiman and Friedlander, alleged bankrupts, on the question of the proceedings which are to take place when a resolution is passed under § 43 of the bankrupt act, as supplemented by the act of 1874, varying the terms of a composition between the bankrupt and his creditors already agreed upon. It appears that at a meeting of creditors there was a resolution passed varying a composition previously agreed upon and accepted. This resolution was confirmed in a regular manner, and when it was brought to the attention of Judge Blatchford, together with a statement of the assets and debts of the bankrupts, the latter asked that it be recorded and the statement placed on file. In giving his opinion on this point, the learned judge says:

The statute provides that the conditions may, by resolutions passed in the manner and under the circumstances provided in relation to an original resolution for composition, add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interest under such provisions who do not assent to such addition or variation. It further provides that any such additional resolution passed in the manner and under the circumstances aforesaid, shall be presented to the court in the same manner and proceeded with in the same way, and with the same consequences, as the resolution by which the composition was accepted in the first instance. This requires that after the resolution varying the provisions of the composition previously accepted, shall have been passed and confirmed and presented to the court, it shall be proceeded with in the same way as the original resolution was proceeded with. In regard to the original resolution, the statute expressly requires that the court shall, "upon notice to all the creditors of the debtor of not less than five days, and upon hearing, enquire whether such resolution has been passed in the manner directed by this section." It follows that this second resolution cannot now be recorded, but that a meeting, on notice to all the creditors, must be called in like manner as a second meeting was called in respect to the original resolution, to enquire whether the second resolution has been passed in the manner directed by the statute. As it appears that creditors who attended at the meeting when the second resolution was passed, objected to the passing of such resolution for reasons then and there stated by them, such creditors must have notice of the time and place of presenting to the court the proceedings of the meeting now to be called, so that they may be heard, and they will then be at liberty to present to the court, as well as any other creditors, any papers which are relevant to show that the composition is one which ought not to be sanctioned by the court.

NEGLIGENT KILLING OF SERVANT—LIABILITY WHEN DEATH IS INSTANTANEOUS.—The opinion of Mr. Circuit Judge Dillon, in Sullivan v. Union Pacific Railroad Company, which we elsewhere print, deserves, perhaps, a passing notice. It will be seen that the learned judge refuses to apply, in Nebraska, where the question is an open one, the so-called principle of the common law, that a master cannot recover damages for the negligent killing of his servant, when the death is instantaneous. It must have required some courage to lay down a doctrine at variance with the entire current of authority in England and America; but the judge shows that the prevailing doctrine had its origin in Baker v. Bolton, a *nisi prius* decision of Lord Ellenborough, rendered in 1808, and that, consequently, it was not a part of the common law of this country at the time of the revolution; and that, although followed in a late English case, and in several American decisions, yet these authorities were not binding upon him, and he was free to declare such a rule, applicable to the case before him, as was consistent with justice and legal reason. To the mind of the writer, the principle declared in Baker v. Bolton has always seemed to involve a gross defeat of justice and of common sense. To say that if you kill my horse instantly, I can recover its value, but that if you instantly kill my wife, child or other servant I can recover nothing for the loss of their services because the death was instantaneous, is sheer nonsense; and it is not to the credit of the American courts that they have engrafted such a barbarism upon our law, deriving it from no higher source than the declaration of a single English judge at *nisi prius*, pronounced since our revolution. If the writer is not mistaken, Mr. Bishop, somewhere in his works, has animadverted, in proper terms, on the slavish tendency of American lawyers and judges to adopt the doctrines of current English decisions, without considering whether they are founded in reason and justice, or whether they are at all applicable to our situation and institutions. Even some English text-books, which have never succeeded in acquiring any standing in their own country, have gone through several editions in this. The common sense of the American people, expressed through their legislatures, has, in several instances, repealed Lord Ellenborough's rule, where their courts have adopted it, and where the legislatures do not repeal it, we believe the courts will, and that, in a few years, there will not be a vestige of it left. T.

CAN THREE MEN AT THE SAME TIME STRIKE A FOURTH WITH THE SAME CLUB?—Some time since (*ante*, p. 484) we referred to the fact that this question had been argued before the Supreme Court of Illinois. We now see from the opinion of the court which is published in the Bloomington Western Jurist, for November (Coates v. The People, p. 325), that the question was decided in the affirmative. The indictment charged that the three defendants "with a stick of wood, which each severally had and held in their several right hands," inflicted the mortal wound, causing death. The ground of objection was, that the act charged was physically impossible. The court (Mr. Justice Scott) said: "There is no physical impossibility in the act charged, however improbable it may be. What is to prevent all three of the persons accused having hold of the same stick with their several right hands at the instant the fatal blow was inflicted. The plea filed admits it was done in the manner charged, and there is nothing in the nature of the act that compels us to hold a mortal wound cannot be struck by three persons in that way." This ruling, singular as it may seem, is supported by a recent Massachusetts case, which holds that an indictment against three persons jointly, for an attempt to commit larceny from the person of the fourth, which charges that the three, with felonious intent, put "their hands" into his pocket, may be sustained by proof that all three were participating in the act, though only one of them put his hands into the pocket. Com. v. Fortune, 105 Mass. 592. The principal reason, however, which the Illinois court give for the conclusion to which they come, is that the Illinois statute makes all accessories at, or before the fact, principals, and provides that they shall be punished accordingly.

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"They must," said the learned judge who delivered the opinion, "be indicted as principals and not otherwise. It might be advisable, as was said in Baxter v. The People, 3 Gilm. 368, to describe the circumstances of the offence as they actually occurred, but this is not indispensable. As in the case at bar, proof that either one struck the fatal blow with the weapon described, and that the others were accessory at the fact, would be sufficient to sustain a conviction of all of them as principals. There would be no variance in such a case between the proofs and the allegations in the indictment. This is the construction given to the statute in Baxter v. The People, and we see no reason to depart from it."

Railway Negligence—Fencing Side-Tracks.

A Missouri statute provides, in substance, that when any animal shall be killed by the cars or other carriage of a railroad company, the owner may recover its value without any proof of negligence or unskillfulness on the part of the agents or servants of the company, but it is further provided that the provisions of the section shall not apply to any accident happening where the road is inclosed by a lawful fence, or in the crossing of any public highway. In the case of Loyd v. The Pacific R. R. Co. (49 Mo. 199), it was held that where a cow was killed in the open grounds of a railroad, at a station or depot on the road, it being necessary for the transaction of business with the public, and the reception and discharge of freight and passengers, that such space should be left open, the company would not be liable without proof of negligence, notwithstanding the road was not fenced at such place, and that the same ruling would be made where the injury happened in a town where there were streets to be kept open, and where to fence the road would be to create a nuisance. In Morris v. St. Louis, Kansas City and Northern Railway Co., the Supreme Court of Missouri has recently restricted this interpretation of the statute, by holding that where a railroad company has a side-track extending for some distance from a station into the country, it must fence this and its main track, or it will be liable for damages resulting from the killing or injury of animals on them, without proof of negligence.

The evidence in the case tended to prove that the mules and colt sued for were killed and injured at a cattle yard, situate about one-fourth of a mile west of Thompson's Station, in Audrain county; that said station is situate in an open prairie country, has a passenger depot and stock-pens situate thereat, and a switch to the road has been constructed at the station, which extends west from the station to within about forty yards of the cattle-guard, where the injury to the stock took place; that from this cattle-guard west the defendant's railroad is fenced, but that the space of about one-fourth mile between where the mules and colt were injured and the depot, is open, unfenced prairie land; that the switch to the road extends west to within forty yards of where the fence inclosing the railroad commences; that the mules had entered on the road at or near the station, and had run down the track to where they were injured; that the train of cars by which the injury was inflicted was going west, and made no stop at the station; that the mules had escaped from plaintiff's pasture the night before the injury, and had gone on the track. The company were held liable to pay damages, without proof of negligence.

Mr. Justice Vories, in delivering the opinion of the court, said: "There is no reason why defendant should not fence its road along each side of the road where it has a switch as well as at other places. Where a switch extends along the main track for a considerable distance through an open prairie, it is just as necessary and practicable to have the road fenced, as upon any other part of the road, and we are not inclined to extend the rule laid down in the case of Lloyd v. The Pacific Railroad Co., before referred to, further than the facts of that case will justify, and that is, that the company is not required to fence such grounds as are necessary to remain open for the use of the public, and the necessary transaction of business at the depot or station."

Judge Benedict's Case.

The case of Lange v. Benedict, which is pending before the Supreme Court of New York, at Special Term, Judge Van Brunt presiding, is one of great interest to the judiciary and to the profession. The defendant is United States District Judge for the Eastern District of New York, and the plaintiff is a publisher of good reputation, who, having been convicted of the offence of stealing government mail bags, was erroneously sentenced by the defendant to be imprisoned for one year *and* to pay a fine of $200; whereas, the statute under which he was tried provides for punishment by fine *or* imprisonment. A writ of *habeas corpus* was sued out, showing these facts, and was made returnable before Judge Benedict, who vacated the sentence, and then, against the protest of Mr. Lange's counsel, proceeded to re-sentence Mr. Lange to a year's imprisonment. A second writ of *habeas corpus* was then sued out Supreme Court of the United States, where the second sentence was adjudged to be void. In the meantime, Mr. Lange was held in prison under the second sentence, and there remained until the supreme court directed his discharge. A report of the case, with a full statement of the facts, will be found in 18 Wallace, 163.

Upon obtaining his discharge, Mr. Lange commenced proceedings in the Supreme Court of the State of New York, against the defendant for alleged false imprisonment, claiming $50,000 damages. By an agreement between Messrs. Arnoux, Ritch & Woodford, attorneys for Mr. Lange, and Messrs. Tracy, Catlin & Broadhead, attorneys for Judge Benedict, the complaint was drawn so as to set up all the facts in the case, and a demurrer was interposed by the defendant. This demurrer has recently been argued, and the judge has taken the papers and reserved his decision. The following brief synopsis of the arguments of the two leading counsel, is thus given by the New York Herald:

General Tracy presented an able and interesting argument, in which he contended that the courts have invariably protected the judges of the courts of record from any actions that might be brought against them by private suitors for any errors they might have committed in the judgments pronounced by them, and that this immunity was so complete and sacred, that such suit could not be maintained even when malice and corruption could be shown; that this immunity was due to the proper administration of justice, and that the wrong sustained by the suitor would be infinitely less than the injury that would result in the administration of justice, if the contrary view should prevail. Illustrating this part of his argument, General Tracy cited the famous case brought against the Recorder of London. The philanthropist, William Penn, was arrested and brought before the recorder for street-preaching. The jury, contrary to the charge of the recorder, acquitted the accused, and thereupon the recorder fined the jury and imprisoned the plain-

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tiff who refused to pay the fine; he was discharged on *habeas corpus* and then sued the recorder for the false imprisonment. The court said that the maintainance of such an action would be more subversive of justice than the illegal act of the recorder. General Tracy also contended that the original sentence was valid and still in force if the subsequent act was illegal; that the original sentence covered a fine for one count in the indictment and the imprisonment for another count, and that the payment of the fine was illegally made, having been made to the clerk without any rule, and that the decision of the Supreme Court of the United States was based on an error in assuming that the fine was duly paid.

Mr. Arnoux, of counsel for Mr. Lange, opened his argument by alluding to the position of counsel who attacked the illegal action of those in power, and then gave a history of the case from its commencement until the hearing before the supreme court. Mr. Arnoux then proceeded to show that the unbroken current of English and American decisions was, that in courts of limited jurisdiction, the judge was not protected when he exceeded his jurisdiction, which was conceded by the defendant's counsel, and that every court had used language broad enough to cover the case of the acts of judges in courts of record who knowingly act without jurisdiction. To the glory of the judiciary, it appears that no judge of a court of record in America, and but one in England, had ever been successfully sued. The whole question in the case turns upon the legal effect of the second sentence. The supreme court declared that when the first judgment was pronounced and had been executed, the power of the court that sentenced Mr. Lange was ended, and, therefore, Mr. Arnoux contended that the second sentence was wholly without jurisdiction and void; that the first sentence, although illegal, was valid until reversed or vacated, and that made the case of the recorder a parallel case, but the second sentence was wholly *coram non judice*, and afforded no protection whatever to the court or officers in any respect.

Chloroform in Rape Cases.

The Monthly Western Jurist (Bloomington, Ill.) for November, contains a long and interesting article on this subject. After stating the law applicable to such cases, the writer details at length two celebrated cases which have occured in this country—that of Dr. Beale, a dentist, tried in Philadelphia, in 1854, and that of Dr. Green, tried in the Common Pleas of Mercer county, Ohio, in 1860. The former case is detailed at length in the Philadelphia Medical Examiner, for December, 1854, and also in Wharton & Stille's Medical Jurisprudence, §§ 245–267. In this case the defendant had administered an anæsthetic to the prosecutrix for the purpose of performing a dental operation upon her, and was charged, upon her unsupported testimony, with committing a rape upon her while under its influence. The other case was reported in the Cincinnati Lancet and Observer for May, 1860. The defendant in this case was likewise charged, upon the unsupported testimony of the prosecutrix, with committing a rape upon her by means of chloroform administered to her while sleeping with his daughter in a room adjoining that in which he slept. In each of these cases the prosecutrix claimed to have heen conscious of the crime which was being committed upon her, but that her will and physical strength were so far overpowered by the anæsthetic that she was unable effectually to resist. In the case of Dr. Green, the prosecutrix testified to the *sensations* she experienced at the time of the act. This case was that of a healthy girl seventeen years of age, who was delivered of a child which she claimed to have been begotten by the rape of which she accused the defendant. She told no one of the crime which had been committed upon her until six months had elapsed after its alleged perpetration—that is, she waited until her condition obliged her to tell some kind of a story. In both of these cases a sympathetic jury returned a verdict of guilty. New trials were refused; but Dr. Beale was pardoned by the governor, after a careful examination of the case. We are not advised of the final result of the case of Dr. Green.

Medical reseaches upon the effects of anæsthetics upon the human system seem to leave little room to doubt that both these convictions were erroneous. It seems highly propable that in Dr. Beale's case the prosecutrix simply labored under a delusion which females are frequently subject to under the influence of anæsthetics, and that, in Dr. Green's case, the charge was preferred by the prosecutrix when she discovered that she could no longer conceal her condition, and through a natural desire to account for that condition in some manner consistent with her innocence. The case of respectable and creditable women accusing dentists and other surgeons of having attempted to violate their chastity while under the influence of chloroform, is one of frequent occurence, and obliges such professional men to have a witness present during such operations, to insure their own reputation and safety. This fact should have raised such a doubt in the mind of the jury in case of Dr. Beale as to have led to his acquittal. The innocence of Dr. Green is vindicated by the fact that it appears to be a matter of universal experience in the administration, both of ether and chloroform, that *sensation* yields before *volition*, and that both sensation and consciousness yield before the power of muscular action ceases. Consequently, when the prosecutrix testified as to the sensations which she experienced during the act, while at the same time she was conscious of the nature of the act which was being committed, of the person who was committing it, and was yet without the power of motion or resistence, she was guilty of a fabrication so unscientific as to have convinced the jury, if properly advised by medical testimony, that her whole story was an invention.

The writer of the article in the Monthly Western Jurist, concludes with the following words of Dr. Wharton: "Sexual connection, therefore, with a person in an unconscious condition, is rape. But to support a conviction there should be, first, proof of the *corpus delicti*, which includes intent to use force. And, secondly, the reality of the unconsciousness must be proved. *Non omnes dormiunt qui clausus et conniventes habent oculos.*" Whart. & S. Med. Jur. (1873), § 242; Wharton's Crim. Law (1874), § 1147. See also Tayl. Med. Jur. pp. 618–625.

Constitutionality of "Local Option" Laws.

EX PARTE WALL.

Supreme Court of California, September 28, 1874.

Present, Hon. WILLIAM T. WALLACE, Chief Justice.
" JOSEPH B. CROCKETT, } Judges.
" ADDISON C. NILES, }
" E. W. MCKINSTRY, }
" AUGUSTUS L. RHODES, }

1. **Local Option Liquor Laws Unconstitutional.**—An act which delegates to 'the voters of every township or incorporated city," the power of determining, at an election to be held for that purpose, the question of granting licenses to sell intoxicating liquors, is unconstitutional.

2. **Acts to take Effect on Happening of Future Contingency.**—The validity of laws enacted by the legislative body, which are not to take effect until the happening of some future contingency therein named, considered.

3. **Town, City and Township Governments.**—The New England system of *town* governments discussed, and the dastinctions pointed out between such governments, and *township* and *city* governments.

On *habeas corpus*.

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Opinion by McKINSTRY, J., WALLACE, C. J., and NILES, J., concuring; RHODES and CROCKETT, JJ., dissenting.

Under the act of March 18, 1874, "to permit the voters of every township or incorporated city to vote on the question of granting licenses to sell intoxicating liquors," an *election* was held in the Fourth Township of Contra Costa County, at which a majority of the votes were cast "against licence."

The petitioner was afterwards convicted of an alleged violation of the law, as declared by the statute, and sentenced to imprisonmentin the county jail.

The power to make laws conferred by the constitution on the legislature cannot be delegated by the legislature to the people of the state, or to any portion of the people. Houghton v. Austin, 48 Cal., present term; Barto v. Himrod, 8 N. Y. 483; Bank of Rome v. Village of Rome, 18 N. Y. 38; Starin v. The Town of Genoa, 23 N. Y. 439; Clark v. The City of Rochester, 28 N. Y. 605; Thorn v. Cramer, 15 Barb. 112; Bradley v. Baxter, Ib. 122; Parker v. Commonwealth, 6 Penn. St. 507; Commonwealth v. Quarter Sessions, 8 Penn. St. 391; Locke's Appeal, 72 Penn. St. 491; State v. Wilcox, 45 Mo. 459; Rice v. Foster, 4 Harr. 479; State v. Copeland, 3 R. I. 33; R. R. Co. v. Commissioners of Clinton County, 1 Ohio N. S. 77; People v. Collins, 3 Mich. 343; Santo v. State, 2 Iowa (Clarke), 165; Geebrick v. State, 5 Iowa, 491; State v. Beneke, 9 Iowa, 203; State v. Weir, 33 Iowa, 134; Maize v. State, 4 Ind. 342; Meshmeier v. State, 11 Ind. 482; State v Swisher, 17 Tex. 441; State v. Panker, 26 Vt. 362.

Our government is a *representative republic*, not a simple democracy. Whenever it shall be transformed into the latter—as we are taught by the examples of history—the tyranny of a changeable majority will soon drive honest men to seek refuge beneath the despotism of a single ruler. To become a *law* an *act* must be passed through both houses of the legislature, be signed by the speaker of the assembly, and be approved by the governor; or, if vetoed by the executive, must again be passed by the constitutional majority. Thus, and thus only, can a general statute be enacted.

While the power and responsibilities of legislation remain where the constitution has placed them, a proposed measure, before it can become a law, must pass through the ordeal of a public and deliberate discussion in the legislature. "Public opinion will prevail; but it will be enlightened, deliberate, permanent, and organically expressed public opinion. It is this opinion alone which the constitution designed should govern. Such a government secures deliberation and responsibility in legislation, and affords protection against the despotism of official rulers, on the one hand, and of irresponsible numerical majorities on the other. It has been appropriately termed 'the flower of modern civilization.'" People v. Collins, 3 Mich. 416.

It is urged, however, that for the legislature to enact that a law shall take effect, provided the people of the state, or of a district, shall vote in favor of it, is not to delegate the law-making power. This position has been upheld by courts of high character, but I think the decisions in which it has been denied are sustained by the better reasons.

It is true a statute may be *conditional;* its taking effect may sometimes be made to depend upon a subsequent event. The last proposition is illustrated by the case of The Cargo of the Brig Aurora v. United States (7 Cranch. 382), in which the validity of a provision of the "non-intercourse law" was upheld. The provision was to the effect, that in case Great Britain or France should revoke or modify its edicts previously issued, so that they should cease to violate the neutral commerce of the United States, the trade suspended by the law should be renewed. It will be observed that in this instance the members of Congress exercised their own judgment, and amply determined that trade should be suspended, while the orders in council edicts should continue.

But it does not follow that a statute may be made to take effect upon the happening of *any* subsequent event which may be named in it. The event must be one which shall produce such a change of circumstances as that the law-makers—in the exercise of their own judgment—can declare it to be wise and expedient that the law shall take effect when the event shall occur. The legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present conditions, or future contingencies. To say that the legislators may deem a law to be expedient, provided the people shall deem it expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the constitution has intrusted the prerogative of determining whether a law is or is not expedient. Can it be said in such case that any member of the legislature declares the prohibition or enactment to be expedient?

A statute to take effect upon a subsequent event, when it comes from the hands of the legislature, must be a law *in presenti* to take effect *in futuro*. On the question of the expediency of the law, the legislature must exercise its own judgment definitely and finally. If it can be made to take effect on the occurrence of an event, the legislature must declare the law expedient if the event shall happen, but indexpedient if the event shall not happen. They can appeal to no other man or men to judge for them in relation to its present or future propriety or necessity; they must exercise that power themselves, and thus perform the duty imposed upon them by the constitution. But in case of a law to take effect, if it shall be approved by a popular vote, no event affecting the expediency of the law is expected to happen. The expediency or wisdom of the law, abstractly considered, does not depen on a vote of the people. If it is unwise before the vote is taken, it is equally unwise afterward. The legislature has no more right to refer such a question to the whole people than to a single individual. The people are sovereign, but their sovereignty must be exercised in the mode pointed out by the constitution. Barto v. Himrod, 8 N. Y. 483; Rice v. Foster, 4 Harr. 479.

It was argued that the general statute which prohibits the sale of intoxicating liquors without license, and the "Local Option" statute should be read as one law, and, so reading them, that it is not left to the popular vote to give effect to the law, but only to determine whether licenses shall be issued under the law. This distinction seems to have been recognized by the Supreme Court of New Jersey, in State v. Morris, Common Pleas, November 1872. There a statute was sustained which, in itself, contained a prohibition of sales without license, and then left to the people in *town meeting* to say whether licenses should be granted. The supreme court of that state, after stating the test to be whether the enactment, when it passed from the hands of the law-givers, had taken the form of a complete law, said:

"If it (the statute) denounces as a misdsmeanor the selling of liquor without license, so far it is positive and free from any contingency; it is left to the popular vote to determine, not whether it should be lawful to sell without lisense, but whether the contingency should arise under which licenses should be granted." The New Jersey statute left the option whether licenses should or should not be granted to the people in "town meeting." The difference between the action of *towns*, as local governments, and a submission to the voters living in any merely territorial subdivision of a county, will be hereinafter pointed out. I do not think, however, that the distinction asserted by the Supreme Court of New Jersey can be maintained. A law being in operation authorizing the business of retailing liquors, provided a license be first obtained, the legislature enacts that the people of a town shall determine whether any license shall be granted. If *they* determine that licenses shall not be granted, none can be issued.

It is plain in such case that the law-makers do not intend to establish the new rule, until it shall have other sanction and allowance than that of the legislature itself. Licenses were granted by authority of the old law; they can be prohibited only by a new law. But in the case supposed, the legislature does not determine that licen-

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ses shall not be granted, but leaves it to the popular vote to determine the very contingency which the legislature must determine for themselves, in order to give effect to the law.

It is certain that the sections of the General Revenue Law relating to *licenses* to vendors of liquors, remain in force until the vote is counted and announced, as required by the statute; it is equally certain (if the statute is valid) that these sections cease to have force from the time the vote is announced, if the majority is against license. By whom, in such case, are the provisions of the Revenue Law repealed or suspended—by the legislature or by the people of the town?

And we are thus brought to another question: Can this law be sustained as in effect conferring on "towns" the power of regulating within their limits the sale of intoxicating liquors?

In determining this question I do not deem it necessary to decide any of the following:

1. Can the officers of a city or town be empowered to regulate the sale of intoxicating liquors, and, if so, can they *prohibit* the sale, in certain quantities, under the power to regulate it?

2. Can a city or town by ordinance or by-law make that a criminal offence which is legalized by the general laws of the state?

3. Does an act of the legislature authorizing a by-law, the effect of which is to relieve those making sales of more than five gallons, within the town, from the payment of a license-tax, which those engaged in the same business outside of the town are obliged to pay, violate the provisions of the constitution: "All laws of a general nature must have a uniform operation?"

4. Would a law be unconstitutional which conferred a power upon the officers of a county or town to be exercised at the option of the officers, provided the people of the county or town should vote in favor of the exercise of the power by the officers?"

It is enough to say that this statute connot be sustained as conferring on the towns the power referred to, because no "towns" have ever been created in this state.

Our constitution, in terms, makes it the imperative duty of the legislature to create certain local governments. "The legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable throughout the state." Art. XI. sec. 4. "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages," etc. Art. IV. sec. 37. The behest of the constitution as to "towns" will be obeyed when a system of town government shall be established by law.

When the system shall be established the towns may make such local rules or by-laws as they shall be authorized to make by the statutes which shall give them life and entity. The bestowal on them of the power to make proper local rules or by-laws will not be a delegation of legislative power conferred on the senate and assembly, because, as was said in Hougton v. Austin, the exercise of such power by the counties, towns, cities, and incorporated villages, is recognized by the same constitution which confers the general legislative power upon the state legislature.

But the constitution is not self-executing; the town governments must be created by statute. And it will be observed the constitution commands the legislature to establish a *system* of town *governments*. This form of expression conveyed a definite meaning when the constitution was adopted, and is at once understood by those familiar with the system of town government elsewhere; it would be meaningless, unless applied with reference to organizations, in their general features at least, like those in other states, where systems of town government had been established. To establish a *system* of government, the duties of the several local officials must be defined, in some of whom (or in the inhabitants of the town acting in a public capacity) a discretionary action must be vested within the scope of the powers given by the organic law which creates the system. In view of the origin of towns and their history in other states, I can conceive of no system of town government which is not *continuous*; which does not furnish officers to whom is given (during their term of office) the management of the machinery of local government, and which does not provide a legislative assembly, whose enactments shall be the product of deliberation and mutual consultation. This last seems the very life of any such system heretofore known in the United States. If the subjects of local legislation are committed to the *people* of the town, they must be committed to them as to a deliberative body; a project for a local regulation must be submitted to the wisdom and discretion of the people in organized assembly, by whom, after proper discussion and consideration, it may be rejected or moulded into a rule to be enforced as law. In our country the idea of *legislation*—in its broader sense, or as applied to local concerns—involves an examination into the merits of a proposed law by the assembled legislators. Under the system of town governments in New England, it has been the practice (by notice designating the question to be presented) for the *select men* to call meetings of the voters of the town—which are presided over by a moderator, and restrained by rules intended to secure orderly proceedings—at which the propriety and expediency of proposed measures may be considered, adopted or rejected. The voters of the town are supposed to be so few in number that they may act directly on matters of local concern, but they act as a subordinate, legislative and deliberative body in every sense that their representatives would so act, if representatives were selected by them. The matters of local interest are *discussed* in the town meeting, before they are passed upon. "The marked and characteristic distinction," says Chief Justice Shaw, in Warren v. Charlestown, "between a *town* organization and that of a city, is, that in the former all the qualified voters *meet, deliberate, act and vote*, whereas, under a city government, this is all done by their representatives." 2 Gray, 84–101. Mr. Quincy, in his Municipal History of Boston (p. 28), in explaining the causes which led to the establishment of a *city* government for Boston, while he proves that the *town* government had outlived its usefulness, shows, that before the city was incorporated, all the qualified electors constituted the local legislature. He says: "With a population upwards of forty thousand, and with seven thousand qualified voters, it was evidently impossible calmly to deliberate and act. When a town meeting was held on any exciting subject in Faneuil Hall, those only who obtained places near the moderator could *even hear the discussion*."

The system of town governments, as it existed in New York prior to 1846, is fully explained in the eleventh chapter of the first part of the revised statutes of 1827–8. There, as in New England, the towns possessed certain of the faculties of a body corporate, could sue and be sued, hold lands and make contracts necessary to the exercise of their corporate powers. In New York, as elsewhere, the citizens of towns chose certain town officers, and when assembled as a deliberative body (justices of the peace presiding), made "prudential rules and regulations" with respect to local matters committed to their discretion. In some other states this power would seem to have been vested in boards of trustees, who constitute the local parliaments.

The legislature of California has never established a "system of town governments." The word "town" is nowhere used in the statutes in the sense in which it is employed in the constitution. The supervisors are authorized (Pol. Code, sec. 4,046) to divide the counties into "townships," as they are authorized to divide them into election, school, road and supervisorial districts but the territory included in any one of the districts last name need not be the same as that included within the limits of a township. No *township governments* have been established. The only officers mentioned in the general laws as township officers, are justices of the peace and constables. The townships have neither

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been given personally, nor any other of the attributes of corporation; no official has been named, empowered to call the inhabitants or voters together for the purpose of consultation and joint action; no act has been passed providing for any presiding officer, or regulating the mode of conducting business, or of declaring the result of the action of the inhabitants or voters when assembled; and neither the voters themselves, nor any boards of officers elected by the voters, have ever been constituted a deliberative assembly for the purpose of adopting prudential rules or regulations in respect to matters placed under the control of the town governments.

The exercise by the town governments, when they shall be established, of the power to make local rules, will co-exist with the power of the state legislature to make general laws, and will apparently (but apparently only) constitute an exception to the rule, that the power to make laws, placed by the constitution in the senate and assembly, cannot be delegated. When the mandate of the constitution shall have heen obeyed and a "system of town governments" shall have been established, and when local legislatures shall have been organized under that system, the state legislature may confide to members of such local legislatures the task of deliberating and acting upon matters *purely local* in their nature. The legislature may give to the town governments, when formed, the right to make local rules; but the legislature has no more right to delegate to the people living within certain territorial limits, but who have no distinctive political character or governmental organization, the power *to make laws*, than it can delegate the same power to all the people of the state.

The statute of March 18, 1874, under the provisions of which the petitioner was convicted, does not itself establish any system of town government. The only officers who are directed to perform any acts are *county* officers; the election is to be ordered by, and the returns made, to the *supervisors*. There is no provision for an assemblage of the people of the town for deliberation; the vote to be taken can in no way be said to express the result of such deliberation. The constitution intended that the opinion of a majority should govern as to town matters, but that it should be an "organically expressed" opinion. The power to enact laws must be employed by the state legislature; that to make by-laws for a town by the local legislature; to become law or by-law it must first be considered by the appropriate deliberative body. The statute under consideration simply permits a species of *plebiscitum* with reference to a particular subject, in which the only *option* of the people of a township is to say "yes" or "no" to a complicated project. After the spasmodic effort at the polls, the "town government" (if this can be called one) subsides into inaction, without any form or power of self-vitalization, until again aroused to the exertion of its single function by the *supervisors of the county*. The statute furnishes neither a *system* nor a government.

When M. de Tocqueville and other writers, who have studied our institutions in a philosophical spirit, have expressed their admiration for the system of town governments existing in New England, as affording an excellent school of preparation for the discharge by the citizen of his duties to the state, it was in view of the public discussions in reference to affairs of local, but sometimes absorbing interest, at which all the qualified inhabitants of the town could be present, and in which all were authorized to take part. To substitute for such local legislation, where measures receive the sanction of law only after public interchange of opinions, the machinery of a "primary election," would be to degrade the whole system. That cannot be called a system of town government in which no deliberative assemblage is provided for, and in which a local law is adopted by the ballots of perhaps a bare majority, who vote secretly and without consultation with the rest of the voters; who are actuated by motives which need not be publicly avowed, or controlled by reasons, the weakness of which would be exposed by a public discussion.

I think, therefore, first—This statute is void, because it did not become a law when it left the hands of the legislature, but was to take effect only when it should be approved by a majority of the people of a township, and then only in the township where thus approved. Second—That this statute is not a law conferring upon towns, any govermental or police power.

Let the petitioner be discharged.

PETITIONER DISCHARGED.

NOTE BY THE COURT.—It is to be understood that the necessities of this case do not demand of the court to determine *what* powers may be granted to the towns. It may be difficult, perhaps impracticable, to draw the line by general definition; but it is certain that *all* the powers of legislation cannot be conferred on the counties or towns. As was said by Douglas, J., in the People v. Collins (3 Mich. 415), "only powers of legislation over matters of local concern can be delegated. If the legislature should attempt to invest the boards of supervisors with power to enact the entire civil and criminal codes which should be in force within their respective counties, this would be manifestly in violation of the true intent and spirit of the constitution."

It would be an entire abandonment by the legislature of the power to pass general laws, and would be destructive of our government; resolving the state into petty districts, or *communes*, each with different laws, to be enforced only within its own borders.

Negligence—Right to Recover Damages where Death is Instantaneous.

DANIEL SULLIVAN v. UNION PACIFIC RAILROAD COMPANY.

United States Circuit Court, District of Nebraska, October Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **Loss of Service—Instantaneous Death—Damages.**—Where a servant is killed on the spot, by the wrongful act of the defendant, the master may recover for the loss of service. Where the death does not immediately ensue, but afterwards takes place, the master is not limited in the estimate of his damages to the period of the servant's death.

2. **Injury to Servant Himself—Instantaneous Death—Right of Action.**—Such a case distinguished from one for the injury to the servant himself. Without a statute, an action for such injury does not survive the death of the person injured, and cannot be brought by his representatives or next of kin.

3. **The English and American cases,** as to the remedy of a father for loss of the services of his infant child, whose death has been caused by the wrongful act of another, commented on.

Demurrer to petition. The petition represents that the plaintiff is the father of one James Sullivan, who was an employee of the defendant at $2.00 per day, which was received by the plaintiff; that his said son was 17 years of age; that, while in the service of the defendant, he was, by its negligence, "caught between the cars of the defendant and was fatally bruised and wounded, from which he died within six hours." The facts, intended to show that the death of the son was caused by the fault of the defendant, are fully stated in the petition, but it is not necessary to refer to them at length. The plaintiff claims as damages, the value of his son's services from the date of his death until he would have become of age, and also $20 for medical services, $10 for nursing and $250 for burial expenses, amounting, as alleged, to the sum of $3,412 for which judgment is asked.

Demurrer on the ground that the petition shows no cause of action.

Redick & Ferguson, for the plaintiff; *A. J. Poppleton & E. Wakely*, for the defendant.

DILLON, Circuit Judge.—The plaintiff sues in virtue of his relationship of father, for the loss of the services of his minor son, and for special damages, which were occasioned by his alleged wrongful death through the negligence of the defendant. There is no statute in Nebraska giving such an action, and counsel concede that, at the time the present cause of action arose, there was no statute in the state like Lord Campbell's Act, 9 & 10 Vict. c.

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93. This action must be maintained, therefore, if at all, on general or common law principles. In commencing our enquiries, let us ascertain the exact character of the action. When a minor child is injured by the tort of another, pecuniary damages result to his father as master entitled to his services, as well as to the child itself. Hence, two distinct actions may be brought. One by the parent or master for the loss of services, and another by the child, by its next friend or guardian, for the injury to itself. These are familiar and undisputed principles. But in the latter case, if the child should die in consequence of the injury, the cause of action did not, by the common law, survive, and by that law, no right of recovery, for the damages resulting from the death, existed in favor of his personal representatives or next of kin. It was to remedy this defect in the law, that is, to give an action to the personal representatives, where death ensued from the wrongful acts of another, that Lord Campbell's statute was passed. This is manifest both from its recital and its provisions. It did not provide for the case of masters, and their rights are not touched by it.

Is it, then, a principle of the common law, that where the death of the servant immediately ensues from the wrongful act of another, there is no remedy for the master, and that where it ensues therefrom afterwards, the master's loss cannot be estimated beyond the period when the death occurred?

Such a principle cannot be vindicated on considerations of reason, justice or policy, and I could only consent to recognize it upon being satisfied that it was one of the rules of the common law, so long and so well settled, that the courts are bound to accept and apply until it is changed by legislative action.

If the child of the plaintiff, had, by the wrongful act or neglect of the defendant, been disabled from work, but not killed, it is clear that the plaintiff would have his action for the loss of service. Fort v. Union Pacific Railroad Co. 17 Wall. 553. So, if the child thus injured was disabled from work thereby, and remained disabled for a year and then died, it is also clear, and has been several times decided, that the father or master could recover for the loss of his services down to the date of the death. Hyatt v. Adams, 16 Mich. 180; Baker v. Bolton, 1 Campb. 493.

The negative of this proposition has never been judicially denied.

But if injury, caused by the tort of the defendant, is so great that death ensues immediately, does the law deny the master or parent all remedy, when, if the injury had been less, there would be, as we have just seen, a remedy at least to some extent? And when death ensues, whether sooner or later, does that limit the time down to which the loss must be estimated? The consequences of the injury where death happens, affect the father until the child would become of age, and to give damages only until the death, is to recognize the right of the father to compensation for the injury to him, but to stop part way in measuring the compensation.

It is evident, that since the father is entitled in law to the services of his child until majority, and since the wrongful act which causes the death of the child, deprives him of such services, we have here that damage and pecuniary injury which, on general principles, give a right to compensation. If such right does not exist, it is on the wrong-doer to show why. No attempt is made, and the attempt cannot successfully be made, to show that justly, the father in such case should have no compensation, or only a partial compensation, down to the date of the death. Accordingly, the civil law, and the French and Scotch law, recognize the right to maintain actions like the one at the bar.

To defeat the right of action, reliance is placed by the defendant solely upon the proposition, that the common law doctrine, as Lord Ellenborough is reported to have expressed it, in a case hereafter adverted to, is, that "in a civil court, the death of a human being cannot be complained of as an injury." Baker v. Bolton, 1 Campb. 493, 1808. It may be observed, that strictly the complaint of the plaintiff is not for the death of his son, but for the wrongful act, which, by producing the death, was the cause of his pecuniary damage. This is, perhaps, what Lord Ellenborough means, and I now proceed to enquire whether this is a doctrine of the common law, established so early, and so firmly as to be binding upon the American courts, and to be changed only by the legislature.

This makes it necessary to refer to the English decisions. This I shall do with all possible brevity, and shall then notice the leading American cases upon the subject. Whoever examines the cases critically, will, I think, come to the conclusion that an American court, in a state where the question is untouched, is at liberty to adopt a rule which is consonant with its sense of justice, and is not bound to regard the doctrine contended for by the defendant as binding upon it.

The earliest case upon the subject is Higgins v. Butcher, Yelv. 89.

The plaintiff's wife died of an assault and battery upon her by the defendant, and the plaintiff brought an action for the damages. The views of the court are thus expressed by Tanfield, J.: "If a man beat the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into a felony, and that drowns the particular offence and private wrong offered to the master before, and his action is *thereby* lost." Obviously, the denial of the master's right is here placed upon the ground that the death of the servant having been feloniously caused, the private injury is merged in the public offence. This would not apply to any case in which the act producing the death, though negligent, was not criminal, and at this day would not be a ground on which to defeat a private remedy otherwise existing.

But the leading case to establish the doctrine maintained by the defendant is the *nisi prius* case of Baker v. Bolton, before mentioned, decided by Lord Ellenborough, in 1808. The plaintiff and his wife were upset while traveling on a stage coach of the defendants, and both were injured, and the wife died in about a month. The plaintiff, *inter alia*, sought to recover damages in respect of the loss of his wife's services, and Lord Ellenborough directed the jury that "the damages, as to the plaintiff's wife, must stop with the period of her existence," and the reason given was that "in a civil court, the death of a human being cannot be complained of as an injury." He cites no cases and enters into no discussion, and does not profess to rest upon precedent. The case was determined in 1808, and if it is the *origin* of the doctrine contended for by the defendant, it was decided at so late a period as not to be binding upon the courts of this country as part of the common law. I admit that it does hold the doctrine that the date of the death of the servant limits the period to which the loss of the master must be estimated.

The direct question did not again arise in England until as late as 1873, when Osborn v. Gillett, Law Rep., 8 Exch. 88, came before three of the judges of the court of Exchequer. Two of the Barons against one dissenting, there held that a master cannot maintain an action for a tortious act which caused the *immediate* death of the servant, and this holding, so far as it was placed upon precedent, was rested upon Baker v. Bolton. The opinions cover the whole ground, and it seems to me that the better reasons were with the dissenting Baron. The majority felt bound by Baker v. Bolton, but, as above suggested, it has no such authoritative force in this country. Whether the case was carried up on error does not appear. If it were, the judgment might well be affirmed, and yet an American court would be at liberty to decline to accept and apply its doctrine. It is noticable that no attempt was made by the majority to vindicate the doctrine they felt bound to follow.

The earliest and leading American cases are Carey v. Berkshire R. R. Co., and Skinner v. Housatonic R. R. Co., 1 Cush. 475, 1848.

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One of these actions was by the plaintiff as widow, for the loss of the life of her husband, and the other by a father for the loss of service of his infant son, whose death was caused by the negligence of the company.

Is it not a little remarkable that the court treats the cases as involving the same principle, although the wife has no legal right to the service of the husband, nor common law right to recover for his death? and following Baker v. Bolton, the court decided that in neither of the cases could the action be maintained.

Another case is Eden v. Lexington, etc., R. R. Co., 14 B. Mon. 204, 1853, in which the husband sued for loss of service of his wife, who was instantaneously killed by the alleged tortious act of the defendant. The case seems justly open to the criticism of Bramwell, B., in Osborn v. Gillett, *supra*. Liability was denied except damages down to the time of the death, on the strength of Baker v. Bolton, and the common law rule asserted in that case is supported, by the judge delivering the opinion, to rest on the untenable ground that the public wrong merges the private injury.

In a similar action the Supreme Court of Michigan held that the husband could recover damages down to the death of the wife, but not beyond that event. This ruling was in accordance with what the court regarded as the common law rule, declared in Baker v. Bolton, and is quite at loss to discover its reason or philosophy.

On the other hand, in Ford v. Monroe, 20 Wend. 210, where the plaintiff's son was killed, there was a recovery for loss of services down to the period when he would have become of age, but the right to recover to this extent seems to have been assumed without question. The question was not decided in Pack v. New York, 3 Comst. 489, 493; and was expressly reserved by the court of appeals in Whitford v. Panama Railroad Co. 23 N. Y. 465, 1861. But in Green v. Hudson River R. R. Co., 2 Keyes 294, 1866, the court of appeals followed the doctrine of Baker v. Bolton. See Plummer v. Webb, Ware, 80.

The authentic evidence of what the common law is, must be found in the judicial reports. It will be seen that all the cases, English and American, on this subject, rest upon the *nisi prius* decision, in 1808, of Lord Ellenborough in Baker v. Bolton. Considering that it is not reasoned and cites no authorities, and the time when it was made, and that the rule it declares is without any reason to support it, my opinion is that it ought not to be followed in a state where the subject is entirely open for settlement. It would be different if the rule had been settled in England by a long course of decisions, made prior to the settlement of this country, as in that event the courts here would find it more difficult to receive it.

In view of the tenor of the cases, some of which, however, are not well considered, and all of which rest upon Baker v. Bolton, it requires some courage to disregard them; but as the rule they assert is incapable of vindication, and cannot be shown to be deeply rooted in the common law, my judgment is, that I am free to decide the rights of the parties without applying it.

With an amendment, in one respect, the petition sufficiently sets forth that the death of the son was caused by the negligence of the defendant, its servants and agents.

DEMURRER OVERRULED.

—AN important accession to legal journalism, and especially to the current literature of modern international law, is the Journal de Droit International Prive. This journal is published in Paris, and edited by Mancini, De Mangeat and Clunet, and contains contributions from the leading publicists of Europe and America. It is devoted to international jurisprudence, and contains selections of cases on important international subjects adjudicated in France, Russia, Spain, Switzerland, the United States, Germany and other countries. The Journal will therefore, will be found of the utmost value to any one desirous of keeping up with the current decisions on international subjects.

The articles which it contains are able and satisfactory. We regard it as one of the ablest and most useful of our foreign contemporaries.—*Albany Law Journal.*

Life Insurance—Warranty.

JOHN CONOVER, EXECUTOR, ETC., v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY.

United States Circuit Court, Western District of Missouri, November Term, 1874.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. **Statements in Application, when not Warranties.**—Where no specific and distinct reference was made in the policy to the written application, the statements in the latter, although it referred to the policy, and contained a warranty, were considered as representations, and not as warranties. The recent leading cases on this subject cited.

2. **Untruthful Answers to Material Questions Defeat Right of Recovery.**—Where the policy itself contains a condition that if the statements made by the applicant in the negotiations for the the policy shall prove untrue, the policy shall be void, untruthful answers, to material questions relating to the health and habits of the assured, will defeat the right to recover thereon, though the matters misrepresented did not cause or contribute to his death.

3. **Statute Construed.**—The act of the Missouri legislature of March 23, 1874, commented on and held not to apply to the case in judgment.

The defendant, through an agency in Missouri, issued a policy for $5,000 upon the life of Eli Barnum, the plaintiff's intestate, dated June 10, 1871, and which stated that "this policy is made and accepted upon the following *conditions*: In case the statements made by or on behalf of, or with the knowledge of the said assured to the said company, as the basis of, or in the negotiations for this contract, shall be found in any respect untrue, this policy shall be null and void."

The policy was issued upon an application therefor, dated May 27, 1871, signed by the applicant, and containing 32 special questions to be answered, and which were answered by him. The 7th question was, "does the party use alcoholic stimulents?" Answer. "No." 8th.—"If so, state how often? in what quantities?" Answer. "None." 9th.—"Has the party at any former time used alcoholic stimulents?" Answer. "No." 15th.—"Has the party ever had inflamatory rheumatism?" Answer. "No." 17th.—"Has the party now, or has he ever had an habitual cough?" Answer. "No." In the application or declaration was the following: "And I do hereby agree that the answers given to the following questions, and the accompanying statement, and this declaration, shall be the basis and form part of the *contract* or policy between me and the company, and I warrant such answers and statements as true and correctly stated, and agree that if the same be not so in all respects, the said policy shall be void, and all moneys which may have been paid on account thereof, and all dividend credits, shall be forfeited to the said company."

The last question was, "is the party and the applicant aware that any untrue or fraudulent answers to the above queries * * will vitiate the policy and forfeit all payments thereon? and has he carefully read the questions and answers thereto?" To which he answered in writing, subscribed by himself, "Yes."

The assured died within one year after the date of policy; and this is an action by his executor to recover the amount insured by the policy. The company defends the action on several grounds, but it is only necessary to state those on which the judgment of the court rests. The company pleads that the statements in the application as to the health and habits of the assured were untrue in these several particulars; viz.: at the time of signing the application, and for years previously he had habitually used alcoholic stimulants; that he had had inflamatory rheumatism, and for years labored under an habitual cough. He did not die of rheumatism or any pulmonary disease, nor, so far as appeared, in consequence of the use of alcoholic drinks.

The action was tried by the court, a jury having been waived. Without recounting the evidence of the various witnesses adduced by the parties, it is sufficient to state that the witnesses on both sides all concurred in the statement that the assured was habitually given to the use of alcoholic drinks; that he not unfrequently became intoxi-

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cated, though he would often, for weeks at a time, not drink at all. He was in the army, as a lieutenant in the fifty-seventh Illinois regiment, and it is clearly proved that he had a severe attack of inflamatory rheumatism in 1862, so severe that he had to leave his regiment and be taken to the hospital. It is also shown that he labored under an habitual cough while in the army. On the other hand, there is testimony to the effect, that at and about the time of his effecting the insurance in question, his general health was good.

After his death, and after this suit was brought and an answer was filed, the legislature of the state of Missouri passed an act, approved March, 23, 1874, as follows:

"Sec. 1. No misrepresentation made in obtaining or securing a policy of insurance in the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable; and whether it so contributed in any case, shall be a question for the jury.

"Sec. 2. In suits brought upon life policies heretofore or hereafter issued, no defence based upon misrepresentation in obtaining or securing the same, shall be valid, unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums hereafter received on such policies, with six per cent. interest per annum from the date of receipt."

Henry Flanagan, *John Conover* and *W. S. Everett* for the plaintiff; *H. K. White*, for the defendant.

DILLON, Circuit Judge.—Much of the discussion at the bar was directed to the point whether the statements in the application concerning the health and the habits of the assured were, under the language of the policy in connection with the language of the application, to be considered as *warranties* as maintained by the defendant, or *representations* as maintained by the plaintiff. It was not seriously denied by counsel that these statements were not true in point of fact, and hence if they are warranties, it is plain the plaintiff has no case. The plaintiff's position was that the statements were not part of the policy by insertions therein, or by distinct and specific reference in the policy itself to the application as part of the policy, and hence these statements in the application could, at most, only be representations; and being such, it was further claimed by the plaintiff that their untruthfulness, although relating to matters material to the company, on preliminary enquiries, were, in fact, as the event showed, immaterial, since the death was not caused by the diseases or habits to which the untruthful answers related.

Inasmuch as the policy itself does not distinctly identify and refer to the written application and make it part of the policy, I am inclined, in view of the established and reasonable rule, that warranties are not to be created or extended by construction, and the doctrines of the later and best considered cases, to hold, that the statements in the application are representations and not warranties. Campbell v. New England, etc., Ins. Co., 98 Mass. 381, 1867; followed in Price v. Phœnix Ins. Co. 17 Minn. 497, 1871; May on Ins.S ecs. 164, 165.

As this is the view most favorable to the plaintiff, the case will be decided on the assumption that it is correct.

It will be seen by reference to the statement of the case, that the policy itself contains a condition that if any "statement made by the assured to the company, as the basis of, or in negotiation for, this contract shall be found in any respect untrue, this policy shall be null and void;" and in the application the statements therein contained, "shall," it is declared, "be the basis and form part of the contract or policy" to be entered into between the parties. In the application the applicant declared that he had carefully read the questions and his answers to them, and that he was aware that if any of the answers were untrue or fraudulent, it would vitiate the policy.

The representations upon which the company grounds its defence, relating as they do to the habits of the assured, in respect to the use of alcholic stimulants, then and previously, and to whether he had ever been afflicted with inflamatory rheumatism (which it is well known often leads to fatal diseases of the heart), or had ever had an habitual cough (known to precede or indicate pulmonary diseases), were material, to enable the company or its medical advisor to form an accurate opinion as to the risk which the insurer was asked to assume. Now the policy itself contains the express provision, that if the statements of the assured, in the negotiations for the policy, shall be found untrue, the policy shall be void. This is the contract the parties made, and it is binding upon them; and for the policy shall be found untrue, the policy shall be void. This is the contract the parties made, and it is binding upon them; and the case is governed by and falls precisely within Anderson v. Fitzgerald, 4 House of Lords Cases, 484, 1853, in which eleven of the judges of England attended the summons of the House of Lords, and where the unanimous judgment was, in a case like the present, that it was erroneous to leave it to the jury, to say whether certain answers were material as well as false, and if not material to direct them, that the plaintiff was entitled to recover. It was expressly decided that by the contract of the parties, the truth of the representations and not their materiality were alone in question, and if untrue, the insurer was not liable. That decison was followed in Cazenove v. British Ass. Co., 95 Eng. Com. Law, 437, 1859, and by the leading case of Campbell v. New England, etc. Ins. Co., 98 Mass. 381, 403, and in the well considered judgment in Price v. Phœnix, etc., Ins. Co., 17 Minn., 497.

These cases hold that where the insurer puts specific questions touching the risk, under conditions like those here agreed upon, the enquiries are conclusively made material and that false answers avoid the policy. It is not necessary in the case at the bar to go to the extent of affirming that all possible questions and answers are material, or may be made so, for here it is manifest that the questions, upon the answers to which the defence is based, pertaining to the habits of the applicant, in a matter material to health and to diseases he had had or was liable to have, were reasonable, and correct answers to which were essential, that the risk to be assumed by the company might be understood. In Anderson v. Fitzgerald, *supra*, Lord Chancellor Cranworth observed, that "whether certain statements are or are not material, where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy. Now it appears to me, my Lords, that that is precisely what has been done here. The question for the jury to decide was simply whether it (the answer) was false or not. In that narrow compass the whole case lies."

I cannot refrain from observing, that it may be questionable whether the practice of the companies is, after all, so entirely reasonable, as it appeared to the Lord Chancellor. Life insurance has grown to such immense proportions as to have important public relations. It is the method which has been largely adopted to make provision for wife and children, and for those dependent upon the life of the assured. The judgments of courts touching the validity of policies, cannot be too carefully considered, so as not to work injustice either to the insurer or the insured. Courts, by a too liberal extension of the doctrine of warranties, and by recognizing the validity for provisions of forfeiture of the rights of the assured, and particularly in allowing the parties, by sweeping language, not fully understood or considered by the assured, when the policy is effected, to make immaterial questions and answers material, have,

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in my judgment, inclined too much in favor of the companies, and hence the judicial tendency of late is to uphold, rather than overturn the contract, when substantial justice requires it.

In view of the fact, that the Tables upon which the expectation of life is calculated, give the average mortality of persons as they run, while the companies select their risk, so that the actual mortalty falls below the assumed mortality, and in view of the practice of the companies to put a multitude of questions to the applicant, and to make correct answers to all of them material, I am inclined to consider the legislation of Missouri as well-timed and necessary to prevent the unfair practice of the companies in framing their policies, though it is perhaps too broad, if it prevents the companies from providing that *wilful* misrepresentation as to material facts will avoid the policy, although it may chance that the misrepresented matters did not actually contribute to the death of the assured. But as the act does not apply to the case in hand, I forbear further remarks upon its policy or meaning.

As the questions in this case were material, and the answers untruthful in material respects, and as the parties, in the policy itself, agreed that this should vitiate the policy, the judgment must be for the defendant. JUDGMENT ACCORDINGLY.

Notes and Queries.

I. FALSUS IN UNO, FALSUS IN OMNIBUS — CHARGING UPON WEIGHT OF EVIDENCE.

OSAGE MISSION, KAN., November 17th, 1874.

EDITORS CENTRAL LAW JOURNAL:—The Supreme Court of Kansas, Judge Valentine rendering the opinion of the court, in the very recent case of Gannon v. Stevens, holds that the following instruction embodies a correct application of the maxim "*falsus in uno falsus in omnibus*;" to-wit: "In your examination of the testimony in this case, if you should be satisfied that any witness has testified falsely and corruptly in reference to any material fact, *you should disregard the whole of the testimony of such witness.*" This ruling appears to be squarly in conflict with the following recent cases: Paulette v. Brown, 40 Mo. 52, 57 et seq; Mead v. McGraw, 19 Ohio St. 55; Plouchard v. Pratt, 37 Ill. 243, 246; Callahan v. Shaw, 24 Iowa, 441, 447. Can you or your readers refer me to any recent English or American case on that question, which sustains or agrees with the Supreme Court of Kansas? It would seem, upon principle, that where the jury are the exclusive judges of the facts, they ought not to be required to *disregard all* the testimony of a witness, though they may believe that the witness, under the influence of some strange motive, such as disgrace or interest, testifies falsely concerning a single material fact. SCIENCE OF THE LAW.

ANSWER.—We do not recall any case which supports the Kansas doctrine, and the strength of our impressions, derived from general reading, is against it. A judge sitting in equity or in admiralty, where it becomes his province to weigh evidence and determine disputed facts, might well prescribe to himself the maxim, *falsus in uno, falsus in omnibus*, in such a case. Even here it should be done with great caution; for, as was said by Mr. Justice Story, in the Santissima Trinidad, 7 Wheat. 338, 339, this maxim may properly be applied in those cases only where a witness speaks to a fact with reference to which he cannot be presumed liable to mistake. But when a judge instructs a jury, as matter of law, that they should follow this maxim in making up their verdict, he clearly invades their province, which is to pass upon the *weight* of the evidence without his control, and, as many of the western courts hold, without his advice. In England, however, and in some of the eastern states, where the judges are in the habit of giving the juries their opinion of the weight of the evidence, and of the value to be attached to the testimony of particular witnesses, such an instruction might meet with approval. The question is very interesting and important, involving, as it does, a discussion of the boundary line between the province of judge and jury, and we should be glad to hear from any of our readers upon it.

Book Notices.

A CATALOGUE OF LAW BOOKS PUBLISHED OR FOR SALE BY MESSRS. BAKER, VOORHIS & CO., LAW PUBLISHERS, LAW BOOKSELLERS, AND IMPORTERS OF LAW BOOKS. New York: Baker, Voorhis & Co., 66 Nassau St. 1874.

This is a handsome volume of about 150 octavo pages, finely printed and bound in cloth. It appears to embrace a very full list of reports, digests, text-books and statutes, now in print, or which have been published in England and the United States. It will be of great use to members of the profession, and we thank the publishers for this copy of it. We ask pardon for suggesting two improvements, should it be reprinted. One is to make the paging uniform throughout. In this edition the two parts into which it is divided are paged separately, giving it the appearance of two pamphlets bound together in a book. Another improvement, which would greatly enhance the value of such a catalogue to the profession, would be to give the most approved manner of citing each work embraced in it. The manner of citing law books now in practice among American lawyers and judges, is confusion worse confounded; and how to cite books, and how to decipher citations made by others, is one of the most difficult things for a young lawyer to learn. Mr. Bishop, in his First Book of the Law, a book which old lawyers may read without disadvantage, has done the profession great service by collecting a list of the principal law books in use in England and America, with the most approved manner of citing them.

THE LAW. A monthly magazine of legal matters for the Profession and the Public. Edited by F. G. M. Wetherfield, of Lincoln's Inn, Esq., Barrister at Law. Vol. 1, No. 1. Price, 1 shilling. London: Lockwood & Co., 7 Stationer's Hall Court, Ludgate Hill, E. C.

This is a small octavo of 72 pages, printed in the best style of the art. It consists of short essays on current legal topics, and an appendix of useful English statutes. We have read several of these essays with so much pleasure, that we trust "The Law" will conclude to drop in on us again, and become a regular vistor. If so, it will be the first English law journal that has accorded us that honor—which means that while our lawyers bellow current English decisions in the ears of our courts as though they were holy writ, English lawyers care no more for the decisions of *our* courts than for those of the courts of the Sandwich Islands. We judge from the tone of the articles in this number of "The Law," that its editor is a *young* Englishman. His views certainly do not savor of the old fogy notions of the last generation. Yet he seems to be a sort of conservative radical (for no enlightened Englishman can be altogether radical) on questions of law reform—conservative of what he thinks is right, and radical toward what he thinks is wrong. He thinks, for instance, that the remedy for preventing the scandalous multiplication of suits for breach of promise of marriage under a statute which permits the parties to testify in such actions, is to prohibit the giving of damages for the injured feelings. He does not believe in sumptuary laws, and thinks that Englishmen would not suddenly lose their liberties if juries were dispensed with, except in trials for treason and for crimes. He is likewise in favor of dispensing with that mediæval humbug which prohibits husband and wife from testifying for or against each other. In short, the editor of "The Law" has views on a variety of questions of interest to lawyers, and whether his views are sound or unsound, he is at least not dull. To the American lawyer, who has a little leisure, and who is disposed to employ that leisure in thinking of something besides money-getting, this publication will, we doubt not, prove an entertaining visitor.

HUBBELL'S LEGAL DIRECTORY, FOR LAWYERS AND BUSINESS MEN. *For the Year Ending July 1, 1875.* New York: J. H. Hubbell & Co.

This book aims to give a list of able and trustworthy legal correspondents; names of banks and bankers; the times and places of holding the state and federal courts; registers in bankruptcy; a concise, yet accurate synopsis of the bankrupt act; the laws of each state and territory, and of Canada, relative to the collection of debts; execution and acknowledgement of deeds and wills, taking of depositions, descent of property, interest, taxes, mortgages, claims against estates, etc. This information, the editor states in his preface, has been collected at great labor and expense. He writes annually, twenty-three hundred private letters, and the information furnished is "the result of a correspondence with nearly twelve thousand presidents or cashiers of banks, bankers or leading merchants throughout the country." The information as to the collection, and other laws of each state, is carefully compiled by a responsible attorney practicing in such state—"gentlemen," as the editor informs us, "of the highest standing in their profession, and of undoubted ability and experience." Turning to the pages which are devoted to those states with which we are acquainted, we become fully satisfied that this statement is not overdrawn. Thus, we find the laws relating to Iowa compiled by Messrs. Putnam and Rogers, of Davenport, a firm of very high standing, the latter gentleman a correspondent of this journal. We find Tennessee represented by Hon. Henry G. Smith, of Memphis, formerly a judge of the supreme court of that state, and a lawyer of great ability and extensive practice. The work for Missouri has been done by Messrs. Hitchcock, Lubke and Player, of Saint Louis, a firm of very extensive practice and high reputation. We have taken pains to examine this work in several particulars with which we are acquainted, and have found no inaccuracy; and we are satisfied that it is

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a work which will be of great use to business men, and indispensable to every attorney in active practice.

We have, however, noticed one mistake; and that occurs on the title page. The work purports to be "for the year ending July 1, 1875." This is a reckless statement which an editor, so careful in other respects, should not have made. Upon its very face, it cannot be true. Many of the judges and attorneys named in it may be dead, and many of the laws embraced in it may be repealed before July 1, 1875. An attorney or business man who buys this book in July next, may, therefore, be deceived by this title page into supposing that the facts which it collates are brought down nearly to the date of his purchase; whereas they will be, in fact, a year old. To illustrate: On page 339 we find the name of Richard Busteed given as United States District Judge for Alabama. Now, Richard Busteed was, no doubt, United States District Judge for Alabama at the time this book went to press; but he is not now, and it is morally certain that he will not be, at any time between now and the first of July, 1875, such United States district judge. With the exception of this inaccuracy, the book appears very complete and trustworthy, and we cordially recommend it to the profession.

Summary of our Exchanges.

The Legal Intelligencer, for November 20, has a decision of the Philadelphia Common Pleas, Jones v. Park, holding that the legal remedy for disturbance of a right way, is an action of trespass on the case. Schroedeer v. Brememan, 11 Harris, 348, and Districh v. Berk, 12 Harris, 470, are cited.

It also reports a large number of discussions of the Supreme Court of Pennsylvania, mostly unimportant *per curiam* opinions. We note, however, the following: Railroad Co. v. James; A city has the right, by virtue of its police power, to regulate by ordinance the speed of railroad trains.

The Allegheny Insurance Co. v. Hanlon: Where accounts are multitudinous, the witness may be allowed to refresh his recollection, by means of other accounts and papers as to the items.

Wharton v. Douglass: Parol evidence is not admissible to change or contradict the terms of a promissory note without an allegation of fraud. Citing Hoare v. Graham, 6 Barn. & Cres. 729; Free v. Hawkins, 8 Taunt. 92; Hill v. Gaw, 4 Barr, 493; Anspach v. Best, 4 P. F. Smith, 154.

Jonathan Sarver *et al.* v. William Gosser *et al.*: The courts of common pleas have equity jurisdiction to control the acts of a majority of a church corporation in violation of its charter.

McKinney v. Allen: In an action *ex delicto*, founded upon negligence, the sum laid in the declaration is the criterion of jurisdiction. Citing Barr v. Bayne, 10 Watts, 299.

Vensel *et al* v. Colner: Notice to the widow of partition and sale, from the recital in the order of sale, will be presumed, especially so after the lapse of twenty years.

Dilworth v. Ackley: 1. A note may be negotiated on the last day of grace as well as three days before.

2. The assignment of stock in an unincorporated joint stock company gives no right as a partner, but merely to so much capital as would appear after settlement to belong to the assignor.

The Legal Gazette, for November 20, publishes a syllabus and a statement of the great Memphis paving case, determined in the Supreme Court of the United States last spring. The editor apologizes for not publishing the opinion on account of its very great length. If the opinion is as long as the syllabus, his readers will excuse him for not publishing it. We agree with the editor of the Gazette when he says of this case—

"Jam redit et virgo: redeunt Saturnia regna:
Jam nova progenies cælo demittitur alto."

Notwithstanding it will appear in a few days, in 19th Wallace, its importance induces us to print the syllabus. It is as follows:

1. Where an individual contracted with a city corporation to pave its streets, and the corporation afterwards, by way of assisting him with funds, issued to him its bonds, having several years to run (and then worth in the market but 50 cents on the dollar), with the understanding that the bonds might be sold for what they would bring, and that other bonds might be afterwards bought by the contractor, so that the city might have its bonds again when they matured, and the contractor sold the bonds. *Held*, on a suit between the parties for a settlement under the original contract for paving, that the contractor could discharge himself from his obligation to return the bonds to the city, by charging himself with, and paying their market value at the time of accounting in the suit; and that he was not obliged to return the bonds *in specie* before he could compel the city to pay him for his work. *Held further*, that the fact that the city was pecuniarily embarrassed, and had no money with which it could go into the market and buy the bonds, did not alter the case.

2. Before a court will sanction the exaction of hard conditions made by a city with its contractors, who have been reduced to necessities by the omission of the city itself to keep with strictness its promises to them, it will be careful to know that every stipulation on the part of the city, under any new agreement, has been fully performed by it. Hence, where a city agreed to issue a certain amount of bonds to a contractor who was embarrassed in carrying on his contract with it, the embarrassment being produced, in part, through the city's own non-payment to the contractor of what it owed him, the contractor agreeing on his part, in the new agreement, to release the city from certain obligations under which, by the original contract, it was bound. *Held*, that the city not having carried out its new agreement *completely*, could not avail itself of the release.

3. Under the laws of Tennessee, and its own charter, the city of Memphis, in the state just named, had full power to make contracts for paving the city, and to bind itself to pay for the work either in cash or in the bonds of the city, or in both. Moreover, the city was liable on such contracts to a suit by the contractor. If the city has guaranteed payment for the paving, in case others (as the owners of property along the street) did not pay, and the highest court of the state decides that such owners cannot constitutionally be charged with the cost, and be compelled to pay, the city cannot allege the illegality of the contemplated mode of the contractors getting payment, as a defence to a claim on *it* for payment.

4. A waiver of the obligation by the city to pay, cannot be presumed from the fact that it and the contractors have looked to the property-owners to pay by an assessment on them, which the city had no constitutional power to make.

6. Where a city contracts with persons to do work for it, agreeing to pay them in bonds, having some years to run, and with interest warrants, or coupons attached, "*principal and interest guaranteed and provided for by a sinking fund set aside for that purpose*," and the contractor takes the bonds, but the city does not provide any sinking fund for the payment of either principal or interest, so that the bonds are worth in the market but about half their nominal value, the contractor to do the work, cannot, in a suit against the city to recover what it owes him, adduce evidence of bankers and stock dealers to show what damage, in their judgment, he has suffered by the city's violation of its contract in providing the sinking fund; in other words, to show what the bonds *would* have been worth if the city had kept its contract. Damages founded on such a claim are not in their nature capable of legal computation; there is no legal standard by which they can be fixed; they are shadowy, uncertain and speculative.

7. When the ordinances of a city, which has a "city attorney" as one of its officers, require that such *attorney* prosecute all suits to which the city may be a party, or in which it may be interested, persons who enter into a contract with the city under ordinances and on advertisements made pursuant to them, and on bids put in to pave its streets, with a provision in the contract that the accounts for the paving shall be made out by the city engineer, and delivered to the contractors for collection, and if not paid within ten days after the payment becomes due, "shall be placed in the hands of the *city attorney* for collection, under the city charter," cannot, even though those accounts are numerous, and the collection of them onerous and expensive, employ other attorneys, and charge to the city what they pay to the additional attorneys for *their* professional services.

8. The fact that the mayor and city attorney urged the contractors to make great efforts in the collections, and advised them to retain counsel in looking up titles and to aid in bringing suits, does not alter the case, there being no evidence that the city legislature, or any committee which was the agent of the city in making the contract, advised or assented to any change in its terms.

9. Where, under large contracts for paving a city, the city and the contractors to do the work having become embarrassed, have resorted to various rather irregular devices to raise money and carry on the work, the city issuing its bonds, and the contractors selling them at half their nominal value, and things between the parties have got into a confused and complicated state, and a suit at law has been instituted, and a bill and cross-bill in chancery filed, a court may not improperly (even before the case is ready for a decree, and without having settled the rights of the parties) refer the case to a master for an accouut of labor done and materials furnished, and the value thereof, and to find how many bonds the city has issued to the contractors, and whether such bonds had a value, and when they matured, and how much the city owed the contractors when the suit was brought, and—the parties consenting that the action at law be consolidated with the suits in equity—to hear and report to the court the proofs and his conclusions upon various matters deemed pertinent by the court, and specified by it, including as a final one, that he state an account between the parties, embracing therein all the matters in the cause of the bill and cross-bill, and showing in the result the aggregate of debt of the

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debtor party to the other. And if the parties do not except to such order, but appear under it before the master and take, both of them, testimony upon the subjects of reference, for as long a term as they desire, and then, announcing that they do not desire to take further evidence, submit the matters of reference for the determination of the master (taking no exception before him), it is no ground of error (the circuit court having passed upon his report, and with some modifications confirmed it), that before the cause was ready for a decree, and without settling the rights of the parties, the court referred it to the master for an account, and that the master took and stated an account under his own view of the law and the facts, and that he virtually decided the case instead of the courts deciding it.

The Western Jurist (Des Moines, Iowa), for November, has a twelfth instalment of the article on Tax Titles in Iowa; it reprints the Albany Law Journal's "Legal Aspect of the Beecher Scandal," and an article on "Salaries of Judges," in the same paper. It also publishes a decision of Mr. Circuit Judge Dillon, in Bronson v. Kukuk, determined in the District of Iowa, October term, 1874, with the following syllabus:

1. Until a patent for land emanates, the legal title thereto remains in the United States, and it will protect any equity which the United States may have in the land from a sale for taxes by the state.

2. In 1853, the plaintiff, as the assignee of a land warrant, located it upon a tract of land; in 1862, and before any patent had issued, the proper department cancelled the warrant and suspended the location, because the warrant had been procured to be issued upon false and forged papers; the plaintiff in the latter part of 1862, *substituted* another warrant, and in 1863 received a patent: *Held*, that the land was not taxable for 1861, and that a tax sale and deed for the taxes of that year were void.

3. The assignee of a land warrant, fraudulently procured from the government, has no higher legal rights than the warrantee; and the government, although the warrant is regular on its face, is not estopped to deny its validity, although it be in the hands of an assignee for value and without notice.

Also a decision by Dillon and Treat, JJ., in the United States Circuit Court, Western District of Missouri, in Opdyke v. Railroad Co., with the following syllabus:

1. When one who is not a party to a written agreement, but who is the person to be benefited by a performance of stipulations therein, may maintain an action against the promissor, considered.

2. On demurrer, held that if the facts alleged in the petition were true, the defendant had made itself liable for the payment of interest on bonds issued by another railroad company, containing a representation that the defendant had, in consideration of the lease to it of the road of such company, guaranteed the payment of such interest.

It also prints the opinion of Mr. Chief Justice Miller, of the Supreme Court of Iowa, in Field v. Des Moines, which relates to the liability of a municipal corporation to pay damages when buildings have been torn down by its officers, in pursuance of an ordinance to prevent the spread of fires. Notwithstanding this opinion is also published in the Chicago Legal News (a journal which many of our readers take) we intend, on account of its exceptional interest, and the great number of authorities collated, to reprint it next week.

The Chicago Legal News, for November 21, publishes an interesting admiralty decision of Mr. District Judge Deady, in the case of the Hotspur, with the following syllabus:

When on a voyage from Glasgow to Buenos Ayres, from thence to Portland, Or., and back to a port in the United Kingdom, the cook and steward, who is not a seaman, is disrated a few days out from B. A. on a charge of wasting provisions, and put before the mast, it amounts to a rescission of the contract by the master, and the steward may, when he arrives at Portland, accept such rescission, and claim his discharge; but what compensation, if any, he shall have for his services, depends upon the particular circumstances of the case.

A contract by a minor to serve as a seaman is a voidable one; and may be avoided by such minor at any time before its completion, and thereafter he is not bound by it in any manner; neither can he sue upon it for his services, but may recover the value of such services, allowing for any injury which the owners may sustain by reason of the avoidance of the contract.

Where, under the British merchants shipping act of 1854, the duration of a voyage is described in the shipping articles as *probably* 12 months, a seaman signing the articles engages absolutely to make the voyage, whether the duration of it be more or less than that period, provided the master, in good faith, endeavors to accomplish the voyage within the time mentioned.

It also publishes a decision of the Supreme Court of Texas (Mr. Justice Moore delivering the opinion) holding that a mandamus will lie in the District Court, against the Commissioner of the General Land Office of Texas, to compel the performance of ministerial acts, where the law does not make the performance of the act discretionary. This case substantially overrules Bledsoe v. International Railroad Company, decided by the same court (*ante*, p. 401), and is one of great importance. Mr. Chief Justice Roberts dissented at great length, and with his usual ability and learning. These opinions probably touch upon all the learning upon the subject in the American books; and counsel in other states who may have occasion to investigate the question of the power of the judiciary to control the officers of the executive department of the government of a state, should not fail to possess themselves of these opinions. Some weeks since we received, through the courtesy of Mr. Chief Justice Roberts, both the opinion of the court and his dissenting opinion in this case; but our space has not permitted us to publish them, nor has our time permitted us to make such a synopsis of them as would do justice to them.

The Legal News also publishes a very interesting and important decision of the Kentucky Court of Appeals (opinion by Mr. Justice Lindsay), and states, editorially, that it relates to the right of a national bank to acquire a lien on its stock for advances to the owner of the stock, and the effect of bankruptcy proceedings upon secured claims. It is held that the bankrupt courts are not invested by Congress with sole and exclusive jurisdiction of a bankrupt's property, and that the assignee and general creditors may, if they deem it to their interests, relinquish, by non-action, to a secured creditor, the title to property upon which he holds a lien, and when they do so relinquish, the jurisdiction of the state courts to perfect or enforce the title thus acquired cannot be questioned.

Legal News and Notes.

—THE compulsory school law in New Hampshire seems to be working well. The percentage of non-attendants upon schools is gradully decreasing.

—THE recently adopted amendments to the New York constitution prohibit special legislation; forbid sectarian appropriations; deny perquisites to salaried officers; prohibit special privileges and charters to savings banks; extend the gubernatorial term to three years; and increase the salary of the governor to $10,000 per annum, and that of the lieutenant-governor to $5,000.

—ON the 20th instant, in the Brooklyn City Court, General Term, Judges Reynolds and McCue rendered decisions upon the argument of appeal of counsel in the case of Tilton against Beecher, in the matter of the order of Chief Justice Neilson, denying the right of defendant to a bill of particulars specifying the times and places at which the alleged acts of adultery were committed between the defendant and the wife of the plaintiff. The former-named judge affirms the order of the lower court, while Judge McCue dissents from the opinion of his associate. The case will probably be taken to the court of appeals.

—FROM a trustworthy correspondent, at Portland, Maine, we learn the following facts with regard to the recent case of Ansel v. Stevens, tried in the United States Circuit Court, at that place, before Mr. District Judge Fox and a jury: The learned judge gave certain instructions, not in writing, except as to certain points, and these are not now available for publication. The defendants propose carrying the case to Washington. The newspaper reports of the case are not altogether reliable. The passenger injured was traveling with an employee's free pass, on which was an endorsement expressly waiving all claim of damage in case of accident. But the learned judge directed the jury to find specially whether the passenger had read, or had knowledge thereof—and to this they replied "*no*." This materially modifies the statements of some of the papers, that the Circuit Court of Maine has decided that railroads are liable to persons traveling on a free pass, even though accompanied by a waiver of all claim for damages.

—PATENT OFFICE.—The annual report of the commissioner of patents, has been submitted to the Secretary of the Interior. From it it appears that the money received aggregates $721,111 35, and the expenditures $694,075. 71. The commissioner urges the necessity of preparing a digest of all the applications on file in the office. In making an examination of a new application, the examiner has to know all that is contained in all previous applications for inventions of the same class. In the class of sewing machines, for instance, 3,000 applications have to be examined. Twenty-five per cent. of the time of the examiner would be saved, by the existence of a digest of all applications on file in the office, which now number nearly 300,000. He also stated that additional room is required for the use of the offie. It is utterly impossible to properly transact the work of the office, in the narrow quarters granted to it. Eight additional rooms are needed immediately. The report pays a just tribute to the character of the persons employed in the patent office, and regrets that the salaries paid are not sufficiently large to retain the best men in the service, who are continually leaving it for more lucrative employment.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, DECEMBER 4, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

IN the article which we elsewhere print on Insurable Interest in Human Life, our readers will recognize the pen of Hon. James O. Pierce, of Memphis, whom we are glad to number among our occasional contributors. Few members of the profession have more thoroughly studied the law of insurance, and none are able to bring to the examination and comparison of adjudications a closer attention and more accurate discrimination.

"Actions Speak Louder than Words."

Hayes v. Kelley, recently determined in the Supreme Judicial Court of Massachusetts, was an action for lime, etc., furnished according to account annexed. Answer, general denial. Case referred to auditor, whose report at the trial in the Superior court, before Brigham, C. J., was objected to on the ground that the plaintiff's books were impromperly admitted in evidence at the hearing. The objection was overruled, and the report was read to the jury, to which the defendant excepted. The man who once knew about the delivery was dead. The plaintiff called the defendant as a witness, but got little that was material to the issue from him. He was uncertain, he said; he did not remember; he might have had some of the goods, and he might not—at first he thought he had, and then he thought he hadn't; finally, he did not think he had any of them. The plaintiff then introduced a witness who testified that he presented the bill in suit to the defendant several times, at one of which the defendant objected to one item, in part, and at another time told his clerk to put the bill in the closet and when at leisure he would look at it, but he never at any time promised to pay it. When the evidence was closed, the plaintiff asked leave to withdraw the auditor's report. Leave was granted. The defendant excepted. The presiding justice, among other things, instructed the jury that when a bill of particulars is presented to a party, his conduct may be such, without his using any words to that effect, as to warrant a jury in finding such conduct to be an admission that the bill is accurate and is actually due. To this also the defendant excepted. The jury found for the plaintiff. The case was argued at the November sitting. We print below the brief of our correspondent, Pelham, who was of counsel for the plaintiff:

HAYES v. KELLEY.

PLAINTIFF'S BRIEF.

The prayers relating to the books became wholly immaterial, because the books were not in evidence. They were used only before the auditor; and when the auditor's report was withdrawn, all evidence from the books was withdrawn. The first question then, is—Had the presiding judge the right to permit the report to be withdrawn—or, to speak more accurately, to strike it out of the case? The plaintiff offered it; the defendant objected to its introduction; the presiding judge admitted it, notwithstanding the objection, and allowed the defendant his exception. What is this report? It is merely evidence—and the exception to striking it out, presents simply the question—Whether evidence, to which exception has been taken, and which has been admitted notwithstanding the exception, can afterwards be waived by the party offering it, and, in the discretion of the presiding judge, be stricken out? And I submit that it may be—and I add, is done every day.

The only other exception is, that the judge, among other things not objected to, instructed the jury that "where a bill of particulars is presented to a party, his conduct may be such, without his using any language to that effect, as to warrant a jury in finding such conduct to be an admission that the bill is accurate and is actually due." And unless this is true, there is nothing in the proverb that "actions speak louder than words;" or as Locke better expresses it—Actions are the best evidence of men's principles. To justify the remark of the judge, it is not necessary that actions should speak *loud*, but only that they should be intelligible; for the question does not respect noise, but perspicuity. And the eye judges of conduct not less certainly than the ear. When I see men inflating a balloon, I infer that somebody is contemplating to go up. When I present a bill of twenty different items to a man who owes me, and he turns to his journal and compares the bill with that, and with his pencil puts against each item a sign indicating a correspondence between his journal and the bill, and then opens his money-drawer and I see therein a file of unpaid bills, and mine that I had sent him a month ago, on top, and a broken eye-glass, a few envelopes and second-hand pens, a Boston cracker and a shoe-string—but no money—and he drops a tear into the drawer, and then takes down his check-book, and I see his bank account is already overdrawn, and he looks at me as though he needed a friend, and sadly shakes his head, and folds the bill and lays it away—is not his conduct such as to lead me to believe that he is satisfied the bill is right and wants to pay it, but has not the means? On the trial of an indictment for the larceny of a horse, it was said the jury were warranted in finding that the horse was of some value, upon evidence that he was a dark sorrel horse, weighing about nine hundred pounds, had a long tail and a bruise on one hip, and had been driven a long distance. Commonwealth v. McKenney, 9 Gray, 114.

Rescript by GRAY, C. J.—It was within the discretion of the judge to allow the plaintiff to withdraw the auditor's report. The instructions requested were immaterial, and those given were correct. Exceptions overruled.

Insurable Interest in Human Life.

The character and quality of the interest in the life of another which will support a policy of insurance upon that life, do not seem to be well settled, in several important respects.

1. It is so thoroughly settled as to have become axiomatic, that a wife has an insurable interest in the life of her husband. A late writer (May. on Ins. § 107), lays this down as "of course," without citing any authorities. The point has been expressly ruled as a commmon law doctrine, in Reed v. Royal Exch. Ass. Co., Peake's Add. Cas. 70 (1795) reported in 3 Bigelow's Cas. 2. Also in Baker v. Union Mut. Life Co, 43 N. Y. 283; Gambs v. Convenant Life Co., 50 Mo. 44; St. John v. Amer. M. Life Co. 2 Duer, 419. The basis of this interest is not defined. From the analogies of other insurable interests, which have a pecuniary basis, it would seem to be the support which the wife is entitled to claim from the husband (see 2 E. D. Smith, N. Y. 268). The insurable interest of a reputed but not legal wife, in the life of the husband with whom she cohabited, was sustained on this ground in Equit-

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able Life Soc. v. Paterson, 41 Geo. 338. And a woman engaged to be married was held to have such an interest in her intended husband's life, in Chisholm v. Natl. Cap. Life Co., 52 Mo. 213. It may be assumed that love and affection alone should furnish a sufficient basis for the wife's insurable interest, in analogy to other marital relations. But this does not appear to have been established by the decisions. They are simply pervaded with the doctrine that the interest exists, which is generally recognized by the courts as "of course."

2. Whether any other relationship will alone support a life policy, may be doubted. A *dictum* of Clifford, J., in Phœnix Mut. Life Co. v. Bailey, 13 Wall. 616, asserts the general proposition in these words: "It is sufficient to show that the policy is not invalid as a wager policy, if it appears that the relation, whether of consanguinity or affinity, was such * * * as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence, *or natural affection*, in the life of the person assured." It is reported as lately decided by a Pennsylvania court, in Kane v. Reserve Life Co., 1 Cent. Law Jour. 345, that the relation of father and son suffices to establish an insurable interest in the life of the father, and in 6 Gray (*infra*) it is said as a *dictum*, that without pecuniary interest, and not on the ground of support, but merely on considerations of strong morals and the force of natural affection, the father's policy would be supported.

But the decisions generally are not in accord with thsee *dicta*. In Miller v. Eagle Life Co., 2 E. D. Smith (N. Y.) 268, Woodruff, J., draws from the cases the following deductions:

"A strong probability of pecuniary benefit from the continuance of the life, without a strict legal claim to such benefit, is sufficient to save the contract from being deemed a wager." "From the nature of the case, an insurance upon life is an insurance of the benefits to result to the insured from its continuance. These are all that render the life insured valuable to him."

A majority of the reported cases will be found to be rested upon such pecuniary considerations or expectations. Thus, it has been held that a sister had an insurable interest in the life of her brother, where she had been supported by him. Lord v. Dall, 12 Mass. 115 (1815). And that a father has this interest in the life of his minor son, because he is entitled to his earnings. Mitchell v. Union Life Co., 45 Maine, 104 (1858); Loomis v. Eagle Life Co., 6 Gray, 396 (1856). *Per contra:* A father has no insurable interest in the life of his son, merely from relationship. Halford v. Kymer, 10 Barn. & Cres. 724 (1830); nor does the mere relationship of a brother suffice to furnish such an interest. Lewis v. Phœnix Life Co., 39 Conn. 100 (1872).

3. The weight of authority is, therefore, evidently in favor of resting all insurances on lives of relatives upon a pecuniary basis, such as supports a policy as between debtor and creditor. As to this there is now no apparent conflict in the authorities. Any pecuniary interest will support a policy, which will not be measured with exactness by the extent of that interest. But in case of debtor and creditor, the amount of the policy must not be so exceedingly disproportionate to the debt as to make the transaction in effect a wager. Cammack v. Lewis, 15 Wall. 643; Mowry v. Home Ins. Co., 9 R. I. 346. In 15 Wall. case the debt was $70.00, and the policy was $3,000, and this was held a wager.

4. There must, however, be *some* pecuniary interest in the life insured. It was said in Trenton Mut. Life Co. v. Johnson, 4 Zabr. (N. J.), 576, that no pecuniary or insurable interest is necessary to support the contract. But this is doubtless to be regarded as a *dictum*, inasmuch as there was in that case a pecuniary interest existing, which would support the contract according to the weight of authority. Other *dicta* to similar effect appearin the decisions; but there is no reported decision to this effect, unless it be Kane v. Reserve Life Co., *supra*. The New York Court of Appeals decided that a policy would be void when taken out by one as beneficiary, who had no pecuniary interest in the life insured; and that this was the rule at common law, of which the statute, 14 Geo. 3, against wagering policies, was merely declaratory. Ruse v. Mut. Ben. Life Co., 23 N. Y. 516, 24 do. 653. (But the same court afterwards avoided this very question in Rawls v. Amer. Mut. Life Co., 27 N. Y. 282). Mr. May has expressed the general result from the reported decisions, in these words: "When it is said that fire, life and other insurances where valued policies obtain, are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the thing insured. The amount of this interest, and the amount to be paid in case of loss, may be fixed by arbitrary agreement, even before the loss" (§ 7). "When the insured has nothing to lose, but everything to gain by the happening of the event insured against, it would be dangerous and demoralizing to subject the insured to so great a temptation, to destroy the property or the life upon which the insurance is effected. A sound public policy will not sanction any such temptation" (§ 75).

5. The policy being issued to one who has the insurable interest, can it afterwards be assigned or sold to one who has no such interest? Mr. May answers this question in the negative, considering it "an attempt to do indirectly what the law will not permit to be done directly" (§ 398). But the decisions do not agree on this point. Such an assignment is supported in St. John v. Amer. Mut. Life Co., 2 Duer, 419, and 13 N. Y. 31, and Valton v. Natl. Life Co., 22 Barb. 9, and 20 N. Y. 32, on the ground that the policy being originally valid, the insured had a right to dispose of it as he saw fit, and the assignment did not change the liability of the insurer. Such an assignment is declared void, as a mere speculation in life policies, in the later cases of Stevens v. Warren, 101 Mass. 564; and Franklin Life Co. v. Hazzard, Sup. Ct. Indiana, 2 Ins. Law Jour. 180. The last case is an exceedingly well reasoned one, and may perhaps be accepted as furnishing the better version of the law; though Mr. Bigelow, reporting the case in 3 Bigelow's cases, p. 559, doubts its correctness. Mr. May on the other hand, endorses it (§ 398).

6. If the person whose life is insured may not assign the policy to a stranger after it is issued, may he do the same thing contemporaneously with its issuance? Can A. contract with an insurer, for a policy on his own life which shall be from the beginning payable to B., who has no interest in that life? This was the subject of a judicial doubt in Wainwright v. Bland, 1 Mees. & W. 32 (1836). But the doubt was resolved in the negative in Shilling v. Acc. Ins. Co., 2 Hurls. & N. 42 (1857), where it was held that such insurance is void. In this

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country some exceedingly nice distinction, have been drawn in considering this question. For while in Stevens v. Warren, *supra*, the Supreme Court of Massachusetts held the assignment of a policy after issuance, to one who had no insurable interest, void (intimating that the consent of the insurer might have validated it), the same court held in Campbell v. N. E. Mut. Life Co., 98 Mass. 381, that one taking out a policy of insurance on his own life, might make it payable to whom he pleased, without regard to interest. *Dicta* to the same effect are found in Rawls v. Amer. Mut. Life Co., 27 N. Y. 282 (1863), and Amer. Life & H. Co. v. Robertshaw, 26 Penn. St. 189 (1856), in both of which cases the insurable interest actually existed. The Superior Court of N. Y. City, in Hogle v. Guardian Life Co., 4 Abb. Pr. (N. S.) 346 (1868), upheld a policy so effected, declining to consider the question of interest which was held to be immaterial. But the Court of Appeals of New York seemingly cast doubt upon that proposition, by saying in the later case of Baker v. Union Mut. Life Co., 43 N. Y. 283 (1871), that one can make such insurance on his own life payable to any one *having an interest in his life*. And the Supreme Court of the United States, in the still later case of Cammack v. Lewis, 15 Wall. 643 (Dec., 1872), has plainly taken the opposite view. The policy in this case was taken out by Lewis upon his own life, but for the benefit of Cammack, who was held to be protected only to the extent of his actual pecuniary interest in the life of Lewis, all beyond that being, as to Cammack, a mere wager.

The question whether the insured or the beneficiary was the contracting party, does not seem to have been taken into account, in the case cited in note 2, *supra*. Nor is it discussed especially in 15 Wall. The reasoning of the cases in 98 Mass. 27 N. Y., 4 Abb. Pr. R. and 26 Penn., is, that as the contracting party has an insurable interest in his own life, the contract has the proper basis at its inception, and will therefore be supported. These cases exhibit the tendency of the American courts. But the doctrine advanced by them seems plainly open to Mr. May's criticism of "doing indirectly what the law will not permit to be done directly;" a practice which the 15 Wall. case refuses to sanction. If the beneficiary may not himself contract for insurance on another's life in which he has no interest, because it would be a mere speculation upon human life, 23 N. Y. 516, 24 N. Y. 653, 39 Conn. 100 (*supra*) the questions may well be asked: 1. Is it any less a wager when the insured himself makes the contract for the benefit of one who has no interest? 2. How can the insurable interest of A. in his own life support a policy, which, by its own terms, can never, for an instant of time, even at its inception, inure to the benefit of A., his widow, minor children, executors or creditors, or of any one else having an insurable interest in that life? To the first question the cases in 98 Mass. and 15 Wall. give contrary answers. The second needs to be plainly and authoritatively answered by the American courts.

J. O. P.

—THE world continues to move. A young lady desirous of entering the law school of Cuzco, an institution supported by the state, wrote to the government to inquire if her sex were a bar to her admission. The Minister of Justice promptly replied that all Peruvian citizens should enjoy equal rights; that women were considered by the law as on the same footing with men, as far as the privileges to be accorded by the republic were concerned, adding that it was a matter of peculiar pleasure to the administration to improve the opportunity of giving publicity to such a declaration.

Destruction of Buildings to Prevent the Spread of Fires.

FIELD v. THE CITY OF DES MOINES.

Supreme Court of Iowa, October Term, 1874.

Hon. J. M. BECK, Chief Justice.
" WM. E. MILLER, }
" C. C. COLE, } Judges.
" JAMES G. DAY, }

1. **Municipal Corporations—Destruction of Building to Prevent Spread of Fire—Liability of City for Acts of its Officers.**— Municipal corporations, whose officers are by statute and by ordinance authorized to order the destruction of any building or fence, "when they shall deem it necessary to arrest the progress of and extinguish" a fire, are not liable to the persons whose property is thus destroyed, in the absence of a statute creating such liability.

——. ——. **Eminent Domain.**—The destruction of buildings, etc., under such circumstances, is not a taking of private property for public use within the meaning of section 18 of article 1 of the constitution, but is a regulation of the right which individuals possess to destroy private property in cases of necessity, to prevent the spreading of fire or other great calamity.

——. ——. ——. The legislature cannot authorize the taking of private property for public use, except upon *first* making or securing just compensation therefor, and any statute professing to do so would be void, and confer no authority to that end.

On the 17th day of January, 1874, the plaintiff filed his petition, stating, in substance, that the defendant is a municipal corporation, organized under the laws of Iowa; that on the 4th day of July, 1872, there was a fire in progress within the limits of the city, and near the buildings of the plaintiff; that there was then in force an ordinance of the city, passed December 10th, 1868, entitled "An ordinance establishing and regulating a fire department," section 16 of which is as follows: "The engineer in command, or in the absence of the engineer, the mayor or any three trustees, may order any building, erection, or fence, torn down or blown up, where they shall deem it necessary to arrest the progress of, and extinguish the fire;" and section 20 of said ordinance is as follows: "Every person, not a fireman, who shall be present at a fire, shall be subject to and obedient to the orders of the chief and assistant engineers, the mayor and trustees, fire policeman, marshal and police contsables of the city, *provided*, said officers shall wear their respective badges of office, in extinguishing the fire, and the removal and protection of property, and in case such person shall refuse to obey such orders, he shall forfeit and pay a fine not to exceed five dollars for each offence, and all such officers shall have power to arrest any person or persons so refusing to obey such lawful orders as aforesaid, or suspected of stealing during the progress of the fire, and hold them in custody until after the fire is extinguished, and then to be dealt with according to law."

It is further alleged that at the time of said fire, "the engineer in command" of the fire department of the city was absent from the city, and that the said fire being in progress, the mayor then assuming in that behalf to act as the agent and official representative of the city, in virtue of his powers and duties as such officer and agent, and particularly in virtue of a pretended right and authority conferred upon and vested in him as such officer and agent by the sections of said ordinance above set out, for the pretended and alleged purpose of arresting the progress of and extinguishing said fire, did order the bystanders to tear down two certain buildings belonging to plaintiff, situated on lot one, in block 31, in the city and in the vicinity of the fire, which order was by them there obeyed, and said buildings torn down and destroyed; that there was no real necessity of tearing down either of said buildings, and that in giving said order the mayor acted carelessly, negligently and without sufficient cause; that if said buildings had not been torn down they would not have been burned by the said fire, nor was the fire either extinguished or arrested by tearing down said buildings, or either of them. The value of the buildings is alleged at seven hundred dollars, and that the plaintiff has demanded compensation therefor, from defendant, which was refused.

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To this petition defendant filed a demurrer, which being sustained, and the plaintiff refusing to amend, judgment was rendered for defendant. Plaintiff appeals.

Gatch, Wright & Runnels, for appellant; *C. P. Holmes*, for appellee.

MILLER, C. J.—1. That any person may "raze houses to the ground to prevent the spreading of a conflagration," without incurring any liability for the loss to the owner of the houses destroyed, is a doctrine well established in the common law. The maxim of the law is, that "a private mischief is to be endured rather than a public inconvenience." 2 Kent's Com. 338. Lord Coke Says: "For the commonwealth, a man shall suffer damage; as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action." Mouse's Case, 12 Coke, 63; Id. 13. In Republica v. Sparhawk, 1 Dall. (Pa.), McKean, Chief Justice, says: "Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure. So, if a man is assaulted, he may fly through another's close. In time of war, bulwarks may be built on private ground. * * * Houses may be razed to prevent the spread of fire, because of the public good." In Dillon on Municipal corporations, § 756, the learned author states the common law doctrine as clearly and succinctly as it is anywhere to be found. He says: "The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, *in cases of imminent and urgent public necessity, any individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spread of an extensive coflagration. This he may do independently of statute, and without responsibility to the owner for the damages he thereby sustains." The ground of exemption from liability in such cases is that of *necessity*, and if property be destroyed, in such cases, without any apparent and reasonable necessity, the doers of the act will be held responsible. In support of this doctrine, see Governor and Company of, etc., v. Meredith, 4 Term R. 794, 797; Taylor v. Plymouth, 8 Met. 462, 465; Mayor, etc., of N. Y. v. Ford, 18 Wend. 126, 132, 133; same case, 17 Id. 285; Dunbar v. Alcalde, etc., of San Francisco, 1 Cal. 355; Surocco v. Geary, 3 Id. 69; Conwell v. Emprie, *et al.* 2 Ind. (Cart.) R. 35; American Print Works v. Lawrence, 3 Zabriskie, 590, 609, 610; same case, 1 Ibid, 248; McDonald v. City Red Wing, 13 Minn. 38.

The plaintiff does not, however, seek to recover against the mayor who directed, and the persons who assisted in, the destruction of his buildings, but he seeks to make the city liable on a principle of *respondeat superior*. It is claimed that the destruction of plaintiff's buildings was not necessary in order to extinguish or prevent the conflagration then in progress; that the act was, therefore, not justifiable at the common law, under the rule of necessity, and that since the city, by its ordinance, had authorized the mayor to judge of the emergency, and direct the destruction of the buildings, an act which any individual might do at his peril without any statute, it thereby made the act that of the corporation.

Of course, unless the corporation had authority conferred upon it by the statute defining its powers, to destroy buildings or other property, for the purpose of arresting the progress of a fire, or the power conferred upon it to pass the ordinance set out in the petition, it could not exercise such power, and would not be liable for the acts of its officers which it had no power to authorize. Dunbar v. The Alcalde, etc., of San Francisco, 1 Cal. 355, and cases cited; see also, The City of Burlington v. Kellar, 18 Iowa, 59; Clark v. City of Des Moines, 19 Iowa, 198; Clarke, Dodge & Co. v. The City of Davenport, 14 Id. 494; Taylor v District Tp. of Wayne, 25 Id. 447.

Municipal corporations, or certain officers thereof, are often appointed by statute, or by ordinance authorized by charter or statute, to judge of the emergency and direct the destruction of buildings and other property to prevent the spread of fire; and such corporations are frequently, by their charters or by some statute, made liable for damages which property owners may sustain by reason of their buildings or property being thus destroyed to prevent the extension of fires. But the liability of the city or town in such cases is held to be purely statutory, and unless the statute clearly makes the corporation liable to make compensation, it is not liable at all. In White v. The City Council of Charleston, 2 Hill (South Car.) 571, which in its facts is essentially like the case before us, the city council acting under the general municipal powers of the city, and without any express statute creating a liability, adopted an ordinance authorizing the intendant, among other officers, in time of fire to demolish such buildings "as may be judged neccessary" by him to arrest the spreading of the fire, thereby investing the officer with the power to judge whether the necessity existed or not. A fire being in progress, the plaintiff's house was blown up by order of the intendant, and the fire was subsequently extingushed before it reached the house destroyed. In an action of trespass by the owner against the city, it was held that, the city being a public corporation, it was not liable to an action by individuals, unless it be given by statute. Judge Dillon, in a note to section 758 of his work on Municipal Corporations, says of this case, that "the result was right, but assuming the power to pass the ordinance, the decision should be placed, we think, upon the ground that the intendant was discharging a *public*, as distinguished from a *municipal* or *corporate* duty, and is not in this matter to be regarded as the agent of the city, and therefore the city would not, on the principle of *respondeat superior*, be responsible for his acts." We will not stop to determine which is the true basis on which to rest the decision, for upon either ground the result is the same, that the city is not liable.

In Fisher v. The City of Boston, 104 Mass. 87, which was an action to recover damages for personal injuries to the plaintiff, caused by the alleged negligence of the officers and members of the fire department in performing their duties in putting out the fire in the city, it was held that the corporation was not liable, although the fire department was established and regulated under a special statute, which by its terms required acceptance by the city council before it took effect. It was said by Gray, J., in delivering the opinion of the court, that "the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity," and it was held that in the absence of an express statute, municipal corporations are not liable for injuries occasioned by reason of negligence in *using* or keeping in repair the fire engines of the city.

It is further held, in the same case, that it makes no difference whether the legislature itself prescribes the duty of the officers charged with the repair and management of fire engines, or delegates to the city or town the power to define those duties by ordinance or by law.

In McDonald v. The City of Red Wing, 13 Minn. 38, it was held that a city is not liable for the destruction of a building torn down to arrest the progress of a fire, unless such liability is created by statute; and that it makes no difference whether such building is torn down under the direction of the city officers assuming to act in their official capacity, or by the citizens and by-standers on their own motion.

In Wheeler v. The City of Cincinnati, 19 Ohio State, 19, the Supreme Court of Ohio said, that "the laws of this state have conferred upon its municipal corporations power to establish and organize fire companies, procure engines and other instruments necessary to extinguish fire and preserve the buildings and property within its limits from conflagration, and to prescribe such by-laws and regulations for the government of said companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to

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be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers, the corporation cannot be held liable to individuals, *nor is it liable for a neglect of duty on the part* of fire companies, or their officers, charged with the duty of extinguishing fires."

In Western College, etc. v. The City of Cleveland, 12 Ohio St. 375, which was an action against the city to recover for property destroyed by a mob, based upon a clause of the city charter in reference to the city council, which provided that "it shall be their duty to regulate the police of the city, preserve the peace, prevent disturbances and disorderly assemblages," it was held that the duty intended was that properly appertaining to an administrative and legislative body acting in the government of the city—the making regulations, by-laws and ordinances for the purposes specified, to be enforced by the appointment of officers; and that neither on general principles, nor from the effect of the enactment, was the city responsible for the destruction of property by a riotous assemblage of persons, *or for* the neglect of the officers in not preserving the peace and preventing the destruction of property.

In Dunbar v. The Alcalde, etc., of San Francisco, 1 Cal. 355, it was held that a municipal corporation is not liable for the destruction of a building in pursuance of the direction of its officers, *where no statute exists creating such liability.* This decision was made in a case where the building of plaintiff had been blown up by the alcalde and other officers of the city during a conflagration, for the purpose of staying its progress, and where the destruction of the building by fire was not inevitable.

In Russell v. The Mayor, etc., of New York, 2 Denio, 461, the statute provided "that when any building or buildings in the city of New York shall be on fire, it shall be lawful for the Mayor, or in his absence, the recorder of the city, with the consent and concurrence of any two aldermen thereof, or for any three aldermen, to direct and order the same or any other buildings *which they may deem* hazardous and likely to take fire, or to convey the fire to other buildings, to be pulled down and destroyed." The statute also provided for an assessment of the damages which the owners of buildings thus destroyed should sustain, and for the payment thereof by the city, and it was held that the city was not liable, in an action at common law, for the loss of personal property deposited in a building destroyed by virtue of an order of the mayor, etc., pursuant to the statute to prevent the spread of fire; that the statute provided for compensation only to the owners of buildings thus destroyed, and to those "having an estate or interest" in such buildings; that the owner of personal property deposited in, and destroyed with the buildings, was not within the statute, and could not, therefore, recover. It was further held in that case, that the authority conferred by the statute upon the officers of the city, is a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity, to prevent the spreading of fire; that in making an order for the destruction of a building, pursuant to the statute, the officers do not act as the agents of the corporation, but as magistrates designated by law for the execution of a public duty, and that the corporation was not responsible for their acts any further than the statute had made them so.

In Stone v. The Mayor, etc., of New York, 25 Wend. 156, it was held that the lessee of a building in the city of New York, destroyed by firemen, by order of the mayor, to prevent the spread of a conflagration, was *not* entitled to recover damages for merchandise in the building at the time of its destruction not belonging to him, but *the property of others*, and which was in his possession as a factor or merely on storage. The ground of this decision, like that in Russell v. The Mayor., etc., *supra*, is that there was no liability on the part of the city to make compensation for the property destroyed, except as, and to the extent, provided by the statute; that unless the statute created a liability on the part of the city, none existed. This is the doctrine of all the cases we have found, with the single exception of Bishop & Parsons v. The Mayor, etc., of Macon, 7 Geo. 200. There the city was held liable for blowing up the building of the plaintiff. No authority is cited except Lord v. The Mayor, etc., of N. Y., 18 Wend. 126. This case was decided both in the supreme court, 17 Wend. 285, and in the court of errors, upon the ground that the statute of the state had expressly made the corporation responsible, and not upon the ground of any common law liability. The decision stands alone, and in the language of the Supreme Court of California, in Dunbar v. San Francisco, 3 Cal. 358, "without some provision in the charter, or some statutory enactment imposing the liability upon the city, I do not see how that decision can be sustained."

In Taylor v. Plymouth, 8 Met. (Mass.), 462, which was an action to recover, against the town, for a building torn down to stop a fire, C. J. Shaw says: "In order to charge the town, the remedy being given by statute only, the case must be clearly within the statute. Independently of the statute, the pulling down of a building in a city or compact town, in time of fire, is justified upon the great doctrine of public safety, when necessary. * * * But if there be no necessity, then the individuals who do the act shall be responsible. This is the more reasonable, as the law has vested an authority in the proper officers to judge of that necessity. But the town is responsible by force of the statute only, and such responsibility is confined to the cases specially contemplated. In support of the same doctrine of the non-liability of the corporation in the absence of an express statute, see the following additional cases: Weightman v. Washington, 1 Black (U. S.), 49; Coffin v. The Inhabitants of Nantucket, 5 Cush. 269; Hafford v. City of New Bedford, 16 Gray, 297; Ruggles v. Nantucket, 11 Cush. 433; Parsons v. Pettengill, 11 Allen, 511; Surocco v. Geary, 3 Cal. 69; Burnhyser v. Evansville, 29 Ind. 187. See also cases cited in notes to Sec. 773, of Dillon on Mun. Corp. p. 732; and see also Ogg v. City of Lansing, Dec. term, 1872, 7 Western Jurist, 56, which was an action brought by the plaintiff against the city, alleging that in November, 1871, a man by the name of Sess was taken sick with small-pox in the city; that the city authorities took said Sess, and the house in which he was confined, under its charge and control, but neglected to take proper and ordinary precautions to prevent the spread of the disease; that Sess died; and the agents and servants of the city requested and directed the plaintiff, who was passing the house in which Sees died, to assist in taking the coffin, in which said deceased was deposited, from the house, without giving plaintiff any notice of the disease which caused the death, and without having cleansed the house or used any means to prevent the spread of said disease; that the plaintiff did so assist in removing said corpse, and soon returned to his own house, whereby the disease was communicated to two of his children, who died thereof. It was held that, although the statute conferred the power upon the city to establish a board of health, who had power to make regulations in relation to communication with houses when there was any contagious or infectious disease, to establish pest houses or hospitals, and when deemed expedient and necessary to prevent the spread of any contagious disease, to remove to the pest-house or hospital any person sick with any such disease, to prohibit communication or intercourse with such houses, etc., and to employ persons to carry into effect all the rules and regulations made by the board, etc., the city was not liable for the alleged negligent conduct of the persons thus employed in the hospital. It was held to be the "true doctrine that the powers conferred upon the corporation are of a legislative and governmental nature," for a defective execution of which the city could not be made liable in a common law action.

In the case before us, the statute (Rev. § 1057), authorizes municipal corporations to "protect the property of the municipal corporation and its inhabitants." Section 1058 empowers them to

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make "regulations for the purpose of guarding against danger from accidents by fire." Section 1071 confers the power upon the city "to make and publish, from time to time, by-laws or ordinances, not inconsistent with the law of the state," for carrying into effect the powers conferred, and makes it the duty of the corporation "to make and publish such ordinances or by-laws as shall be necessary to secure the corporation from injuries by fire," etc. And by section 1096, the corporation is authorized to establish a city watch or police, and organize the same in such manner as will most effectually secure the inhabitants from personal violence and their property from fire and unlawful depredation, to establish and organize fire companies and provide them with proper engines and such other instruments as may be necessary to extinguish fire and preserve the inhabitants of the city from conflagration, and to provide such by-laws and regulations for the government of the same as they shall deem expedient."

We will not stop to determine whether these statutory provisions do or do not confer authority upon the city to pass the ordinance under which plaintiff's property was destroyed, for if they do not confer such authority, the city in its corporate capacity could not be made liable for the unauthorized act of any of its officers; the ordinance would be void, and would confer no authority on the mayor or other officers to do the act complained of, and the city would not be liable therefor. See Dunbar v. San Francisco, *supra*, and cases cited on p. 356. If, on the other hand, the ordinance is valid and authorized, the mayor to judge of the emergency and do, what, by the common law, any individual might do, at his peril, without a statute, upon cases cited, the city is not liable for the consequences of his acts in the absence of a statute creating such liability.

II. It is insisted by appellant's counsel, that the destruction of plaintiff's buildings, where there was no necessity to do so to arrest the progress of the fire, was a taking of private property for public use, and having been taken by appellee in pursuance of the ordinance and statutes referred to, the plaintiff is entitled to compensation from the city.

There are several satisfactory answers to this position: *First.* The power of eminent domain is vested in the state, and can be exercised by it alone, either directly or by the corporation or persons to whom it is delegated by the legislature; the purpose must be a public one and specified in the act delegating the power, and the power must be strictly pursued. See cases cited in notes to sections 467, 468 and 469, of Dillon on Municipal Corporations. There is nothing in the statutes of the state conferring the power of eminent domain upon the cities of the state, except for the purpose of laying off, opening, widening, straightening, etc., streets, alleys, public grounds, wharves, landing places, and market places; revision sections 1064, 1065, 1066, 1067. These sections of the statute confer upon the corporations the right of eminent domain for these purposes, and make provision for compensation to the owners of property to be taken under the power. The power is not conferred for any other purpose, and consequently can only be exercised for the purposes authorized. *Second.* If it be conceded that the destruction of buildings at the discretion of the mayor or other officer of the city, when a fire is in progress, is a taking of private property for public use, then it is beyond question that the statutes and the ordinance of the city, before referred to, do not confer any authority upon the city or any of its officers or other person to so destroy buildings or other property, and even if the statute, in express words, professed to authorize such destruction when deemed necessary by an officer of the city, no authority to do so would be thereby conferred. The statute would be null and void, because in direct conflict with section 18 of article 1 of the constitution. Any statute professing to authorize the taking of private property for public use without *first* making, or securing to be made, a just compensation therefor, would be invalid and confer no power whatever to take such property. There is no provision in the statute of the state providing for making compensation for property destroyed in cities for the purpose of preventing the spread of fire, consequently, if such destruction be an exercise of the power of eminent domain, it follows conclusively, that such destruction is not authorized by the law. Not only so, but if the destruction of buildings or other property for the purpose of preventing the spread of fire in a city or town, under the direction of some officer of the corporation upon whom is conferred an authority to judge of the emergency, be a taking of private property for public use, within the meaning of the constitutional provision before referred to, then the legislature cannot authorize such destruction, for, by the constitution, compensation is required to be *first* made or secured, before the property can lawfully be taken, which would be utterly impracticable in cases of fire in compact cities.

Third. In addition to the reasons above given, the great weight of judicial authority holds that the destruction of property, under authority conferred by law upon officers of municipal corporations, is not an exercise of the power of eminent domain, but is a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity to prevent the spreading of fire, or other great calamity. The following cases hold that the destruction of property, under such circumstances, is not the exercise of the right of eminent domain: Russell v. Mayor, etc., of N. Y., *supra*; The American Print Works v. Lawrence, 3 Zabriskie, 595, 615; McDonald v. City of Red Wing, 14 Minn. 38, 41, 42; Stone v. Mayor, etc., of N. Y., 25 Wend. 172, 173, opinion of Senator Verplank; Surocco v. Geary, 3 Cal. 69, 73, 74; Dunbar v. The Alcalde, etc., of San Francisco, *supra*. The following cases, while they do not expressly decide, they support the same doctrine: Taylor v. Plymouth, 8 Met. 462, 465; The Mayor, etc., of N. Y. v. Lord, 18 Wend. 126; Conwell v. Emrie, 2 Carter (Ind.), 35.

While there are to be found in the opinions of judges in some cases, expressions leading to a different view, we have found no case directly holding a doctrine different from that of the cases above cited on this point.

We find no authority, either in the adjudged cases or in legal principles, upon which to hold the municipal corporation liable for the act of the mayor in ordering the destruction of plaintiff's buildings. The judgment of the circuit court, in sustaining the demurrer to the plaintiff's petition, must be affirmed.—[*The Western Jurist.*

Bankrupt Act—Payment by Insolvent Husband of Premiums on Life Insurance Policies for Benefit of Wife.

IN RE BEAR & STEINBERG, BANKRUPTS.

In the District Court of the United States, for the Southern Distict of Mississippi.

Before Hon. R. A. HILL, District Judge.

1. **Legal Title to Life Insurance Policy.**—The legal title to a policy of insurance on the life of a husband, taken out by him for the benefit of his wife, is in the wife.

2. **Payment of Premiums.**—The value of the policy depends upon the premiums being paid as they fall due. The wife may pay them from her own means—or, they may be advanced by a friend, other than the husband.

3. ——. **When Husband may Advance Them.**—If reasonable in amount, as compared with his estate and liabilities, and if he is solvent at the time, the husband may advance them.

4. ——. ——. **Valid as to Subsequent Creditors.**—Advances by the husband, in that behalf, are certainly valid as to subsequent creditors.

5. **When Legal Title to Policy of Insurance is not Assignable by Husband.**—When so held by the wife, the legal title is not assignable by the husband, either at law or in equity.

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6. Payment of Premiums by Insolvent Husband a Fraud upon Creditors.—Any payment of premiums made by a husband after he has become insolvent, is a fraud upon his creditors, whether so intended or not, and his assignee in bankruptcy may recover from the wife the amount so advanced, with interest, from the proceeds of policy when paid, the claim for which he may sell when it is ascertained, and the purchaser will acquire the contingent right to it.

7. Procedure in Bankruptcy—Register to take Proofs, Sell, etc.—The register in bankruptcy is ordered to take proof of amounts paid by the bankrupts, if any, after they become insolvent, and out of what fund, individual or partnership; which claim, when ascertained, the assignee shall sell for cash, in like manner as other debts, or *choses in action* are sold.

Harris & George, solicitors for creditors; *Wharton & Johnstons*, for bankrupts.

HILL, J.—This case is now submitted upon the exception of the creditors to the schedules of the bankrupt, upon the ground that they do not contain, and the bankrupts have not surrendered therein, a life policy taken out by each for the benefit of his wife. The question, upon examination, I find one of no little difficulty, and have postponed its decision for the purpose of obtaining all the light on the question attainable; but as it may be important to the parties in interest to have it settled without further postponement, I proceed to its examination. It is admitted that the policies are upon the lives of the husbands for the benefit of their wives; this being so, the question is, to whom do they belong? I am inclined to the opinion that the legal title is in the wife, and not the husband. The value of the policy depends upon the payment of the premiums as they fall due. This may be done by the wife out of her own means, or may be advanced by a friend other than her husband; if advanced by the husband it is but an advancement, settlement, or provision made by him for her benefit, out of his estate, which if solvent at the time the advance was made, he could do without any violation of the rights of creditors; provided it was reasonable in amount when considered in connection with his estate and liabilities; and certainly would be valid as to subsequent creditors; indeed a suitable provision for one's household is not only not condemned, but sanctioned by law, both human and divine. I am of opinion that the title to a life policy of the kind mentioned, both legal and equitable, is in the wife, and cannot be controlled or assigned by the husband.

It is otherwise, when taken out by him for his own benefit, or for the benefit of his estate, as in the case of Catchings v. Manlove, 39 Miss. 655, cited by creditor's counsel; hence the necessity of the assignment to his wife and children in that case, which being made when the husband was insolvent, was properly declared void as against his creditors, but was valid as against other parties.

Whilst I am satisfied the policies in the case now submitted belong to the wives of the bankrupts, and are not subject to be surrendered by the bankrupts, yet any payments which they may have made out of either their individual or partnership effects after they became insolvent, was a fraud, whether so intended or not, so far as to entitle the assignee to recover from the wife the amount advanced, with interest, out of the policy when it shall have been paid, and this claim, when ascertained, may be sold by the assignee, and will pass the contingent right to the purchaser. The case of Erben, referred to by counsel, was a claim upon the part of the bankrupt for whatever interest he had in the policy to be set off as exempt under the statute of Pennsylvania, which was allowed, which, if it was property in the sense of the statute, was properly set off, and did not raise the question as between the creditors and right of the wife, and is not authority upon the question now presented.

The other cases referred to by the distinguished and able counsel of the creditors will be found when closely examined, I am of opinion, not in conflict with the conclusion above stated. The register will take proof as to the amount paid by the bankrupts, if any, after they became insolvent, and out of what fund paid, which claim, when ascertained, will be sold for cash by the assignee, as provided for the sale of other debts or choses in action.

Divorce—Denial of Matrimonial Intercourse.

STEELE v. STEELE.

Supreme Court of the District of Columbia, General Term, April, 1874.

A husband cannot maintain a suit for divorce solely on the ground that his wife has denied matrimonial intercourse to him.

The plaintiff filed a bill in this case for a divorce from the defendant, his wife, on the ground of desertion. The desertion complained of, is that the defendant withdrew from his bed, and denied him matrimonial or sexual intercourse; that he continued to remain in the same house with the defendant for a considerable time thereafter, and then removal to another house, whither the defendant did not go; that subsequently the complainant requested the defendant, through a friend, "to live with him again as his wife," and she replied that "he could come and live in the house, but she would not live with him as his wife, *i. e.*, she would have no matrimonial intercourse with him."

The bill prayed for divorce *a vinculo matrimonii*, on the ground of desertion.

The proofs established that the complainant and defendant were lawfully married in September, 1865, and that there were —— children from the marriage, and that the defendant had assigned, as a reason for denying matrimonial intercourse to the complainant, that she did not desire to have any more children.

The case was submitted upon bill and testimony to the Court below, and a decree was made dismissing the bill. The case is now here on an appeal from that decree.

W. P. Peirce, for complainant, made the following points:

The plaintiff maintains that he is entitled to a divorce from the bonds of matrimony, under an act of Congress, approved June 1, 1870, and asks that the decree dismissing the bill be reversed on the following grounds:

1. That the withdrawal of the defendant from the matrimonial bed of the plaintiff, for the uninterrupted space of two years, was desertion within the meaning of the statute.

See Bishop, Mar. & Div., 3d Ed., Sections 506, 510; Browning Laws, Mar. Div., page 113, &c.

2. That the removal of the plaintiff from the house in which they were domiciled, being the natural and intentional result of the defendant's conduct towards him, constitutes desertion on the part of the defendant.

See Hodges v. Hodges, 1 Esp. 441; Camp v. Camp, 18 Texas, 528; Greenl. Ev., Sec. 18, &c.; Bishop Mar. & Div., 3d Ed., Sections 517, 525; Schouler's Dom. Rel., 1st ed. 54.

3. That the subsequent refusal of the defendant to domicile with the plaintiff "as his wife," and also the fact that she now remains in a sepaate domicile, the result of no wrong on the part of the plaintiff, constitutes desertion on the part of the defendant.

See Bishop Mar. & Div., 3d Ed., Sections 728, 514; Kent's Com., 8th edition, 2d volume, 174.

No appearance for defendant.

The Court were of opinion that the statute in regard to divorce did not confer authority upon the Court to decree a dissolution of the bonds of matrimony, on the grounds set up in this case.

The Chief Justice, while concurring in the judgment, expressed the opinion that a denial of the marital right of intercourse, when continued for a period of two years, should be regarded as a desertion within the meaning of the statute, unless such denial was made in consequence of inability from sickness, or other sufficient cause in good faith.

Order appealed from affirmed.

—[*Washington Law Reporter.*

—THE compulsory school law in New Hampshire seems to be working well. The percentage of non attendants upon schools is gradually decreasing.

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Relative Importance of Case-Law.

[Continued from page 572.]

Coming next to the considered decisions of judges sitting in *banc*, or in courts of first instance in chancery, we find that the principles regulating the authority of such decisions are well settled. An erratic judge will sometimes overleap the bounds imposed by the comity of courts of co-ordinate jurisdiction, and run amuck against the decisions of other judges of equal authority. But apart from this, it may be laid down as one of the rules observed by all judges of first instance, that the latest decision upon a litigated question, is the one followed in subsequent cases involving the same point. The language of Martin, B., in Reg. v. Robinson, L. R., 1 C. C. 80, indicates this general principle. He observes as follows: "When a point has once been distinctly raised and decided in a reported case, I, for my part, regret to find such a question criticised and disputed over again. When a point has once been clearly decided, I think it is far better to acquiesce in the decision, unless it can be brought for review before a higher court." And this submission to a prior decision will, in ordinary cases, be observed, even though the judge deciding the latter case does not approve of the case he follows, as was done by Lord Selborne, sitting for the Master of the Rolls, in Pike v. Dickinson, 21 W. R. 862.

If, however, the latest decision is at variance with earlier cases, and they are not cited or considered therein, then it very much affects the value of such a decision. Earlier conflicting decisions being thus overlooked, the judges have generally felt themselves at liberty to disregard the later cases, if such earlier ones are more numerous or more satisfactory to their minds. Thus, in Gillan v. Taylor, 21 W. R. 823 (a case of charitable gift), Wickens, V. C., remarks: "I have unwillingly come to the conclusion that I am bound by the case of the Attorney-General v. Price, 17 N. S. 371, and Isaac v. Dr. Friez, Ambl. 575. It is remarkable that those cases were not considered by Vice-Chancellor Wigram, in Lily v. Hey, 1 Hare, 580, and of course one must treat Vice-Chancellor Wigram's decision with the greatest respect. If the Attorney-General v. Price, and the other cases I have mentioned, had been before Vice-Chancellor Wigram, in Lily v. Hey, I should have followed the more recent decision. As it is, I am not entitled to dissent from authorities so much in point." See also for an application of the same holding, Coote v. Whittington, 21 W. R. 837, and Rowsell v. Morris, 22 W. R. 67, where Sir George Jessel, M. R., refused to follow Coote v. Whittington.

Malins, V. C., may not unfairly be classed as one of the erratic judges above alluded to. He deals with the question we are considering in his own peculiar style, as reported in Ferrier v. Jay, 23 L. T. N. S. 302. "This point," he says, "has been before two learned judges, whose decisions are in direct opposition to one another. On the bulk of the authorities, I am bound to follow the latter of the two decisions. Although all the authorities do not appear to have been cited in that case, I must assume that the Vice-Chancellor had them all in his mind when he made that decision."

Of the Irish Bench, Lord Justice Christian may be taken as one of the most illustrious types of the judicial Ishmaelite that the annals of the law can exhibit. His views upon this subject are given in *Re* Tottenham's Estate, Irish R. 3 Eq. 528: "When the decision of one court is cited to another of co-ordinate authority, the latter has a right to regard it in a critical, and even sceptical spirit; and while accepting the decision, to decline the reason of deciding, if a better one can be assigned. But I confess, I think that when an inferior court (I mean inferior in the sense of curial procedure) has before it the decision of its non-appellate tribunal, it is the duty to conform itself frankly and loyally to the reason of the decision, and not merely to its letter."

The decision of a co-ordinate branch of the court, or of a court of co-ordinate jurisdiction, will be followed till reversed on appeal, in order to avoid an unseemly conflict of decisions: Per James, V. C., in *Re* Times Assurance Co. 18 W. R. 404, and see also *Re* Hotchkiss' Trusts, L. R. 8 Eq. 643. In Boon v. Howard, 22 W. R. 541, Keating, J., is reported to say: "There is no positive rule which precludes the court from examining its previous decisions, though those are to be departed from only on the strongest grounds. The court ought to respect its own decisions and those of other courts."

In Owen v. London R. Company, 17 L. T. N. S. 210, Cockburn, C. J., held, that as the authorities were somewhat divided, the courts were entitled to exercise their own independent judgment on the question to be decided. In such a conflict of authority, the earlier decision was followed by Romily, M. R., in Hall v. Bushill, 12 Jur. N. S. 243. But in making a choice among conflicting decisions, the considerations which ought to influence the court are well expressed by Mr. Justice Jebb, in Loveland Coyne v. Bartley, Alc. & Nap. 308: "When the court is obliged to decide upon conflicting decisions, and one of them is of late date, of unquestionable authority, and is adopted by compilers and text and elementary writers of character, and is also in accordance with the opinions of the bar, so far as we can collect it from a series of authorities and precedents, we should not be warranted in making a decision contrary to that opinion."

[To be continued.]

—[*Canada Law Journal.*

[Correspondence.]

A New Solution of the Railroad Question.

EDITORS CENTRAL LAW JOURNAL:—I believe your courtesy will allow me space to reply to your answer to my strictures upon the "New solution of the railroad question." To a part of it I shall not attempt to reply, because it is evident that the chief difference between us is one of political rather than of municipal law, and a discussion of that difference would be burdensome to you and unprofitable to your readers. I would venture to suggest that you seem to be in favor of what is called a "liberal construction" of the constitution and of public law, and are opposed to what you style "nice legal barriers;" while I cannot help believe that such construction leads to the grossest injustice, and that "legal barriers" form the only safeguards of liberty and property. When ours ceases to be a government of law, with its legislatures as well at its courts controlled by written constitutions and old common law notions of private rights, which have prevailed for centuries, its usefulness will have departed.

It may be that an individual who builds a train of cars for traffic on a railroad, and has the tracks condemned for the use of his train in rivalry of and against the will of the owners of the road, will represent the public thereby, but the argument is not satisfactory to me. Still, I will not dispute it, and must admit that it is very ingeniously urged. But, when you make the negro boy who drove his team across some one's field, when the highway was out of order, represent the public, I humbly submit that you will call upon old Chancellor Kent in vain, if you seek to justify upon the right of "eminent domain." You say, "the first illustration of the right of eminent domain given by Chancellor Kent, is": "if a common highway be out of repair a passenger may lawfully go through an adjoining private enclosure." 2 Kent Com. 338. So he says, but he cites it as an illustration of a principle entirely different. In the note to this sentence, he adds: "So, an entry upon another's land may be justified in cases of overruling necessity, or to recover properety carried on another's ground by the force of the elements." He styles these "the right of a public necessity." He adds: "These are cases of urgent necessity, but private property must in many other instances yield to the general interest. The right of eminent domain or inherent sovereign power gives to the legislature the control of private property for public use and for public use only." He then speaks of the need of compensation in such cases. The right of passage over adjacent land, when the highway is out of order, is as different from the right of eminent domain as that is from the right of police. The right of eminent domain requires compensation. The right of passage does not. In the one case you condemn the property by fixed legal proceedings. In the other you act at once without leave or license from anybody. You cross the field, and no matter what the injury, if it be unavoidable, it is *damnum absque injuria*. If your hat blows off and lodges in your neighbor's apple tree, you may get it without any compensation to him, and although it is the hat of an "individual" and not of the public. Your

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house may be pulled down to prevent the spread of fire, but that is not an exercise of the right of eminent domain. It is the right of police or self-preservation, and no compensation follows at common law.

If the needs of the public are not answered by the existing railroads, you may condemn land for another, but I submit, with great deference, that by principles and charters as old as Runnymede, reiterated over and over again in England and in this country, you cannot take the road already built—and why?—simply because it is evident that the public need does not require it. You can build another alongside, and your ability to do that disproves your right to take this. I also deny that there is any principle under which the employees of a railroad could, in time of peace, be made to operate the train of a rival. The "police power" sometimes knocks down peaceable citizens, but it has never yet discovered any way to make them go to work *in invitum*, except in the chain gang.

The old chancellor was not unwilling to have a government which some of us would think too strong, but he had a just respect for the rights of property, and he said in the same chapter from which you quote, "It undoubtedly must rest, as a general rule, in the wisdom of the legislature to determine when public uses require the assumption of private property; but, if they should take it for a purpose not of a public nature * * or if they should vacate a grant of property or of a franchise under the pretext of some public use or service, such cases would be gross abuses of their discretion and fraudulent attacks on private rights, and the law would clearly be unconstitutional and void."

Chancellor Walworth, in 5 Paige, 159, eloquently vindicates the rights of the owners of property. From that and other cases which have been carefully considered by learned courts, it is evident that the use for which private property is to be taken must be really a public use, and that there must be some substantial need of taking the identical property sought. If the public could build another railroad on the desired route, or near it, such need would not exist and the proceedings would be in violation of law and void.

I fear I am presumptious in opposing the views of the editors of the CENTRAL LAW JOURNAL, but the principles involved are important; some other people think as I do, and if we are running our train on the wrong track we ought to be switched off. T. G.

DENVER, COL.

REMARKS.—1. After considering the subject more attentively than before, we do not see any reason to modify any of the views previously expressed by us on this question. Our correspondent lays much stress upon the fact that Chancellor Kent, in using the illustration of the passenger going over the land of the private owner, when the highway was out of repair (2 Kent Com. 338), was illustrating "the rights of public necessity," and not the inherent sovereign right of eminent domain. We continue to think that there is no substantial difference between the "rights of public necessity," so far as concerns the assumption of private property for public purposes and the right of eminent domain. For the latter right is founded upon public necessity or public convenience, and is not, as its name would indicate, an ultimate right of property in the sovereign, but merely the *right of appropriating* private property for the public purposes, whenever an exigency shall arise demanding it. Bynk. Quæst. Jur. Pub. lib. 2, c. 15; Heinec. El. Jur. et Nat. lib. 2, c. 8, s. 168, n; Vattel, c. 20, § 34. The name itself (*dominum eminens*) was an invention of Grotius; but the principles on which the right rests were understood long before his time, and were understood (though, perhaps, imperfectly) by the early writers and judges of the common law, who, however, do not designate it by this name. It is believed that the word eminent domain cannot be found in the text of Blackstone's Commentaries, and the writer does not remember to have seen it in any of the earlier judgments of the English courts which Mr. Broom has collected to illustrate the doctrine that private right must yield to public necessity, under the maxim *salus populi suprema lex*. Broom Leg. Max. 1. Nor do we perceive any force in the position taken by our correspondent, that in the case of the use or destruction, by the public, of private property, through necessity, as in case of a highway out of repair, or property destroyed to prevent the spread of fires, compensation need not be made; whereas the exercise of the right of eminent domain must always be attended with compensation to the private owner. For, while we admit that this distinction is taken in some cases, and notably in one which we elsewhere print in this number, yet we do not perceive how our correspondent's argument derives any advantage from it. For the "public necessity," which will justify the taking of private property without compensation, clearly will justify such taking when adequate compensation is made.

2. Our correspondent submits, that while we may condemn land for another road, yet by principles and charters as old as Runnymede, reiterated over and over again in England and in this country, we cannot take the road already built, and simply because it is evident that the public good does not require it. "You can build another alongside," he adds, "and your ability to do that disproves your right to take this." We think this proposition carries within itself a direct contradiction. If "the public good does not require it," how can you condemn the lands of private owners to build a new road parallel with one already built? If the railroad corporation can say "you cannot take our road because you can build another," the land-owner can say, with equal force, "you cannot take my land to build a new road, because there is a road already built; go and take that." The rights of the adjacent land-owner and of the railroad-owner being, then, equal, considerations of public economy and convenience, and the generally conceded fact that it is against sound policy for governments to engage in the work of building vast internal improvements, when it can be avoided, would intervene and turn the scale in favor of taking the property of the railroad-owner. And this would be far better for him; for, through the payment of tolls from private train-owners, he would acquire an adequate and continuing compensation for the use of his property; whereas, a railroad owned and operated by the government, parallel to his, would result in a practical confiscation of his invested capital. In the face of such a powerful competitor, with the public treasury at its back, and not burdened by a bonded debt, he could not subsist—certainly he could not pay dividends on watered stock representing four or five times the cost of his railroad property.

3. We presume our correspondent does not mean to hint that the franchise of a private corporation may not be taken for public uses though the exercise of the right of eminent domain, as well as the property of private persons. If he does, we beg to refer him to the following cases: Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35; Crosby v. Hanover, 36 N. H. 420; Boston Water Power Co. v. Boston and Worcester R. R. Co., 23 Pick. 360; Central Bridge Corporation v. Lowell, 4 Gray, 474; West River Bridge v. Dix, 6 How. 507; Richmond R. R. Co. v. Louisa R. R. Co., 13 How. 81 (Grier, J.); Chesapeake and Ohio Canal Co. v. Baltimore and Ohio R. R. Co., 4 Gill & J. 1; State v. Noyes, 47 Me. 189; Red River Bridge Co. v. Clarksville, 1 Sneed, 176; Armington v. Barnet, 15 Vt. 745; White River Turnpike Co. v. Vermont Central R. R. Co., 21 Vt. 594; Newcastle, etc., R. R. Co. v. Peru, etc., R. R. Co., 3 Ind. 464; Springfield v. Connecticut River R. R. Co., 4 Cush. 63; Forward v. Hampshire, etc., Canal Co., 22 Pick. 462.

4. This being the undoubted law, it remains to enquire who shall judge (1) whether the *use* for which the property of the railroad-owner is sought to be condemned, is a public use; and (2) whether the *public necessity* justifies the taking.

(1.) Upon the first point we are willing to concede that there may be cases in which the courts may properly interfere, and declare, that the *use* for which the legislature has authorized property to be taken, is not a *public use*. Bankhead v. Brown, 25 Ill. 540; Olmstead v. Camp, 33 Conn. 531; Tyler v. Beacher, 44 Vt. 648; Loughbridge v. Harris, 42 Ga. 500. We freely concede that the courts will not permit the property of one man to be taken from him and given to another, under a mere pretext of benefiting the public, although adequate compensation be paid. Cooley Const. Lim., 531; Currier v. Marietta, etc., R. R Co., 11 Ohio State, 228; Gilmer v. Lime Point, 13 Cal. 306; Brunning v. N. O. etc., Co., 12 La. An. 541; Harding v. Goodlett, 3 Yerg., 41; Memphis Freight Co. v. Mayor, etc., 4 Coldw. 417; Clack v. White, 2 Swan, 549.

(2.) But the general proposition, nevertheless, remains true, that the question, whether there is a necessity which will authorize the taking, is a *political* and not a *judicial* question. The old chancellor was not far out of the way, when he said, "if the public interest can in any way be promoted by the taking of private property, it must rest *in the wisdom of the legislature* to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the rights of private individuals for that purpose." As was said by Denio, J., in People v. Smith, 21 N. Y. 597, "the necessity for the taking of private property for the use of the public, or of the government, is not a judicial question. The power resides in the legislature." "The authority to determine, in any case, whether it is needful to exercise this power," says a living writer of even higher authority on this subject than Chancellor Kent, "must rest with the state itself; and the question is always one of a strictly political character, not requiring any hearing on the facts or any judicial determination. * * On general principles, the final decision rests with the legislative department of the state; and if the question is referred to any tribunal for trial, the reference and the opportunity of being heard are matters of favor and not of right." Cooley Const. Lim. 538. In support of these views the learned author cites People v. Smith, *supra;* Ford v. Chicago and N. W. R. R. Co., 14 Wis., 617; Matter of Albany St., 11 Wend. 152; Lyon v. Jerome, 26 Wend., 484; Hays v. Risher, 32 Penn. St. 169; North. Mo. R. R. Co. v. Lackland, 25 Mo. 515; Same v. Gott, Ibid., 540. In view of these authorities we apprehend that if the national, or a state legislature, should declare it a public necessity to condemn the property of a railroad-

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owner so as to make it a common highway for the benefit of the public, instead of the means whereby a few individuals perpetrate upon that public an outrageous and systematic extortion, no judicial tribunal would have the hardihood to say no.

5. We did not assert, nor intend to assert, that there is any principle by which the employees of a railroad company can, in time of peace, be made to operate the road of a rival. We did and do assert that it is a familiar principle that the paramount authority of the government extends to the commanding, when necessary, of the *services* as well as the property of its citizens. If our correspondent is not familiar with this principle, he must freshen up on the elementary writers. "His property, liberty and life shall," says Mr. Broom, "under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good." But the necessity which will command, *in invitum*, the services of a citizen, must generally be a great public necessity, such as war, a great conflagration, flood or other public disaster. A familiar illustration in time of peace of this principle, is believed to be found in those laws which compel all able-bodied citizens, within certain ages, to work on the public roads, or other citizens with certain qualifications to serve on juries. And in England no qualified person could refuse the office of sheriff, on a similar principle; and this is the law in Tennessee to this day, although since the office has become lucrative, it is a dead letter. But this principle is obviously one which ought not to be extended in time of peace; and we do not think, and never have thought, that it could be extended so as to press into the service of a rival corporation, *nolens volens*, the employees of another. Nor would this be at all necesssary. Voluntary agents without number would present themselves as soon as adequate compensation was insured. Nor would it be necessary that these agents should be officers of the government, or paid out of the public treasury. The pilot who conducts an ocean steamer into New York harbor is paid by the vessel's owner or master; yet his conduct is strictly controlled by regulations established by Congress, designed to prevent collisions and preserve the lives of those who "go down to the sea in ships."

Notes and Queries.

CONFUSION OF MATERIALS—REPLEVIN

I. NEBRASKA CITY, NEB., Nov. 16, 1874.

EDITORS CENTRAL LAW JOURNAL:—I have for you or your readers a legal conundrum. B. purchased of A., who is a lumber merchant, a bill of lumber, and gave his promissory note therefor containing a clause "that the title to said lumber should not pass" from A. until payment of the note, but should remain in A. B. builds a house with said lumber, adding of course, nails and plastering upon the lands of C. with C.'s permission. The house is of course personal property, but can A. replevy the same, or proceed otherwise against it *in rem*? An answer with authorities is requested. E. F. W.

ANSWER.—There is a difference between articles which do not lose their identity, and lumber, brick, &c., which do lose their identity on being incorporated into a building. This principle is discussed in some of the cases relating to *fixtures*. Clearly in the case supposed, replevin cannot be maintained, and the right to enforce a lien in chancery is, to say the least, doubtful, but it is difficult to define in advance the conditions of equitable interference.

II. LARCENY—STATUTE.

WINCHESTER, ILL.

In Illinois, larceny is, by statute, *defined* to be "the felonious stealing, taking and carrying, leading, riding, or driving away the personal goods of another." Rev. Stat. 1874, p. 377, § 167. By the same statute (p. 395, § 292), it is provided that "all offences herein *defined* shall be prosecuted, and on conviction, punished as by this act prescribed, *and not otherwise*." The same statute (p. 377, § 168) provides the punishment for larceny as follows: "If the property stolen *exceeds* the value of $15, [he] shall be imprisoned in the penitentiary not less than one nor more than ten years; if the value of the property stolen *is less* than $15, he shall be confined in the county jail not exceeding one year, and fined not exceeding $100."

What would be the punishment, or could a man be punished at all, if found guilty of stealing property worth *exactly* $15? JAS. M. RIGGS.

REMARKS.—We see no substantial difficulty in the above statute, but we invite the attention of our readers to it. If the value of the goods stolen were exactly fifteen dollars, and the prosecuting attorney had any doubt about the construction of the statute, he could draw the indictment so as to charge the felonious taking and carrying away of goods of the value of fourteen dollars and ninety-nine cents, and proof of the stealing of goods of the value of fifteen dollars would be no variance. But we apprehend that if the indictment charged the stealing of goods worth exactly fifteen dollars, and the proof showed that fifteen dollars was the exact value of the goods stolen, there would be no difficulty in the case; the court would construe the stealing of property of the exact value of fifteen dollars to fall within the clause which punishes the stealing of property of a *less* value than fifteen dollars; for the greater includes the less. To hold that under such a statute the thief who has stolen *exactly* fifteen dollars may go unpunished, would be a sticking in the bark of the statute worthy of the nonsensical subtleties of a hundred years ago, but disgraceful to any court of justice of the present day. We apprehend that a court which, under an indictment for murder, could see that it was possible for three men at the same instant to strike a fourth with the same club, would have no difficulty in expounding the above statute, in case a thief were convicted under it of stealing a five and a ten dollar greenback, so as to punish the thief and protect society.

Book Notice.

SEDGWICK ON STATUTORY AND CONSTITUTIONAL LAWS. 2d Edition, with numerous additional Notes by JOHN NORTON POMEROY, LL. D., New York: Baker, Voorhis & Co. 1874. pp. 692,

We are glad to welcome the second edition of this standard work. It has justly ranked, since its first appearance, as one of the best productions of American legal authors. No other single Treatise covers the exact ground occupied by it. Its object is to state and illustrate the Rules which govern the courts in the construction of Statutes and written Constitutions. When we consider how much of our law consists of positive or express provisions, constitutional or statutory, we at once realize the importance of a work on this subject. Indeed, no lawyer can afford to do without it. More than one half of Mr. Sedgwick's Treatise is devoted to statutes, and in this respect it treats from an American stand-point the same subjects so admirably considered in the excelent English work of Dwarris. In this respect its plan differs from that of the valuable treatise of Judge Cooley, on Constitutional Limitations. Strictly, only the last two chapters in Mr. Sedgwick is upon the same subjects to which Judge Cooley's work is devoted. The former work is the more elementary and philosophical; the latter the more intensely practical. The legal literature of America cannot afford to dispense with either, and we do not know, were we driven to the election, with which we would first consent to part.

One great charm of the work under reveiw, is the clear, elegant and flowing style in which it is written, In this respect it constantly reminds one of the first volume of Starkie on Evidence. In this respect, also, it is superior to the same author's work on the Measure of Damages. This is owing in part to the subject, but in a measure, also, we suspect to the circumstances under which it was written. We have heard that it was prepared by its author when left desolate by the loss of one deeply beloved, and to divert his mind from the pressure of his great grief. Accordingly, it is "Dedicated to the Memory of his Wife," and in his Preface he touchingly says "he takes leave of a task which has beguiled many hours of their weariness, and which has furnished a partial solace for the sadness of many others." In what an amiable light does this reveal the lamented author. It endears him to us.

The editor's work has been well and thoughtfully done. He leaves Mr. Sedgwick's text intact—and puts his own labors in the form of Notes, which bring the subject discussed down to date. The extent of the editor's additions is indicated by the fact that over 2,500 cases are cited in his notes, and yet the work is kept in manageable limits. Again we thank Messrs. Baker, Voorhis & Co., for their excellent edition of this valuable work.

Summary of our Exchanges.

The Albany Law Journal, for November 21, contains an article on survivorship between husband and wife, in which several New York cases are collected; also an extract from the address of David Dudley Field, before the New York Mercantile Library Association, on the Law and the Legal Profession; also an extract from the Solicitors' Journal, on Some Recent Decisions in Private International Law; also the opinion of an English county judge, from the London Law Journal, on Railway Unpunctuality; together with its usual abstract of New York decisions, notes on current topics, notes of cases, etc.

The Pittsburgh Legal Journal, for November 18, publishes several opinions of the Supreme Court of Pennsylvania. We note the following:

Schell *et al.* v. Stein: A deed regularly acknowledged or proved, and recorded in the proper book, and indexed in the separate index appropriated to the book, but not in the general index of all the deed books, is not defectively recorded.

Bell and Weir v. Reed: No one will be permitted so to excavate his land as to do a permanent injury to the land of his adjoiner, when such adjoiner's land is in its natural condition, or the injury thereto would result notwithstanding and without artificial pressure thereon.

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The Chicago Legal News, for November 28, publishes an elaborate opinion of the Supreme Court of Illinois, by Mr. Justice McAllister, in Hewitt v. Long, which was a contest between a father and mother for the custody of their minor child. The nature of the case is thus explained by the editor of that journal: "Before the child was born, the father deserted the mother and went off to Iowa. She obtained a divorce on the ground of desertion, and a decree for the custody of the child, in the Cass County Circuit Court. The father married again in Iowa, and became rich. The child, Alice, being about fourteen years of age, the father, on petition, against the wishes of the child, had the decree so modified as to give him the custody of the child, and allow him to remove her to Iowa. The mother appealed. The court discusses the common law rights of fatherhood, the statutory and natural rights of the mother, and the rights of the child whom it was sought to take from the mother and remove to another state, against her will. It was said by the learned judge, in delivering the opinion, that Alice, having been born in this state, she owes natural allegiance and has certain independent personal rights. The laws and customs of this state are her birthright. It is by those laws and the circumstances of her parents that she became a ward of the court, and as such entitled to its protection and superintendence over her welfare, and that she cannot be removed from this state against her will. Breese, C. J., dissents from this opinion of the court, and delivers an elaborate opinion, in which Sheldon, J. concurs. We shall publish this opinion in our next."

In also publishes a decision of Mr. District Judge Blodgett in the case of Reed, a bankrupt, holding—

1. That a debt barred by the statute of limitations of the state where the bankrupt resides, cannot be proved in bankruptcy.

2. That less strictness of proof is required to establish a promise by the debtor *before* the bar of the statute has attached, than to prove a new promise *after* the debt has become barred.

Also an opinion of Mr. District Judge Morrill of the United States District Court for the Eastern District of Texas, holding, that inasmuch as the applicant for a discharge in the case before him was a voluntary bankrupt, and has not assets equal to thirty per centum of the claims proved against his estate, upon which he was liable as principal debtor, and has not obtained the consent of one-fourth of his creditors in number and one-third in value, his application for a discharge must be refused.

Also an opinion of the Supreme Court of South Carolina, by Moses, Ch. J., holding that the city of Charleston has power to tax its own stock (whatever that is), and that it can tax its stock held by non-residents.

The Legal Intelligencer, for November 27, contains but two or three cases of the general interest. In Morse v. Worrell, Common Pleas of Philadelphia, before Paxson, J., it appeared that the plaintiff's trade-mark was "The Rising Sun Stove Polish," with vignette of the sun. Held, that defendants would no be restrained from using the words "Rising Moon," with vignette of the moon.

It publishes opinions of the Supreme Court of Pennsylvania in the following cases: Burke v. Hammond: 1. Abandonment of realty will be presumed unless some indication be left in, or upon the property, of intention to return.

2. A continuous claim for twenty-one years and payment of taxes, raises a presumption of a grant from the warrantee.

James P. Hanna, Survivor of Ira B. McVay, v, Robert Wray: 1. In a proceeding against a surviving partner on a partnership liability, the plaintiff is incompetent to testify to transactions and conversations between himself and the defendant's deceased partner.

2. A judgment against such surviving partner, unless fraudulent, would bind in settlement between himself and the estate of his deceased partner.

3. Karnes v. Tanner, 16 P. F. Smith, followed.

The Legal Gazette, for November 27, prints the opinion of Mr. Justice Strong of the Supreme Court of the United Statet (delivered November 9th) in the case of the ship Belle of the Sea v. Johnson & Higgins. The following is the syllabus:

The captain of the ship Belle of the Sea, executed a bottomry bond, payable within ten days after the safe arrival of the ship at New York. Upon her arrival, the mortgagee took her into possession, and employed the libellants to take up the bottomry bond, to collect the freight, general average and insurance, and generally to transact the business of the vessel. This arrangement was assented to by the owner any charterer. The bond passed by assignment into the hands of the libellants. As the sums collected proved to be insufficient to pay the expenses of discharging the ship, &c., it was claimed by the libellants that they had the right to apply what was collected, 1st, for their commissions, necessary expenses, and disbursements made by them on account of the ship; 2d, to the discharge of the bottomry bonds. It was contended that they had surrendered these rights by agreeing to pay the bond, and thus discharge its lien, looking to the freight, the general average, and the insurance alone for reimbursement.

1. *Held*, that the evidence did not establish the fact of any such surrender.

2. That the rights claimed by libellants belonged to them, and that the decision of the court below in affirming those rights be confirmed.

For a report of this case in the court below, see 4 Leg. Gaz. 108.

We see nothing else of interest in this number of the Legal Gazette, except matter which we have already noticed as being in other periodicals.

The following are the contents of the Psychological and Medico-Legal Journal for November:

ORIGINAL COMMUNICATIONS.—Mr. Wallace Wood, Mental Physiology; Dr. J. L. Teed, Study of Nervous Disease—second art.; Dr. James P. O'Dea, Philosophy of Suicide, Part 1—General cause (*continued*); Mr. George Chaoon, The Children's Aid Societies; M. Schafthausen, Pre-Historic Anthrophology and Ethnology.

PROCEEDINGS OF SOCIETIES.—New York Medico-Legal Society; Changes in Constitution and Election of Officers; Societe Medico-Psychologique of Paris; Discussion on the Frequency of Suicide.

CONTEMPORARY LITERATURE.—Flint's Essay on Conservative Medicine; Clay's Hand Book of Obstetric Surgery; Swan's Surgical Emergiences; Lindsay & Blakiston's visiting List; Montane's Crane chez les Microcephales; Sha Rocco's Masculine Cross; Cohen's Croup and Tracheotomy: Buzzard's Syphilitic Nervous Affections; Galezowski's Echelles Typographiques; Dr. Clifford Allbutt, Letter to the Editor.

The Albany Law Journal, for November 28, has an article by John Proffatt Esq., of the Liabilty of a Married Woman on Tort. It concludes the article of Mr. Wood the Lateral and Subjacent Support of Lands. It reprints from the Pall Mall Gazette an article on Damages for Breach of Promise, and has otherwise its usual amount of interesting matter.

Legal News and Notes.

—IN the last financial year the pensions for judicial services in Great Britain amounted to £58,681 3s. 3d., and in Ireland to £17,258 18s. 8d.

—THE Supreme Court of Massachusetts declares the divorce law of 1874 unconstitutional.

—FORTY-THREE life-insurance companies have been compelled to suspend business during the last five years in the United States.

—THE safe burglary trial at Washington has ended in the acquittal of Williams, and in the disagreement of the jury upon Whitley and Harrington, indicted as conspirators.

—THE newly elected members of the Supreme Court of Arkansas met on the 23d ultt., at Little Rock, in accordance with the provisions of the new constitution. The members drew lots for terms as follows: Chief-Justice English, 6 years; Associate-Justice Walker, 4 years; Associate-Justice Harrison, 4 years. Luke E. Barber was elected clerk and reporter of the decisions.

—PENSION OFFICE.—The commissioner of pensions has submitted his annual report to Secretary Delano. It gives a review of the business of the office up to include June last. It recommends that higher fees be paid examining surgeons, so that better talent can be commended. The amount of appropriation that will be required for the pension service during the fiscal year ending June 30, 1876, will be $30,500,000. The commissioner again calls the attention of the secretary of the interior to the danger of destruction by fire to which the records of the office are liable in consequence of the exposure of the Seaton House to such an accident. He urges Congress should be reminded of the great risk to which these valuable records are exposed, to the end that a more suitable building be provided for the use of the office.

—PUBLICATION OF UNITED STATES REVISED STATUTES.—The text of these revised statutes, including the table of contents by chapters and subjects, marginal references and citations, is now in print. The work on the index, under the directions of Judge C. W. Jaines, is advancing as rapidly as possible, consistent with the degree of accuracy which is sought. This cannot be finished before January. Meantime it is proposed to furnish the courts, and many of the principal officers of the Government, with copies without an index, and the distribution of these incomplete volumes can begin at once. The index will be the most complete of any ever prepared by the government. It will cover 400 pages, and contain about 20,000 entries. The revised statutes contain 5,600 sections, and the minimum numbers of references in the index to each section is three, while in other instances they run as high as eighteen references to a section of fourteen lines. The index to Edmund's New York statutes contains about 32.000 entries.—[*Daily Register.*

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—A young bachelor who had been appointed Sheriff, was called upon to serve an attachment against a beautiful young widow. He accordingly called upon her and said: "Madam, I have an attachment for you." The widow blushed and said his attachment was reciprocated. "You don't understand me. you must proceed to court." "I know it is a leap year, sir, but I prefer you to do the courting." "Mrs. P. this is no time for trifling, the Justice is waiting." "The Justice! why, I prefer a parson."

—THE DENTISTS AND THEIR FALSE GUMS.—This morning arguments will commence in the United States Circuit Court, in the famous Goodyear dental vulcanite suit against the dentists. Judges Emmons, Longyear and Withey will sit. This suit is brought by the Goodyear Dental Vulcanite Company to recover royalty for the use of vulcanized rubber amounting to upward of $7,000,000. It is a test case, and Dr. George Willis is the nominal defendant, although the suit is practically defended by all the dentists in the United States, some 15,000 in number, under the auspices of the Dental Protective Uninn of Michigan, of which Dr. B. T. Spellman is president.—[*Detroit Free Press.*

CRIM. CON—EVIDENCE—COLOR OF CHILD'S HAIR.—A point was raised in Petrie v. Howe, 4 N. Y. Sup. 85, which reminds one of the celebrated case of The Alms House v. Whistlo. The action was crim. con. The plaintifft after testifying that his wife was the mother of four children by him, and that after the alleged criminal intercourse she gave birth to a fifth, was asked what was the color of the hair of the first four children. The fifth child was present in court. It was held that this species of physiological evidence was not admissible, and because it had been received, a new trial was granted.—[*Albany Law Journal.*

—WE have already had occasion to note the loose manner in which criminal justice is administered in Scotland, We had occasion to note a case in which a man of some rank, in attempting to shoot a farm laborer accidently killed a horse, and was let off with a slight fine and reprimand. An exchange says: "In the Highlands of Scotland almost every crime except murder is regarded with comparative indifference, and criminals when convicted, frequently have the option of leaving the place, never to return, rather than being sent to jail. In the Orkney and Shetland islands, also, when persons are convicted, they are sent across the Pentland Firth, to the mainland of Scotland, as a punishment, whereas the same class of criminals in England would be transported or sent to penitentiaries.

—RUFUS CHOATE'S OPINION OF A DISTINGUISHED DEMOCRAT.—Some twenty-five years ago, while Mr. George Ticknor Curtis was still exercising the functions of a United States Commissioner, in the rural city of Boston—before he had sent back a fugitive slave, and had thereupon immigrated to this more congenial metropolis—Mr. Rufus Choate left his law office early on a November morning, to pass the day in taking testimony before Mr. Curtis, in a patent case. Returning to the office late in the dusky, chilly afternoon, after finishing the task, Mr. Choate threw his bag upon the table, and remarked in the hearing of his law partner, Mr. Joseph Bell, and the half a dozen young law students, who were all aware what he had been doing: "I consider Mr. George Ticknor Curtis the most unsatisfactory man, upon the whole, that I have ever known, and I wish that I may never set my eyes upon him again." Then walking wearily across the room to the fire-place, he stood for a few moments warming himself, before a pile of sea-coal which was blazing in the grate. With the increasing warmth of his body, the usual sweetness of his disposition seemed at last to return, and after a long pause, he broke the silence by the remark: "I do not know but I might endure to look at him from a window in a procession."—[*From the Evening Post.*

—POST OFFICE.—The Postmaster-General has just issued the following new decision: After January 1, 1875, if a weekly and monthly publication be mailed together in one wrapper the postage must be prepaid at the higher rate for monthly publications, *i. e.*, three cents for each pound or fraction thereof. In reference to the proposition submitted by publishers of magazines asking permission to mail the January number of their respective issues in December, at the rates prescribed by the new law, the Postmaster-General decides that he has no authority in the matter, and that the January number can only be mailed in January, at the terms of the new law, or if mailed in December it must be subjected to prepayment at the office of mailing, or pay double transient rates at the office of delivery. The publishers will undoubtedly hold back the delivery of the January number until January. The use of sealed transparent envelopes for the transmission of matter of the third class is sanctioned by postal regulations. Under no circumstances should a postmaster tear the wrapper of any packet or package passing through his office. If he cannot determine the contents of a package passing at less than letter rates without destroying the wrapper, he should charge it up with letter postage, to be collected on delivery. A postmaster who goes outside of the delivery of his office to sell postage stamps, stamped envelopes, or newspaper wrappers, or who uses them for the purpose of discharging his private obligations, will be promptly removed if reported to the Post-Office department.—[Washington Chronicle.

—TOLEDO, Ohio, has a Guybord case. In the common pleas court which sits in that city, an injunction was recently applied for by John Wynn, against Rev. Jas. O'Reilly, pastor of St. Francis De Sales Catholic church, to restrain the latter from interfering with the burial of the body of Mrs. Mary Wynn, wife of plaintiff, in St. Francis De Sales cemetery at that place. It appears that the family of Mrs. Wynn own a lot in that cemetery, in which they desired to bury her; but after preparations for burial had been made, Wynn was notified by Father O'Reilly that he would oppose it, if necessary, by force. The remains were deposited temporarily in a vault in Forest cemetery where they now are, and Wynn applied for an injunction to prevent interference with the interment. Father O'Reilly in his answer, sets forth that the cemetery is under control of the bishop of the diocese of Cleveland, and that the rules of the Catholic church make it obligatory upon the bishop or his representative to refuse to permit to be interred therein any persons of whom full proof of membership is not furnished, and that they died in full communion; that Mrs. Wynn had, for a long time prior to her decease, ceased to be a member of the Roman Catholic church, and died out of communion. The court reserved its decision. Meanwhile the case of Guybord, involving the same question with reference to an excommunicated Catholic in Canada, has just been determined by the English Privy Council against the church, and the parish priest announces his readiness to go to jail rather than obey the mandate. Well, let him go. But is it not a little singular that Guybord himself, the man who, it should seem, would be, of all others, most interested, makes no complaint?

—MANY of the reports which come to us continue to have cases on breach of promise of marriage, and courts of original jurisdiction in England and the United States, are frequently called upon to try such cases. But there are many reasons why this species of action should be abolished. In France there has been much discussion of the subject. The declaration of November 26, 1639, art. 7, enacted that the courts should not receive proof of a promise of marriage, except in writing. The Code Napoleon was silent on the subject. Some French writers, as Toullier, Merlin and Rolland de Villeargues, are of opinion that promises of marriage are valid. But Pezzani, in his *Empechements du Mariage*, gives some strong reasons why no action should lie for damages for breach of promise. He contends that the enforcement of such a promise, when against the will of either party, would be against public policy; and that the original obligation being void, the accessory obligation of damages is void, on the principle that *quod nullum est, nullum produicit effectum*. Duranton was also opposed to allowing damages in such cases. If the sentiment of society will not deter individuals from resorting to courts for redress for breach of promise, the legislature ought to abrogate this remedy. Where parties are well acquainted with each other's circumstances, as they surely ought to be before entering upon so important an engagement, there is no sound principle of law which can sustain an action for the failure to perform an engagement of this character. If there is deceit or imposture on the part of either of the parties, there might be a remedy in another form; but there should not be a remedy as for the breach of the promise of marriage.—[*Albany Law Journal.*

—THE evidence of husband and wife, in criminal cases, still remains in that barbarous state from which this branch of our law has gradually become civilized, of late years, mainly through the influence of Bentham. The absurd theory of interested witnesses being incapable of giving evidence, is here, and here alone, maintained. The times when parties could not be called to prove their own case, are now some distance backward: but it was not until the Evidence Amendments Act, 1853, that husband and wife could be witness for, and against each other even in civil cases; and criminal cases were specially excepted. We have, then, this anomaly, which was curiously illustrated about a month ago in one of our police courts. One man summoned another for an assault, and the only witnesses present were the wives of each: the complainant could, and did, call his wife in support of his statement; but when the defendant, who said the other man struck the first blow, was going to call his wife, he was told that could not be done, because she was his wife. The astonished defendant thought this was hardly fair, and said so: while we may also think that the complainant's wife was as much an interested witness as the defendant's; and if the evidence of the one could be taken by the magistrate, with this allowance, so could that of the other. Moreover, who can be more deeply interested in the fate of a child than its father or mother? Yet they may be heard in its favor. If the present anomaly is founded on the idea that man and wife are one, then why was the concession made in civil cases? and the same answer applies if it is a remnant of the theory of interested witnesses being incapable. But if, as seems most likely, it is a relic of that curious state of the law when, although a man was in theory presumed innocent, small chance was left him to prove it, by not even allowing him counsel for his defence, then in the interests of justice and common sense, the sooner it is done away with, the better.—[*The Law.*

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, DECEMBER 11, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance.

MEASURE OF DAMAGES ON BREACH OF CONTRACT TO CONVEY.—The well-considered and satisfactory opinion of Mr. Justice Wagner of the Supreme of Missouri, in Kirkpatrick v. Downing, which we print elsewhere, decides a point new in Missouri, and of general interest. Nothing could be added to the reasoning with which the learned judge sustains the principle laid down. The conclusion of the court conforms to the only philosophical principle governing the measure of damages for the breach of contracts in cases not attended with special circumstances of imposition or oppression—namely: that the obligee shall receive compensation for the actual loss he has sustained.

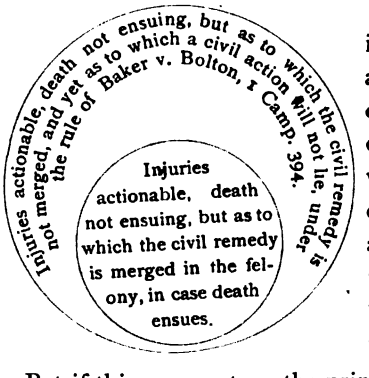
COUNTER-CLAIMS.—The suggestive article on this subject, which we publish elsewhere, will, we doubt not, attract the attention of our readers. It is written by Hon. Philemon Bliss, professor of pleading and practice in the law school of the state university at Columbia, Missouri, and lately one of the judges of the supreme court of this state. The appropriateness of his allusions to the admirable work on pleading under the New York code by Mr. Van Santvoord, and the general interest which attaches to the question, will be seen when it is considered that our statute on the subject is copied from that of New York, and has its counterpart in the codes of several other states. We take great pleasure in stating that Judge Bliss will contribute, from time to time to this journal, other articles on code pleading.

Right of Action for the Killing of a Human Being.

We ask the attention of our readers to a communication, in another column, from Dr. Hammond, of the University of Iowa, in which he reviews the recent opinion of Judge Dillon, in Sullivan v. The Union Pacific Railroad Company. Though brief, it is one of the best specimens of legal criticism it has been our privilege to publish; and it gives us sincere pleasure to welcome him again to our columns after a long silence.

Dr. Hammond shows that the principle declared by Lord Ellenborough, in Baker v. Bolton, 1 Camp. 493, and which has been generally adopted in this country, is the result of the extension of two of the principles of the ancient common law beyond their true limits. The first of these principles was that there could be no action for an injury which amounted to a felony, because the civil remedy was merged in the offence against the king. The second principle was that the right of action for a personal injury died with the injured person.

1. The doctrine of the merger of the civil remedy in the felony, and the reasons on which it rested, are thus concisely stated by Mr. Justice Bigelow, in Boston, etc., v. Dana, 1 Gray, 83: "By the ancient common law, felony was punished by the death of the criminal, and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person whose body could not be taken in execution, and whose property and effects belonged to the king, would be a useless and a fruitless remedy, it was held to be merged in the public offence. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore, a party injured by a felony, could originally obtain no recompense out of the estate of the felon." As long, therefore, as this ancient principle of the common law subsisted, it furnished a sort of reason why an action would not lie to recover damages sustained in the killing of a human being; since a killing, whether malicious or negligent, which would furnish a ground for the recovery of damages, would not ordinarily fall below the grade of involuntary manslaughter, and would hence be presumably felonious. But the rule was, as Dr. Hammond points out, insensibly extended beyond the boundaries of the reasons on which it rested. For in point of fact, there are many negligent homicides, where, in case death had not ensued, an action for damages would lie, and yet where the person who would be responsible in a civil action, would not, had death ensued, have been guilty of a felonious homicide. Thus, in the case of Sullivan v. The Union Pacific Railroad Company, although the particular employee or agent of the company, through whose negligence Sullivan's son was killed, may have been guilty of manslaughter, yet the corporation could not have been punished for that crime, although had death not ensued, they may have been liable to pay damages. Again: if a person were permitted to bring a civil action for an injury causing death, he could sustain his case by a preponderance of evidence; whereas, in a criminal prosecution, the king or the state would be obliged, in order to secure a conviction, to satisfy the jury of the defendant's guilt beyond a reasonable doubt. This difference between the rules of evidence applicable to civil and criminal cases, would include within the scope of its operation a very large number of cases. The boundaries, therefore, between injuries causing death, which, had death not ensued, would have been actionable, and those to which, death not ensuing, the common law doctrine of merger applied, may be expressed by the following diagram:


Injuries actionable, death not ensuing, but as to which a civil action will not lie, under the rule of Baker v. Bolton, 1 Camp. 394.
Injuries actionable, death not ensuing, but as to which the civil remedy is merged in the felony, in case death ensues.

It is thus seen that there is a large number of cases, among which are those which call into exercise the principle *respondeat superior*, which fall outside the reason on which the principle that a civil action will not lie for the killing of a human being when the death is instantaneous, is based.

But if this were not so, the principle would be inapplicable in the United States, because the doctrine of merger, on which it rests, has never had a foothold here. It has been generally repudiated by the American courts, and in those states where the courts have not repudiated it, it is believed to have been abolished by statute. Boston, etc., v. Dana, *supra*; Blassingame v. Glaves, 6 B. Monroe, 38; Ballew

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v. Alexander, 6 Humph. 433; Story v. Hammond, 4 Ohio, 376; Robinson v. Culp, 1 Tread. 231; White v. Fort, 3 Hawks, 251; Pettingill v. Rideout, 6 N. H. 454; Cross v. Guthery, 2 Root, 90; Piscataqua Bank v. Turnley, 1 Miles, 312; Foster v. Commonwealth, 8 M. & S. 77; Patton v. Freeman, Coxe, 113; Allison v. Farmer's Bank of Virginia, 6 Rand. 223; Gen. Stats. Kansas (1868), p. 383, § 306; Code of Iowa (1873), p. 431, § 2526; 1 Stant. Ky. Code (1860), p. 371, § IV; 1 Wagn. Stat. Mo., p. 515, § 28; Voorhies' New York Code (1864), p. 19, § 7, etc., etc.; 2 Rob. Prac., 548, 549. But if this doctrine of merger were a part of our law, still it would have no application to a case like that of Sullivan v. The Railroad Company; for although a master is civilly responsible for injuries caused by the negligence of his servant, yet the servant alone can, as a rule, be punished criminally; and hence it is the action against the servant, and not that against the master, which would merge.

2. The other principle of the common law, out of which, as Dr. Hammond suggests, the doctrine of Baker v. Bolton sprung, is believed likewise to be repealed by statute in many of the United States. Code of Iowa (1873), p. 431, § 2525; Gavin v. Hord, Ind. Stat. (1862), § DCCLXXII, etc., etc. But where it is not repealed, it can have no application to the case of a master suing for damages caused by the killing of his servant, because it is the *servant's* right of action that abates with his death, and not that of the master. The latter sues in his own right, and not in the right of his servant, or as his representative.

It is thus seen that the doctrine which Judge Dillon repudiates rests upon two principles, one of which has become obsolete in American law, and the other partially so, and neither of which, if still a living principle, could have any application whatever to the case of a master suing for the damages sustained by himself in the killing of his servant. This was, then, a case in which the maxim might fitly be applied, *cessante ratione, cessat ipsa lex.* T.

Code Pleading—Counter-Claims.

I do not propose to discuss the subject of counter-claims in general, not even those "arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim"—for this clause can hardly be made plainer by explanation—but rather those that are authorized by the clause immediately following, to-wit: "or connected with the subject of the action." The statute (1 Wagn. Mo. Stat., p. 1046, § 13), thus authorizes a defendant to bring a cross action against the plaintiff, or set up, by way of counter-claim, any cause of action he may have against him which is connected with the subject of the plaintiff's action.

In commenting upon the phrase in this connection, Mr. Van Santvoord says, that "the words, subject of the action, should, perhaps, be construed, not as relating to the thing itself about which the controversy has arisen, but as referring to the origin and ground of the plaintiff's right to recover or obtain the relief he asks. Anything *necessarily* connected with it, that is, growing out of, or the direct result of the contract or the transaction which the plaintiff alleges as the ground of his demand, may, if a proper subject of cross action by the defendant, be set up as a counter-claim, but the defendant should be able to trace the origin of his right or claim to relief to the transaction itself, which furnishes the plaintiff his ground of action. * * * The conclusion drawn from this view of the case, is, that the words 'connected with the subject of the action,' as used in the section of the code under consideration, are used merely to qualify the words which immediately preceed them.'" p. * 565-6.

Is this the correct view? If so, the phrase can have but little significance, for the other clause expressly authorizes the defendant to counter-claim a cause of action arising out of the contract or transaction set forth in the petition. Unless the additional claim authorize the defendant to bring his cross action against the plaintiff for a cause connected with the *property* in respect to which the plaintiff has brought his action, although it may have nothing to do with the contract or transaction set forth in the petition, if not surplusage, it, at most, can have but a limited application.

"The subject of the action," in a restricted sense, may be the same thing as "the contract or transaction named in the petition as the foundation of the action." In this sense, the lease is the subject of an action for rent reserved, and the same may be said of any instrument of writing upon which suit is brought. When the contract, upon which the petition is based, shows but a part of the real transaction, the construction given to the phrase by Mr. Van Santvoord may allow a counter-claim, relating to the part omitted, as to the consideration for the agreement sued on, when it is not expressed in the agreement, and when it need not be, set out in the petition. But in such case, as when the agreement is a promissory note, and the consideration is property sold, the subject of the action is the note, although, in a more enlarged sense, it is the property or the instrument conveying it. The Missouri decisions, as we shall presently see, sustain, in effect, the latter view, but there are cases where a defendant may have a cause of action against the plaintiff, which he would set up by way of counter-claim, that has nothing directly to do with an instrument upon which the plaintiff may have based his action, nor with its consideration—the petition, indeed, may not be founded upon a writing—and yet this defendant's claim does pertain to property rights in regard to which are involved in the suit. If rights in regard to property are so involved, why may not this property, in the liberal construction we are directed to give to the code, be regarded as the subject of the action? If the phrase is made only to comprehend what has before been indicated, to-wit: the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or the consideration of such contract, cases will arise when matters, that are neither one nor the other, may be so involved in the suit that they should be decided in the same action, that the defendant be not driven to an independent one. The provision in that respect should certainly be as liberal as the old chancery rule, and the phrase is broad enough to make it so.

If the property, the right to which, or some right growing out of, or in relation to which is involved in a suit, cannot be called the "subject of the action," it is often difficult to say, as distinguished from "the contract or transaction named in the petition as the foundation of the plaintiff's claim," what it may be. Mr. Van Santvoord says, that in an

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action for the recovery of real property, the *possession* is the subject of the action, but does not this confound the remedy, the judgment, whether for money or possession of property, with that to which the claim to such property relates, or upon which it is founded?

To illustrate the general view: The owner of land brings an action for possession against one holding under a contract of sale, may not the latter, by counter-claim, ask for a specific performance of the contract? Certainly not, in the restricted sense given to the phrase under consideration. In that sense, such a counter-claim can only be made when the suit is founded upon the contract the defendant would thus enforce as a suit for its recission. A naked claim for possession, founded upon title, has nothing to do with the contract; the latter, unless possession be given by, or be inferred from its terms, is not even a defence, and in such case the affirmative relief, of a judgment for specific performance, relates not to "the origin or ground of plaintiff's right to recover," nor is it necessarily connected with any contract or transaction upon which he bases his right, but only pertains to the land sought to be recovered. Yet this cross action is sustained upon respectable, if not binding, authority. Dewey v. Hoag, 15 Barb. 365.

In an action to enforce a lien, as an equitable mortgage, it is proper to bring in, as parties, all other lien-holders, especially subsequent ones, that the rights of all may be determined. Can it be doubted that such defendant lien-holder may counter-claim his own demand and ask for judgment in his favor, although it has no other relation to the plaintiff's than the fact that it rests upon the same land, and that he may obtain an affirmative judgment, even if the plaintiff should fail as to his own claim?

Or, one sues for payments due upon a contract for the sale of land, and the defendant answers that the plaintiff's title was defective, and that he was bankrupt, or, for other reasons, could not perfect it so as to make the purchaser a title when the eedd should become due. This would be matter of defence; and, to go farther and claim a return of the money already paid, would be a counter-claim arising out of the contract upon which the action was based. But suppose the defendant had, in the meantime, obtained title to the property and desired to remove the cloud arising from the colorable title of the plaintiff, could he seek this equitable relief by way of counter-claim? The action is founded upon the contract, but the counter-claim is not connected with that, but with the property, and it cannot be made unless the latter is the subject of the action.

Suppose, again, a promissory note be given for the rent of land, the landlord covenanting, by a separate instrument, to make repairs; in a suit upon the note, can the defendant counter-claim damages arising from the breach of this covenant? Or, the note is given for the price of a machine, the seller agreeing collaterally to replace it if the one sold proves defective, can the purchaser, when sued, counter-claim damages for not complying with the agreement? The counter-claim is not founded upon the contract upon which the petition rests, but each is the consideration of the other, and one may, perhaps, with more propriety, be said to relate to the subject of an action founded upon the other, than if it related to the property merely in respect to which the contract in suit was made. The right, in these cases, to make the counter-claim might be consistent with the view quoted above from Mr. Van. Santvoord.

The questions raised in most of the above supposed cases have not been passed upon by the Supreme Court of Missouri, nor do I find such an authoritative construction given to the phrase under consideration, as to indicate what its opinion would have been. There are several cases, however, where, in a suit upon a contract, the defendant was allowed to counter-claim damages in the nature of a recoupment, arising from a breach of another contract, or from an injury to property, which contract on property was the consideration of the contract sued on.

In Grand Lodge v. Knox, 20 Mo. 433, one who was sued for the purchase-money of land was allowed to counter-claim damages arising from the removal of fixtures by the seller, and in a similar case, when the purchaser was sued upon notes given for the purchase-money, he was permitted to counter-claim the value of a growing crop wrongfully removed by the seller. Gordon v. Bruner, 49 Mo. 570. There have been several cases in which it is held that a purchaser may, when sued for the purchase-money, whether evidenced by a promissory note or otherwise, set up by way of counter-claim, fraud and deception in the sale. House v. Marshall, 18 Mo. 368; Owens v. Rector, 44 Id. 389; Morse v. Rathburn, 49 Id. 91. McAdow v. Ross and Smallwood, 53 Id. 199, was a statutory proceeding by which the plaintiff sought judgment against defendant Smallwood, and an enforcement of a lien upon his house for lumber furnished defendant Ross, who built the house. Smallwood answered that the plaintiff had guaranteed that Ross should build the house according to a certain contract, which he had not done, and asked judgment against the plaintiff upon his guaranty. The court sustained the counter-claim, which is going a little further than the other cases, though not, perhaps, as far as some of those above supposed.

The proper construction of this phrase derives additional importance from the fact that it is used in describing causes of action that may be united in one petition. 1 W. S., 1012, § 2. Those that arise either out of "the same transaction, or transactions connected with the same subject of action," may be so united, and it is important to know whether the various transactions that become sources of controversies, must, in order to authorize their adjudication in one action, be connected with the same contract, or whether it will suffice, if they are connected with the property concerning which the disputes have arisen.

This is written rather to provoke enquiry, to call out opinions from such of your correspondents as have given special attention to code pleading, than as expressing any settled conviction upon the subject. B.

COLUMBIA, MO., Nov. 25, 1874.

—MR. CHIEF JUSTICE WAITE is thus described by a New York correspondent:

"Chief Justice Waite is the youngest man on the bench, and looks still younger than he is. With a solid and erect form and bearing, square and massive head, covered heavily with black hair, which years are mottling into gray; strong and expressive face, genial but decided manner on the bench, he looks the chief justice of the present, being clearly distinct from the ideal judge of the past, when white and scanty locks, a bald and glistening dome of thought, great age, and somewhat of coldness and reserve, marked the typical jurist."

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Measure of Damages upon Breach of Contract to Convey Land.

THOMAS KIRKPATRICK v. WILLIAM G. DOWNING.

Supreme Court of Missouri, October Term, 1874.

Present, Hon. DAVID WAGNER, WM. B. NAPTON, H. M. VORIES, T. A. SHERWOOD, E. A. LEWIS, Judges.

1. **Vendor and Purchaser—Recoupment—Rents—Waste.**—In a suit by a vendee against his vendor for damages, for failing to convey land according to contract, the vendor cannot have a recoupment on account of rents or waste.

2. ——. **Measure of Damages on Breach of Contract to Convey.**—Where a vendee sues to recover damages sustained through the failure of his vendor to convey land according to contract, the measure of his damages is the actual loss he has sustained; and this is the difference between the price agreed to be paid and the value of the land at the time of the breach of the contract to convey.

The plaintiff, Kirkpatrick, filed his petition, in which he stated that on the 25th of August, 1857, the defendant, Downing, was owner in fee of 160 acres of land, which was therein described; and that on the same day Downing sold the same to Kirkpatrick for the sum of $3,200, and executed to him a title bond therefor. That Kirkpatrick paid in money and property $500 at the time, and gave his five several promissory notes for the payment of the balance, each for the sum of $540, and payable respectively, in one, two, three, four and five years; that, by the terms of the bond, Downing was to make a deed to the plaintiff upon the payment of the last note; that Kirkpatrick took possession of the land, and on March 1, 1859, with the consent of Downing, he sold forty acres of the land to Charles Hughes, for $1,200, which amount was paid by Hughes to Downing, and was to be credited on the indebtedness of the plaintiff; that plaintiff occupied and cultivated the land to some time in 1858, and paid $80 tax on it, and made lasting and valuable improvements thereon, costing $1,000, and cleared thirty-five acres of land, which was worth $700, and paid the promissory notes in full, and demanded of Downing a deed for the land, which he refused to make; and that he sold and conveyed the land to one Baker. That in 1864, whilst plaintiff was absent from home, Downing procured fraudulently from plaintiff's son a surrender of the title-bond, the son having no authority to give it up. The petition then prayed for judgment for $1,780, the value of the improvements made and amount of taxes paid, and also $3,200 purchase-money, with interest thereon.

In substance, the answer of Downing states that he was the owner of the said lands in fee simple; sold them to plaintiff at the price and upon the terms stated in the petition, and that he bound himself, upon the payment in full of the notes, to convey the title to the plaintiff. The answer denied the payment of the notes in full, and averred that, independent of the $1,200 paid by Hughes, plaintiff only paid $920, and that plaintiff and defendant agreed that the forty acres sold to Hughes should be conveyed by defendant to Hughes. It was admitted that plaintiff made some improvements, but it was denied that he ever made as much as was alleged.

There was a denial of any fraudulent procurement of the surrender of the title-bond. But it was alleged that plaintiff left home in 1864, his family residing on the land, and that they continued on it till 1865, and that plaintiff's wife was his agent during his absence; that in 1864 plaintiff's family were committing waste on the land, impairing defendant's security for the purchase-money, and that the defendant remonstrated with her about it, and that she said that she was authorized to rescind the contract, and produced a letter to that effect from her husband, and that the contract was then and there cancelled, and that the two remaining notes which were due, amounting, with interest, to about $1,900, were delivered to her by the defendant; that these notes, with the interest, were greater in amount than the value of the land, and that in pursuance of this cancellation, plaintiff's family left the land.

That afterwards, in 1865, defendant sold the whole 160 acres for $1,600, the full value of it at that time; and at the same time the 120 acres was not worth more than $900; that plaintiff and his family were in possession of the land from 1857 to 1865, cultivating the same and enjoying the crops, the use of the land being of the annual value of $400, which defendant prayed to have recouped; that, while in possession of the land, plantiff committed waste, cut away timber to the value of $500, which was also asked to be recouped.

All that part of the answer in reference to a sale of the land to another person for its full value, and the annual value of the rental of the land, and the waste committed by the plaintiff whilst in possession, was stricken out. The plaintiff then filed a replication to the new matter set up in the answer, and the cause was tried before the court and a jury, and a verdict was rendered for the plaintiff for $2,676 60. It is unnecessary to notice any of the points made in relation to the admission or exclusion of evidence, as we have been unable to perceive any substantial error in the rulings of the court in that respect.

The evidence was conflicting in regard to the authority of the plaintiff's wife to deliver up the title-bond and rescind the contract, and the jury, by their verdict, evidently found that she possesses no such authority. That was a matter for them to determine on the testimony, and with their verdict we have no right to interfere. That part of the answer asking for a recoupment for the value of the rent and damages was rightfully stricken out. The relation of landlord and tenant did not exist in this case, and that is the only relation upon which the defence would have been available. The case of Coffman v. Huck (19 Mo. 435), is a direct authority for this proposition, and it was then held that a party who enters upon land as a vendee, cannot, upon a subsequent recission or breaking up of the contract of sale, be made liable for the rent of the land as a tenant. He is only liable to the extent of the benefit actually derived by him from the use of the land, in ascertaining which he may be allowed for all outlays in improvements.

But the only question of any real importance in this case, and upon which the decision must ultimately turn, is that in regard to the measure of damages. This is the only question that was presented with any prominence in the instructions of the court, and this will now be considered.

For the plaintiff the court gave the following declaration: "The jury are instructed that unless they believe from the evidence that the wife of the plaintiff was authorized by him to cancel and rescind the written contract for the conveyance of the land from defendant to plaintiff, and surrender the bond and receive the notes in pursuance thereof, and that said wife did not cancel and rescind said contract and deliver up said bond in pursuance of said authority given said wife by said plaintiff, they will find for plaintiff and assess his damage at the amount of purchase-money paid by plaintiff, with six per cent. interest thereon, from the time the same was paid until the present time."

At the instance of the defendant an instruction was given, that if the wife of the plaintiff was authorized to cancel or rescind the contract of sale, then the verdict should be for the defendant, but the court refused, at his request, to declare the law to be: "That if the jury shall believe from the evidence that the defendant acted in good faith in the sale of the land in question to Baker, and not with intent to injure or defraud plaintiff, then the measure of damages in the case is the actual damage sustained by plaintiff, and if the jury shall further believe from the evidence that at the time defendant sold said land to said Baker, that plaintiff was owing defendant therefor more than said land was worth in cash in the market, then the jury should allow nominal damages only."

Upon the question of damages in cases like this, the authorities

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are conflicting and inharmonious. That there are many cases of the very highest respectability sustaining the view taken by the court below, is unquestioned. In conformity with the decisions in both England and America, the courts in this state have held that the measure of damages on a breach of covenant of seizin is limited by the consideration-money and interest. Dickson v. Desire, 23d Mo. 166; Tong v. Matthews, Id. 437. The covenant of seizin is broken as soon as it is made. If, at the time of the execution of the deed, the grantor does not own the land, the covenant is broken immediately, and the rule for assessing the damages arising on this breach, is based upon the principle that, no land having passed by the vendor's deed to the purchaser, the purchaser has lost no land by the breach of the covenant—he has lost only the consideration he paid.

And many cases, as before remarked, have held this rule equally applicable to the case of a sale of land, when the vendor, for any reason, refuses to carry out his agreement and convey the title. As abundant authorities may be found, both for and against this rule, it is best to examine the question in the light of reason, and determine, if possible, what line of adjudication will most likely be promotive of the ends of justice. Mr. Sedgwick well remarks in his treatise on the measure of damages, that although courts have felt themselves bound, in some instances, as to real covenants, to adopt abitrary rules, still the constant effort is to give compensation for what is actually lost; not to allow remuneration for a mere technical breach of agreement, but to make the measure of damages correspond with the real injury sustained, and not to permit an action where no loss has been suffered. Sedg. Meas. Dam., 6th Ed. 194. A difference has been taken in some of the cases in regard to the good or bad faith of the vendor in failing to comply with his agreement as affecting the amount of damages, some holding that where he is guilty of fraud, or has acted dishonestly, substantial damages may be awarded to the purchaser, whilst others take the opposite view, and declare that the motives which actuated the seller can have no influence on the principle involved, and that the damages in either event will be the same. In Flurean v. Thornhill (2 W. Bl. 1,078) it was held that the contracts for the sale of real estate are on the condition, always implied if not expressed, that the seller has a good title, and if without fraud he fails to convey by such title, the vendee is not entitled to damages for the loss of his bargain. But in the still later and very recent case of Engel v. Fitch (L. R. 3 Q. B. 314), this question was subjected to a very full and elaborate discussion in the Queen's Bench. It appeared in this case that the defendants, mortgagees of the lease of a house, sold it by auction to the plaintiff, the particulars of the sale stating that the possession would be given on completion of the purchase. The plaintiff resold it at an advance to a person who wanted the house for occupation. Upon an investigation of the title it was found satisfactory, but on the plaintiff requiring possession, before completing the purchase, the mortgagor was found to be in possession, and refused to give it up. The defendants could have ousted him by ejectment, but they refused to complete the sale on the ground of expense. On this the plaintiff brought an action for breach of the contract of sale, and it was held that, as the breach of contract arose, not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to their contract, the plaintiff could recover, not only the deposit and the expenses of investigating the title, but also damages for the loss of his bargain, and that the measure of damages was the profit which it was shown he could have made on a sale. The cases bearing on the subject were all thoroughly reviewed, and the above results arrived at.

The case of Engel v. Fitch was affirmed in Exchequer Chamber (L. R. 4 Q. B. 659), with a slight difference in the mode of stating the measure of damages which was held to be the difference between the contract price and the value at the time of the breach of the contract, the profit which it was shown the plaintiff could have made, on a resale, being the evidence of this enhanced value and its amount. In delivering the judgment, Kelly, Ch. B., said: "No case has been cited in which the purchaser of real property has been held disentitled to recover damages like the present, except in the case of Fleurean v. Thornhill and the cases which followed it, and upon the one ground of the vendor's inability to make out a title; and there is no authority to show that when the breach of contract has been on any other ground, any other rule, as to damages, applies in contracts as to the sale of real property than that which prevails in the ordinary case of a breach of contract." This decision is highly approved by Mr. Dart, and in commenting upon it (2 Dart Vend. and P. 4th Eng. Ed., 873-4) he says: "This decision, though scarcely reconcilable with some of the earlier authorities, has placed the rule on a clear and intelligent footing, and has excluded from its operation the case of a vendor selling *mala fide*, or entering into a merely speculative contract for sale." This rule, then, is clearly deducible from the English authorities: If the vendor knew, at the time the contract was entered into, that he had no title; or if the sale goes off because he changes his mind; or because he neglects to take the necessary steps for putting the purchasers into possession; the purchaser may, in an action for breach of such contract, recover, beyond his expenses, damages for the loss of his bargain. 1 Chit. Contracts, 11th Am. Ed. 437. Mr. Perkins, in his last edition of Sugden on Vendors and Pur., in an elaborate note, says that the current of American authorities now runs in the same direction. He says that it has been held, that where the vendor has, in bad faith, agreed to sell land to which he knew he had no title (McDonnell v. Dunlap, Hardin, 41; Davis v. Lewis, 4 Bibb, 456; Baldwin v. Munn, 2 Wend. 399; McNair v. Compton, 35 Penn. St. 23; Brinckerhoff v. Phelps, 24 Barb. 100; S. C., 43 Barb. 469; Drake v. Baker, 34 N. J. 358; Peters v. McKeon, 4 Denio, 456; Bush v. Cole, 28 N. Y. 261); where, having the title at the time of the agreement to convey, he has afterwards disabled himself from conveying by a transfer to a third person (Wilson v. Spencer, 11 Leigh, 261; Dustin v. Newcomer, 8 Ohio, 49); where he refuses to convey because the land is greatly enhanced in value (Brinckerhoff v. Phelps, 24 Barb. 100; S. C., 43 Barb. 469), and also where, having the title at the time, he ought to convey according to his agreement, he still refuses to convey; in all these cases, in a suit at law for a breach of the agreement to convey, the vendee is entitled to recover such sum as will indemnify him for the actual and direct loss sustained by the non-performance of the agreement, which would generally be the difference between the contract price and the enhanced value of the land, when the conveyance should have been made." Western Railway v. Babcock, 6 Met. 358; Pringle v. Spaulding, 53 Barb. 17. So in Michigan, the measure of damages for a willful breach of a contract to sell and convey a lot of land, was held to be the difference between the actual value of the land at the time of the breach and the sum agreed to be paid. Allen v. Atkinson, 21 Mich. 353. And again, in the case of Hammond v. Hannin (Id. 374), the court regards it as settled, that, while the ordinary measure of damages for breaking a covenant to sell real estate continues, the consideration, money and interest, with, perhaps, also the cost of investigating the title; yet, that where a party contracts to sell, knowing he cannot make a title, or having a title, refuses to convey, or disables himself from conveying, or otherwise acts in bad faith, the vendor is remitted to his general liability. The rule is, then, the same in relation to real as to personal property, and the measure of damage is the value of the land at the time of the breach. The same rule prevails in the Supreme Court of the United States. In Hopkins v. Lee (6 Wheat. 109), the court said "the rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of its breach. The price being settled by the contract, which is generally the case,

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makes no difference, nor ought it to make any; otherwise the vendor, if the article has risen in value, would always have it in his power to discharge himself from his contract and put the enhanced value in his own pocket; nor can it make any difference in principle whether the contract be for real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases the vendor is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference."

So in Maine, Hill v. Hobart (16 Maine, 164), it was decided, that in debt for breach of a bond conditioned for the conveyance of land, the measure of damages was the value of the land at the time the conveyance should have been made. The court says, when the vendee proceeds at law, he is entitled to a complete indemnity and no more. By a performance he would have received the land, and not receiving that, if he obtains the value at the time, that is the exact measure of his loss. And the same doctrine is announced in many other cases. Warren v. Wheeler, 21 Me. 484; Lawrence v. Chase, 54 Id. 196; King v. Brown, 2 Hill, 485; Boardman v. Keeler, 21 Vt. 84; Bryant v. Hambrick, 9 Georgia, 133; Barnham v. Nichols, 3 R. I. 187; Burr v. Todd, 41 Pa. St. 206; Shaw v. Wilkins, 8 Humph. 647; McKee v. Brandon, 2 Scammon, 399; Hopkins v. Yowell, 5 Yerger, 305; Cannell v. McLean, 6 Har. and J. 297; Marshall v. Haney, 9 Gill, 251; Whiteside v. Jennings, 19 Ala. 784. The same principle is applied where the vendor has not actually tendered performance, or has not made an available tender, but, in consequence of the acts of the vendor, or otherwise, is still entitled to maintain a suit for breach of contract on the part of the vendor in not conveying. In such a case the measure of damages would be the same, namely: the difference between the contract price and the value of the land at the time of the breach. Lee v. Russell, 8 Ired. 526; Nichols v. Freeman, 11 Ired. 99; Goodwin v. Francis, L. R. 5 C. P. 295. The rule must be reciprocal; where the property has enhanced in value, the purchaser gets the benefit of the enhancement, so where a depreciation has taken place he must submit to a corresponding loss. In both cases he obtains the true measure of damages, full compensation for the loss sustained. Thus, in Nichols v. Freeman, the plaintiff purchased a lot of land for $8,000, and paid the greater part of the purchase-money. The plaintiff was let into possession, and the defendant executed a bond in the penalty of $10,000, conditioned to convey upon the payment of the balance of the purchase money. The plaintiff was evicted by the judgment-creditors of the defendant, and the property sold by the plaintiff for $2,500, which was admitted to be the real value of the property at the time. The court refused to allow the plaintiff to recover the amount of purchase-money, as if he had repudiated the contract and sued for money had and received. It was said: "Here the plaintiff seeks to recover compensation; what sum will put him in as good a condition as if the contract had been performed? In this case he would have got property which is worth $2,500, but he would have been forced to pay the balance of the purchase-money and interest. He has not paid this latter amount, and his damage is the difference between that sum and the value of the property, which, by the case, is agreed to be $207.80;" and to that sum the redress was limited. So, in Goodwin v. Francis, where the purchase-money had not been paid, Boville, Ch. J., in delivering his opinion, said: "I am not aware of any decision in which it has been held that, where a man having a good title refuses to convey, according to contract, he is not liable to compensate the other party for the loss of his bargain, as well as for any expenses he may have actually incurred; the contrary is laid down in Engel v. Fitch, and I do not see that Sikes v. Wild is inconsistent with it, for in that case there was a failure of the title. I think, therefore, that the defendant is liable for the difference between the contract price and the market value of the estate, and that the price at which it was resold is *prima facie* evidence of its market value." Where there is no evidence given showing any change in the situation, the consideration paid and interest will be taken as the correct value of the land.

But where there is evidence given showing a change in the value of the land, the value at the time the breach occurred, and when the conveyance ought to be made, will furnish the standard of damages. This is fair and just for both parties, as they obtain precisely what they are entitled to, and the basis is predicated on actual loss, the full and adequate compensation. The rule commends itself for its intrinsic justice. It conforms to the varying circumstances of each case, and is equitable and just. The arbitrary and unbending rule that the purchase-money and interest shall in all cases be taken as the criterion of damages, will, in the majority of instances, do injustice either to the seller or purchaser. No reason is perceived why it should be adhered to and enforced, when one more consistent with equity is found, and which is easily administered. The rule for which we contend is just to both parties. It gives to the purchaser precisely what he has lost in consequence of the breach of contract committed by his vendor, and it makes the latter responsible for the violation of his agreement in the full amount in which he has occasioned injury. Now in the present case, the plaintiff still owed a part of the purchase-money for the land, but he cannot obtain a conveyance of the land upon the balance due, because the defendant has disabled himself from conveying by selling the land to another person.

What, then, is the extent of his loss, and what constitutes the measure of his damages? Plainly, the difference between what he owes on the land and what the land is worth. Wherefore it follows that the judgment should be reversed and the cause remanded.

The other judges concur.

Constitutional Law—Release of State's Lien upon Railroads.

SILAS WOODSON AND H. CLAY EWING v. URIEL A. MURDOCK AND LUTHER C. CLARK.

Supreme Court of the United States, October Term, 1874.

1. **Constitutional Law—Power of Legislature to Release State's Lien upon Railroad.**—The constitution of Missouri provides that "the general assembly shall have no power, for any purpose, to release the lien held by the state upon any railroad." *Held*, that this did not prohibit the legislature from compounding a debt due and to become due by a railroad company to the state, and thereby discharging the state's lien. (Miller and Davis, JJ., dissenting.)

2. ——. ——. **Case in Judgment.**—The Missouri Pacific Railroad Company had become liable to the state of Missouri for the payment of $7,000,000 of state bonds which had been issued in aid of this road, which bonds had not yet matured, and also for $4,000,000 interest on said bonds, which the company had failed to pay when due. An act of the legislature directed a sale of the road under the state's lien thereon, but contained also a provision that if the railroad company should, at any time within ninety days of the first day of April, 1868, pay into the treasury of the state the sum of three hundred and fifty thousand dollars, in the bonds of the state or in money, then, and in that event, the governor should not advertise the road for sale; and if the company should, within ninety days thereafter, pay into the state treasury an additional sum equal to five millions of dollars in all (either in cash or Missouri state bonds), the governor should, upon the production of the receipts of the state treasurer for the said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title and interest which the state of Missouri had in and to the railroad, its property and appurtenances; and that the Pacific Railroad Company should, from and after the delivery of the deed, be fully discharged from all claims or debts due the state, and all liability growing out of the issue of the bonds of the state to aid in the construction of their railroad. *Held:*

(1.) That this act did not contravene the constitutional provision above recited.

(2.) That it did not contravene the fourth section of that part of the constitution of Missouri known as the railroad ordinance, which provides that in case the railroad companies which had recived state aid should refuse or neglect to pay a tax on their gross receipts levied by such ordinance, and the interest or principal of any of said bonds, or any part thereof should remain due and unpaid, the general assembly should provide by law for the sale of the railroad and other property, and the franchise of the company that should be thus in default, under the lien reserved to the state, and should appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from

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said company. This ordinance did not forbid the sale of a defaulting railroad, except at public auction, for a price equal to the full amount of the debt of the defaulting company, and without a reservation of a lien upon the property sold, not merely for the unpaid part of the purchase-money, but for all that remains unpaid of the debt for which the property is sold, but it left the legislature free to provide other means of collecting the debt and enforcing the lien.

3. ——. ——. **Acts of Legislature—Subject-Matter not Expressed in Title.**—The act in question was entitled, 'an act for the sale of the Pacific Railroad and to foreclose the state's lien thereon, and to amend the charter thereof." *Held*, that it was not obnoxious to a constitutional inhibition against the passage of acts which relate to more than one subject, and that not expressed in the title.

The facts of this case will be found fully stated in the report of the case in the court below, 2 Dillon, C. C. ——. The opinion of the court also states them with adequate fullness to an understanding of the question involved.

Mr. Justice STRONG delivered the opinion of the court.

It has not been contended here that the complainants are not entitled to the injunction decreed by the circuit court, if the act of the Missouri legislature approved March 31st, 1868, was a legitimate exercise of the legislative power.' But it is insisted that the 5th section of that act is in conflict with the constitution of the state, and, therefore, that the arrangement made under it with the Pacific Railroad Company cannot be held to operate as a discharge of the company from the debt due by it to the state, or as a release of the railroad from the lien of the state's mortgage. The question presented, then, is this: Was the fifth section of the act mentioned prohibited by the constitution of the state? By the first section the governor was directed to sell the Pacific railroad and its appurtenances in accordance with the provisions of section five of the act, and of an act approved February 22d, 1851, entitled "An act to expedite the construction of the Pacific Railroad and the Hannibal and St. Joseph Railroad." By the second section the price for which the railroad was directed to be sold was required to be not less than eight millions and three hundred and fifty thousand dollars, payable to the state treasurer, in bonds of the state or in money, within ninety days from the day of sale. If that sum was not obtained the governor was required to buy in the railroad for the state. By the third section it was made a condition of the sale that the purchaser or purchasers should bind himself or themselves to change the gauge of the road within ten years from the date of sale, so as to conform to the gauge of the Union Pacific railroad. The fourth section enacted that upon the payment of all the purchase money, and upon the delivery of an obligation, in conformity to the requirement of the third section, the governor should execute a deed to the purchaser or purchasers conveying all such right, title, and interest in and to the said Pacific railroad, its franchises, appurtenances, and the property belonging thereto, as were subject to the lien of the state. Then followed the fifth section, which is the one mainly in contest. It enacted that if the Pacific Railroad Company should, at any time within ninety days after the first day of April, 1868, pay into the treasury of the state the sum of three hundred and fifty thousand dollars, in the bonds of the state or in money, then, and in that event, the governor should not advertise the road for sale; and if the company should, within ninety days thereafter, pay into the state treasury an additional sum, equal to five millions of dollars in all, (either in cash or in Missouri state bonds), the governor should, upon the production of the receipts of the state treasurer for the said amounts, execute and deliver to the said Pacific Railroad Company a deed of release for all claims, title, and interest which the state of Missouri had in and to the railroad, its property and appurtenances, and that the Pacific Railroad Company should, from and after the delivery of the deed, be fully discharged form all claims or debts due the state, and all liability growing out of the issue of the bonds of the state to aid in the construction of their railroad.

Within ninety days after the passage of this act, the company paid into the state treasury $350,000, and within ninety days after such payment $4,650,000 more, in all $5,000,000, the sum specified in the 5th section, and received from the governor a deed conveying all the right, title, and interest of the state, and discharging it from all liens and claims of the state, and from all liability growing out of the issue of state bonds, to aid in the construction of its road.

That this was a compromise of the claims of the state against the company—practically, a sale to the company of the state's interest growing out of its advance of state bonds under the statutes of 1851, and the following years, is very plain, and such was its obvious intention. The principal of the debt was not then payable. The bonds issued by the state had not then fallen due. All of them were either twenty or thirty-year bonds, and the company was under no obligation to pay the principal until the bonds became payable. The extent of her obligation was measured by the provision of the act of 1851. That act required the company to make provision for the payment of the principal and interest of the bonds in such manner as to exonerate the state from any advances of money for that purpose, and, had the interest been paid up to 1868, the state could then have exacted no more. The interest, it is true, was in arrears from July 1st, 1859, To that extent the state had an immediate claim upon the company, but as the whole debt, according to the agreed statement of facts, was $7,000,000, the aggregate of unpaid interest in 1868 was less than $4,000,000. The arrangement then made, by which five millions was received in full satisfaction, and the deed given, included, therefore, not only interest due, but principal which had not fallen due, and, hence, it may properly be regarded as a commutation or a sale of the rights of the state to the company.

We come, then, to the question whether anything in the constitution of the state prohibits such a transaction. A new constitution was adopted in 1865, the fifteenth section of the fourth article of which is as follows: "The general assembly shall have no power, for any purpose, to release the lien held by the state upon any railroad." This ordinance, it is insisted by the appellants, denied to the legislature the power the make such a disposition of the interests of the state as was made in 1868 in virtue of the 5th section of the act of March 31st of that year.

The language of the prohibition is remarkable. It is not that the general assembly shall not release the *debt*, due to the state by any railroad company. Legislative control over the debt is left untouched. The provision has reference only to a security for the debt. Had it been intended to put the debt beyond the disposition of the legislature, it would be difficult to find a reason for confining the prohibition to a release merely of the lien. But it is easy to see why it should be ordained that while the debt remained the security for it should not be given up. And that such was the intention appears quite plainly in view of the state of things which existed when the constitution was framed and adopted. Prior to its adoption it may be said to have become almost a legislative habit to release the liens held by the state upon railroads without discharging the debts. In numerous cases statutes had been enacted by which railroad companies were authorized to borrow money and to mortgage their roads as security for the loans, the state releasing its lien to give the mortgagees a priority. The purposes for which these releases were made were various, and they were generally avowed in the statutes. Thus in 1864 the legislature released the state's lien upon a part of the Pacific road, avowedly for the purpose of enabling the company to complete its main road to Kansas City. At the same time the lien of the state on the North Missouri Railroad was released for several avowed purposes—to enable the company to complete their main road to the Iowa state line; enable the company to construct its west branch; and to enable it to build a bridge across the Missouri river. And again, in 1865, February 16, the legislature released the first lien of the state upon the road of the same company for the same purposes, retaining, however, a second lien. All this took place very shortly before the constitution was adopted. That such releases were contemplated when the convention framed the constitutional inhibition, and when the people ratified it, can hardly be doubted. The constitution was plainly

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intended to prohibit them, and, therefore, language was employed denying the power to release the lien, and saying nothing of the debt. Certainly there is no expressed restriction of legislative power over the debt itself. If any exists it must be supplied by implication. Keeping in mind, then, that the constitutional prohibition is directed only against a release of liens, what should be regarded as it meaning? We agree it is not to be frittered away by doubtful construction, but like every clause in every constitution, it must have a reasonable interpretation, and be held to express the intention of its framers. It must be held to have been intended for the public protection, for the preservation of the public property, and to make available claims the state held against railroads. But if it is to be construed reasonably, and in accordance with what must have been the intentions of those who adopted it, it cannot be construed literally. It cannot mean that the lien of the state upon a railroad shall not be released upon full payment of the debt, to secure which the lien was created. If it does, it is equivalent to a prohibition against the state's receiving payment. Surely it will not be contended to deprive the legislature of power to make use of the lien to enforce satisfaction of the debt, though thereby the lien be discharged. That would be to destroy the value of the lien. Nor can it mean that the lien may not be employed to obtain from the property bound by it all that the property is worth, and all that the indebted company can pay, though that be less than the entire amount of the debt. It is not a restriction upon the power of the legislature to make the most, which in its judgment is possible, from the security. In terms, the legislature is left unrestricted as to the mode of receiving payment, or settling with its debtors. Composition, accord, and satisfaction, and full payment in cash are left within the legislative discretion, at least so far as the liquidation of the debt is concerned. So there is nothing in the clause of the constitution quoted which can be regarded as a restriction upon the power of the legislature to sell any claims held by the state against a railroad company. It is not an ordinance that the legislature shall not deal with debts due to the state from railroad companies as it may deal with debts due from other debtors. It is that the *lien* shall not be released *for any purpose whatever*, that is, for the accomplishment of any object the legislature might have in view, and unless we can hold this means it shall not be released even by full payment of the debt, it can mean no more than this, that, while the debt remains, the legislature may not let go the security for it. Such a construction accounts for the peculiarity of the language employed. There is a very palpable distinction between the lien which the state holds upon a railroad, and the debt, obligation, or duty which the lien was created to secure. The two could not have been confounded by the framers of the constitution. If it was intended that, under all circumstances, every dollar due from a a railroad company should be exacted, and that no settlement should be made, or sale authorized, without payment of the utmost farthing, it is incredible that the constitution would not have so declared. That such was not the intention is plainly shown by the railroad ordinance adopted with the constitution, and a part of the organic law of the state. By that ordinance the legislature was authorized and directed to sell the railroads on their failure to pay a tax levied, and when the sale should be made to others than the indebted companies, no limitation was directed to be affixed to the price, and such a sale, we have no doubt, would have discharged the road from the state's lien. The state itself was empowered to become a purchaser at the sale at any price at which it could buy, and whenever it purchased, the lien, of course, was merged in the title, and the general assembly was required to provide by law in what manner the railroad, or franchises, or other property, should be sold for the payment of the indebtedness of the company in default. But the ordinance does not require that at such sale the purchaser from the state shall pay the full amount of that indebtedness. A lien is required to be reserved for all sums remaining unpaid; that is, very clearly, for all that part of the purchase-money from the state, at her sale, which remains unpaid. If this is not the meaning, the state may never be able to sell at all, and the plain purpose of the ordinance may be entirely frustrated. And that such is its meaning has been determined by the Supreme Court of Missouri. See 37 Missouri, 129. The fifth section of the ordinance does, indeed, require that no railroad or other property, or franchise purchased by the state, shall be restored to the company in default, until it shall have first paid in money, or in Missouri state bonds, or in bonds guaranteed by the state, all interest due from said company, and requires that all interest coming due thereafter shall be paid semi-annually in advance, but even this is no assertion that such a restoration shall not be made for a sum less than the original indebtedness. Whether it may or not it is unnecessary to decide, for the provision applies only to a case where the road has been sold, and where the state has become the purchaser, which is not this case.

Neither the clause in the body of the constitution, therefore, nor any provisions of the railroad ordinance, forbid the legislature to sell the railroad, or compromise the debt claimed by the state, for less than the entire indebtedness. It follows, then, that though the legislature had no power to release the lien while the debt remained, it was not prohibited from selling the claim or commuting the debt. And there is no inconsistency in this. The legislature may well have been trusted with the management of the obligation, responsible only to its constituents, while the security for the fulfillment of the obligation may have been withdrawn from its control. A trustee may have no right to give up a security for a claim, and yet be at full liberty to settle and adjust the claim itself or to sell it. It need hardly be added that if the legislature had power to accept a commutation of the claim of the state, or to sell the debt for what in its judgment it deemed best for the public interests, it had also power to make a formal relinquishment of the lien after the debt had been liquidated. The constitutional provision was not designed to continue in existence liens that the law had extinguished.

For these reasons we hold that the fifth section of the act of the legislature of March 31, 1868, was not in conflict with that provision of the constitution which forbids, for any purpose whatever, a release of the lien held by the state upon any railroad.

Nor do we perceive that there is any conflict between it and the railroad ordinance. The appellants insist that the ordinance forbids any sale of a defaulting railroad, except at public auction, for a price equal to the full amount of the debt of the defaulting company, and without a reservation of a lien upon the property sold, not merely for the unpaid part of the purchase-money, but for all that remains unpaid of the debt for which the property is sold. Such is not our reading of the ordinance, nor is it that of the supreme court of the state. We have already said that the lien required to to be reserved is only to secure the unpaid balance of the purchase-money. This is too clear for argument. It is equally clear to us the ordinance does not require that the sale shall be for a price equal to the whole debt, or that it shall be at public auction. The first, second, and thirdsections impose upon each of the three railroad companies, of which the Pacific Railroad Company is one, an annual tax of ten per centum of the gross receipts, for two years, and fifteen per centum thereafter, until the principal and interest of the bonds for which the companies were liable should be fully paid. Then followed the fourth section, as follows: "Should either of the said companies refuse or neglect to pay said tax herein required, and the interest or principal of any said bonds, or any part thereof remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchise of the company that shall be thus in default, under the lien reserved to the state, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company." There is nothing in this which takes away from the legislature the power to determine the time, the

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manner, or the price of the sale which it was directed to cause to be made. It is true the sale is ordered to be made under the lien reserved to the state, referring, doubtless, to the mortgage taken under the act of 1851, and it is also true that by that act it was enacted that if either of the companies. to which bonds might be issued should make default in the payment of either principal or interest of the said bonds, the governor might sell their road by auction, giving six months' notice, or buy it in for the use of the state, but these provisions were no part of the lien. They were means specified for enforcing it. The legislature was at liberty to provide other means of collecting the debt and enforcing the lien. The sale directed by the ordinance was for non-payment of the tax imposed, and the direction to sell under the lien reserved, was simply an order to proceed to collect the mortgage. The lien is not to be confounded with proceedings for its foreclosure.

Finally, it is insisted by the appellants that the 5th section of the act of 1868 is unconstitutional because its subject is not embraced in the title of the act, and because the constitution ordains that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject be not embraced in the title, such act shall be void only as to so much thereof as is not so expressed." The title of the act of 1868 is "An act for the sale of the Pacific railroad, and to foreclose the state's lien thereon, and to amend the charter thereof." That the subject of the 5th section is embraced in this title, is very apparent. If the subject is not the foreclosure of the state's lien, it is impossible to say what it is. And we think it cannot be justly said the act embraces more than one subject. It has many details, but they all relate to one general subject, which is the sale of the railroad and the foreclosure of the state's lien thereon. Cooley's Constitutional Limitations, 141, et seq.

We cannot sustain this objection.

Nothing, then, in our judgment, warrants the conclusion that the 5th section of the act of March 31st, 1868, was not a legitimate exercise of the legislative power of the general assembly of the state. It follows that the arrangement made in pursuance of it with the Pacific Railroad Company, and the deed of the governor to the company, extinguished the debt due to the state, and, consequently, put an end to the lien.

The five millions of dollars paid to the state were raised upon bonds of the company and a mortgage, of which the complainants in the court below are the trustees. The money was advanced on the faith of the legislation of 1868, and so were $3,000,000 more, for which a subsequent mortgage was given. If that legislation was not unconstitutional, as we have endeavored to show it was not, it would be a gross wrong to the bondholders who thus advanced their money, were the defendants permitted to sell the railroad, its property and franchises, for the satisfaction of a claim or lien which has no longer any existence.

The decree of the circuit court awarding an injunction is, therefore, affirmed.

[We shall publish the dissenting opinion of Mr. Justice Miller in this case next week.—EDS. C. L. J.]

[Correspondence.]

Action for the Death of a Human Being—The Case of Sullivan v. Union Pacific Railroad Company.

EDITORS CENTRAL LAW JOURNAL:—This decision, published in your paper of Nov. 27th, seems to me to deserve, not merely as you yourselves say of it, "a passing notice," but very careful study. As Judge Dillon's connection with the CENTRAL LAW JOURNAL, may be in the way of its receiving from the editors all the attention it deserves, permit a volunteer to offer a few words upon the principle involved.

At common law there are two (and I think *only* two) distinct rules by which an action for civil damages, based upon the death of a human being, might be defeated, provided it came within the terms of either one. In the first place, if the death was caused by a felony, any action for a civil remedy for it would be merged in the criminal prosecution, according to the doctrine of Higgins v. Butcher, cited by Judge Dillon. Strictly speaking, the civil remedy would not be merged, but only *suspended* till the conclusion of the criminal action: Marsh v. Stone, 6 B. and C. 551, 557, 564; but as the punishment for a felony causing death was not only the death of the offender, but the forfeiture of his property, this distinction was of little practical importance. The rule applied only to cases of felony, but in such cases would cut off an action brought either by the representatives of the deceased, or by any person damaged by his death.

In the second place, the principle that a personal action dies with the person, which was always regarded as peculiarly applicable to personal torts, operated to abate any cause of action that might otherwise have belonged to the injured party. This was not limited to cases of felony, but applied equally to deaths by negligence or misadventure. On the other hand, it had no application to actions brought by a husband, parent, master, etc., of the deceased, for the damages sustained by him through the death. Thus it is evident that the two rules are not co-terminous. The latter applies to all cases where the party dying would have been the plaintiff, whether the death were felonious or not; the former, to all cases of tort amounting to felony, whether brought by the injured party himself, (*i. e.* in cases of death by his representatives), or by some other party interested in his life.

The two rules together embraced so large a proportion of all actionable deaths (particularly before the great increase of travel and deaths in travel due to modern improvements), that it is hardly to be wondered at if the few cases that came under neither rule were lost sight of, and the death alone came to be regarded as sufficient to take the case out of the class of actionable torts. Such examples of the extension of a rule beyond the limits of the principle on which it was founded, are by no means rare in our law; and when we consider that in this instance there were two rules, precisely similar in their practical effects, often coinciding in their application to a single case, and one or the other of them cutting off the vast majority of all cases of action for death, we can hardly wonder that after a time, it came to be assumed by hasty thinkers that "the death of a human being, though clearly involving pecuniary loss, was not the ground of an action for damages." 1 Hill. on Torts, 83, and cases cited.

Just when this insensible extension of the true rule was first made, is now, perhaps, impossible to state. With great respect for Judge Dillon's extraordinary erudition and accuracy, I cannot help thinking it dates far back of the origin he assigns it in Baker v. Bolton. Although Blackstone does not lay down the rule in express terms, I think no one can read the brief sentence in which he passes over the subject in the course of a careful enumeration of all actions for private wrongs, without feeling convinced that he was unware of any action for damages for the death of a human being, under any circumstances. 3 Comm. 119. And Judge Wilson, in one of those lectures on law that deserves far more attention than they have received from the present generation (if only as the first attempt ever made to teach a distinctively American system of law), after supposing the murder of a father in the presence of his family, informs us that there was no civil remedy. "The widow and the orphans, who were the witnesses of the crime, and the sufferers by the loss, are recognized in the former, but not in the latter character" (works of James Wilson, Vol. III, p. 30, Ed. 1804). This, of itself, might only refer to the amitted doctrine in a case of felony; especially as he goes on to suppose them applying for the recompense, and the law answering: "His property is forfeited by the crime; *no funds remain* to make you reparation for your loss." But in the next page he informs us that "in one of the very early laws of Pennsylvania (*i. e.* early in the

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eighteenth century) it is directed that those next of kin shall be considered in the loss occasioned by the death of the party killed" (ib. p. 31, citing R. O. Book A. p. 49) such a statute of course implies that no remedy was then understood to exist at the common law.

On the other hand, it is certain that the true doctrine, though generally overlooked, was not altogether forgotten. Beside the case of Ford v. Monroe, mentioned by Judge Dillon, and which has by others been erroneously called the only one of its kind in the books, there is Jones v. Perry, 2 Espenasse, 482, where the father of a child that died of hydrophobia, was allowed to recover from the owner of the dog the expenses of his illness, and perhaps others. But the one best worth notice, is Cross v. Guthrey, 2 Root, 90, decided in Connecticut as early as 1794. It was an action of the case against a physician who had so unskillfully amputated the breast of plaintiff's wife that she died in about three hours, whereby the plaintiff was put to cost and expense, *and deprived of the society of his said wife*, etc. After a verdict of £40 for plaintiff, the defendant moved in arrest of judgment, because the private injury was merged in the public offence. But the court say: "The declaration is sufficient; the rule urged by the defendant is applicable only to capital *crimes*, where from necessity the offender must go unpunished, or the injured individual go unredressed."

It is remarkable that this case, the very first American decision on the subject, and fourteen years before Baker v. Bolton, has been so completely overlooked in all the subsequent discussions of the rule. It will of course be seen that it furnishes an authority, directly in point, for Judge Dillon's recent decision; and that the latter is not only correct in principle, but brings back the American law, at least, to the exact position with which it started.

But I have already trespassed too long on your space, and can only express, in conclusion, my earnest wish that our judges would follow Judge Dillon's example more frequently, in boldly testing cases by the light of principle, rather than contenting themselves with heaping up great masses of unexamined tested citations

Yours respectfully, W. G. H.

Iowa City, Dec. 1, 1874.

Notes and Queries.

I. FALSUS IN UNO, FALSUS IN OMNIBUS—ANSWER TO "SCIENCE OF THE LAW."

LEAVENWORTH, KAS, Dec. 2d, 1874.

EDITORS CENTRAL LAW JOURNAL:—In No. 48 of your journal (*ante*, p. 599) we notice a communication from some person signing himself "Science of the Law," embracing a criticism of a late decision of the Supreme Court of Kansas in the case of Gannon v. Stevens. We have examined the *official syllabus* of the case, and found therein no allusion to, or mention of, any principle of law pertaining to the credibility of witnesses, as claimed by "Science of the Law." This fact, we think, conclusively shows, that if the question was made in the briefs or arguments of counsel in the case, the same was not passed upon by the court, or only incidentally noticed. The statutes of Kansas require the court to prepare a *syllabus* in each case, embracing all the principles of law decided therein. Perhaps the instruction complained of by "Science of the Law," was not properly before the court. Be this as it may, we deem it but just to the supreme court brefly to state its decisions on the principle of law in question, in former cases.

The first case in which this question was decided (Campbell v. The State, 3 Kas. 488), as reported, states the rule to be as follows: "If the jury believe, from all the evidence, that the witness, M. B., has testified falsely in respect to any material fact, it is their duty to disregard the whole of her testimony." This decision, if it ever was decided as reported (see reporter's note in 8 Kas. 142), was materially qualified in the case of Hale v. Rawallie, 8 Kas. 142, in which case Brewer, J., in speakiug of the rule in such cases, says: "The testimony of a witness who, in some point has ignorantly testified falsely, is not wholly to be rejected. Only that witness is wholly to be disbelieved who has *knowingly* and *willfully* testified to a falsehood." In the case of The State v. Horne, 9 Kas. 131, the rule in principle, as last stated, was acquiesced in by the court. A still later case, Wood v. M., K. & T. Railway Co., 11 Kas. 322, speaking of the principle involved in the questio under consideration, says: "But where the recording officers are proved to have *knowingly* made a largely false and fraudulent record, how can we place reliance on any of the record? *Falsus in uno, falsus in omnibus.* Does the written testimony of a witness stand higher than the oral? If these five election officers were on the witness stand and testified that 546 legal voters cast their votes on that day for Fredonia, and it should afterward appear that they *knowingly* and *willfully* testified falsely in reference to 127 of these votes, and the number of votes was material, would not the district court have been compelled to reject their entire testimony?"—citing 3 Kas. 488. Taking the explanation of the reporter (Note, 8 Kas. 142), in conjunction with the report of the case of Campbell v. The State, 3 Kas. 488, and the subsequent decisions, the rule in Kansas (unless changed by the case of Gannon v. Stevens), would seem to be this: That if the jury believe that a witness *knowingly* and *willfully* has testified falsely in respect to a *material* fact in the case, then the jury must disregard the whole of his (or her) testimony. This proposition, we think, "Science of the Law" will find in harmony with the majority of decided cases, and with the fundamental principles of the law of evidence. In fact, the cases cited by him support the above rule *in toto*, and do not conflict with the decisions of the Supreme Court of Kansas, so far as reported. The court, having decided the question in concord with both principle and authority, and reaffirmed the same in several instances, would, in our opinion, at this late day, not change the rule, unless upon a thorough examination, which in all probability would be noted in the *syllabus* of the case. We think, that, until the case of Gannon v. Stevens is reported, there will necessarily arise a very strong presumption of fact that the case does not decide or apply the rule as squarely as stated by "Science of the Law." A. B.

II. FALSUS IN UNO, FALSUS IN OMNIBUS.

DOVER, DEL., Dec. 3, 1874.

EDITORS CENTRAL LAW JOURNAL:—In the case put by your correspondent, "Science of the Law," the evidence was wholly for the jury. They were the judges of its weight and effect; and, in coming to a just conclusion, would properly and necessarily have regard to the character and standing of the witness, as well as the consistency of his narative or statement. The part of the charge of the learned judge in italics, and commented upon by your correspondent, could not properly be *binding*, and probably was not intended to be so.

The maxim itself, *falsus in uno, falsus in omnibus*, like most maxims, is founded in wisdom and experience, and is the only safe rule. It is always predicated of a *wilfully* false witness, one who, for gain, malice, or other corrupt cause, on oath, affirms what is not so, or denies what is so. The reason of the rule will be more apparent, and our respect for it be strengthened, if we consider for a moment the nature of an oath. It is a direct and solemn appeal to God that we speak the truth. It is a public pledge of our conscience in the most solemn manner, that we speak the whole truth, and nothing but the truth. Society has prescribed this form, and we assent to it. So we call both God and man to be witnesses and judges. If we speak falsely, we say, God will judge us at the last day. If we speak falsely, we say, man will judge and punish us by the law of the land. In view of all this, one who testifies corruptly in one thing, should not be believed in any; for the pledge he has given of his truth has been broken, and we have no other. *Falsus iu uno, falsus in omnibus.* J. ALEXANDER FULTON.

Summary of our Exchanges.

The Monthly Western Jurist (Bloomington, Ill.), has an article entitled Larceny in Foreign Countries not Punishable in the United States.

It publishes a decision of the Supreme Court of Illinois (Stowe v. Flagg) with the following syllabus:

1. A corporation cannot be created by agreement of parties, and can only be created by legislative enactment.

2. The act relating to the formation of manufacturing companies, etc., corporation laws of 1857, Laws of 1857, page 161, examined and construed, an held, that in order to the creation of such corporation, that when the certificate described in the first section of the act shall have been filed in the office of the clerk of the court, and a duplicate thereof filed in the office of the secretary of state, and he shall issue his license, the parties, etc., and their successors, shall constitute a body corporate, etc.

3. Stock is essential to the existence of a manufacturing company under the statute, and there must be at least three stockholders.

4. That until such proceedings are had the proposed corporate property is not changed to corporate property.

Another by the same court (Merritt v. Gates) stating when the acknowledgement of a deed by a married woman, is sufficient to convey land of which she owns the fee; 2, that where a certificate of acknowledgment is signed,

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and the deed delivered to the grantee, the officer cannot amend the same, nor execute a new certificate for the purpose of giving validity to the deed. At the end of this case the editor of the Jurist says:

"But it must be observed that the deed in question was executed and delivered prior to the act of 1869, and is applicable only to conveyances executed prior to that time. For a full discussion of the act of 1869 and 1872, see the case of Simmons v. Hervey, *ante* page 20," and note. See also, Trustees of School v. Davidson *et al.*, *ante*, page 164. If the rule declared in the case has been changed by statute, why publish it?

Another, by the same court, Thomas v. Board of Trustees, holds that a mechanic's lien cannot be created against the Industrial University at Champaign, for the reason that that institution is a state institution, "distinguishing," says the editor, "the case from the case of The Board of Education v. Greenbaum & Son, 39 Ill. 609, which was a petition against the Board of Education of the state of Illinois for a mechanic's lien, when it was held that the property of the Normal University is not the property of the state, but is the property of 'The Board of Education of the State of Illinois,' a corporation whose charter cannot be repealed by the legislature. The corporation may sue and be sued, and unlike a municipal corporation, the only remedy a creditor has against it is by judgment and execution, as in a case against an individual or other corporation not of a municipal character. And that the building is subject to the claims of a creditor under the law for the enforcement of mechanic's lien. In the principal case the court say: 'Plaintiff in error, so far as we can see, has a complete remedy by suit under the statute, against the board of trustees and contractor, by recovering judgment and execution thereon.' "We doubt," continues the editor, "whether the court intended to hold that the building and grounds of the University were liable to levy and forced sale. We are of opinion that the court did not intend to hold that a creditor of the university stands on any other or different ground from other creditors of the state."

The Jurist also publishes what appears to be an important telegraph case, Hubbard v. Western Union Telegraph Co., decided by the Supreme Court of Wisconsin. This was an action to recover damages for the neglect of the defendant and its servants to transmit the following message from Port Huron, Michigan, to Milwaukee, Wisconsin: "Buy twenty thousand, seller, June, pay telegraph there." It admitted that the message meant, and would have been understood by plaintiff's agent, to buy twenty thousand bushels No. 2 wheat. The court below having found the issues for the defendant, and the supreme court holding that the judgment below was wrong, but that the plaintiff was only entitled to nominal damages, court refused to reverse the judgment. According to the syllabus, the court hold, that telegraph companies are not insurers, and do not guarantee the delivery of all messages with entire accuracy, and against all contingencies; but are held to ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents. This rule applies also to night dispatches. To this case the editor appends a long note, consisting, principally, of a quotation from the opinion in Tyler v. W. U. T. Co., 60 Ill. 431.

The Jurist also publishes the opinion of Snyder, J., in McCormick. v. East Saint Louis, Circuit Court of Madison County, Illinois, with the following syllabus:

1. The ordinance of the city of East St. Louis, providing that the committee of ways and means of the common council, "be authorized to adjust and compromise any claims of persons holding certificates of indebtedness issued by the metropolitan police commissioners of the city of East St. Louis," etc., considered, and held void.

2. It is a well established rule of law that where power is given to municipal authorities, in express language, to become indebted, the terms and purposes of the grant will measure the extent of the power.

3. The provision of the charter held a restriction upon the power of the council, and that any contract made, or attempted to be made, looking to the payment of the metropolitan police scrip, was as unauthorized and prohibited by the charter.

The Jurist concludes the number with an opinion of Mr. Attorney-General Edsall, of Illinois, holding that, under the laws now in force in that state, assaults, and assault and battery, are indictable in the circuit court, as well as punishable before justices in a summary manner.

The Albany Law Journal, for December 5, contains a short article on the Taxation of Mortgages, in which it examines four California cases: Savings, etc., Society v. Austin, 46 Cal. 415; People v. McCreery, 34 Cal. 432; People v. Wartenby, 38 Cal. 461; Lick v. Austin, 43 Cal. 590.

It has an editorial article on Action by Parent for Seduction of Minor Daughter, which is directed to the elucidation of two points, namely: Whether the daughter, at the time of the seduction, is sufficiently in the service of the parent to enable him to maintain the action; and whether a mother can maintain the action, the father of the daughter being dead. The following cases are examined: Kennedy v. Shea, 110 Mass. 147; Griffiths v. Tetgen, 15 C. B. 344; Rist v Faux, 4 B. & S. 409; S. C., 11 W. R. 918; Ogden v. Lancashire, 15 W. R. 158; Thompson v. Ross, 5 H. & N. 16; Manley v. Field, 7 C. B. (N. S.) 96; Hedges v. Tagg, 7 L. R. Exch. 283; S. C. 20 W. R. 976: Bartley v. Richtmeyer, 4 N. Y. 38; Sargent v. Dennison, 5 Cow. 106; Simpson v. Busk, 5 Lans. 337; Damon v. Moore, Ib. 454: Gray v. Deerland, 51 N. Y. 424; Furman v. Van Size, 10 Albany Law Journal, 251; and Lampman v. Hammond, 3 N. Y. Sup. Court Rep. 293.

The same journal publishes a synopsis of an opinion of the New York Court of Appeals of great local importance—Farmer's Bank v. Hale—holding that, under a statute of that state, where state banks take usurious interest, the contract is void *in toto*, and not merely as to the interest. In National Bank v. Lamb, 50 N. Y. 95, the same rule was declared with reference to loans of national banks doing business in that state, the court of appeals holding that such banks are subject to the usury laws of the state. And the court now say they are bound to apply the same principle to the state banks, in accordance with chapter 163 of the laws of 1870, § 2, which reads as follows: "It is hereby declared that the true intent and meaning of this act is to place the banking associations organized and doing business as aforesaid, on an equality, in the particulars in this act referred to, with the national banks organized under the acts of Congress," etc. Three of the seven judges, Johnson, Grover and Andrews, dissented.

The same journal publishes a case of far greater importance in banking law, in which the New York Court of Appeals holds that where a check is presented to the bank, on which it is drawn, for certification, and the bank certifies it "good," the bank does no more than guarantee that the drawer has sufficient funds in the bank to meet the check, and that these funds shall not be withdrawn until the check is presented for payment It does not guarantee the genuineness of the signature, nor that the check has not been altered, nor in any other way the honesty of the persons through whose hands it has passed. In our judgment this is the more sensible and beneficial view of the question. It is such a decision as a court composed of intelligent business men, familiar with the customs of banking, would have made. It also tends to preserve the useful and convenient practice of certifying checks, which, under the contrary decision of the question, would be broken down. The editor of our able contemporary, the Daily Register, says of this case: "The responsibility of a bank which certifies to the goodness of a check drawn upon it, has at last been defined by our court of final adjudication. When a bank marks a check "good," it only certifies, in law, that the drawer of the check has funds sufficient to meet that check in bank. That is to say, it does not guarantee the correctness of the figures which set forth the amount drawn for. A raised check, say from $10 to $100, or from $60 to $600, although marked "good" by a bank, is good only for the genuine amount drawn for. This is the law, and although not heretofore authoritatively announced, it is not *new*.

"If the banks have got into a loose habit of certifying to checks, that is no reason why the law should be changed to accomodate them. Suppose the check is raised *after* the certification of the bank upon which it is drawn—who should be the loser? Not the bank certifying, for its certificate has been *altered*. It has no means of defence until the check comes back for payment, then it may or may not discover the fraud. If it discovers it, surely it cannot be held responsible for the fraud; if it does not discover it, and pays the fraudulent amount, it must be the loser. The bank receiving such check on deposit, or paying it, has, in the first instance, a chance to detect the fraud and the perpetrator thereof, and, in the second, the right to refuse payment. This decision will do good, by making the banks more careful in handling these certified checks."

The Chicago Legal News, for December 5, publishes a very important opinion of the Supreme Court of the United States, by Mr. Justice Hunt, in the case of Home Insurance Co. v. Morse, error to the Supreme Court of Wisconsin, holding that the statute of Wisconsin which enacts that a corporation organized in another state shall not transact business within its limits, unless it stipulates in advance that it will not remove into the federal courts any suit that may be commenced against it by a citizen of Wisconsin, is repugnant to the constitution of the United States and the laws passed in pursuance thereof, and is illegal and void. Waite, C. J., and Davis, J., dissent. The question is one of great importance, and will be quoted by some as an evidence of a tendency on the part of the federal courts to extend and strengthen their jurisdiction, and to interfere unwarrantably with the rights of the states; while on the other hand it will be pointed to as a triumph over the exclusive and tribal legislation which many of the states have directed against foreign corporations and foreign enterprises.

The Legal News also publishes an important opinion of the Supreme Court of the United States, in Sprott v. United States, appealed from the Court of Claims. That court made the following finding of facts and conclusions of law:

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1. At different times during the years of 1864 and 1865, large quantities of cotton were purchased by the agents of the confederate states, for the treasonable purpose of maintaining the war of rebellion against the government of the United States. Of cotton thus purchased by various agents in Claiborne county, Mississippi, three hundred bales were sold to the claimant by one agent, in March, 1865, for ten cents a pound, in the currency of the United States. The sale was made by the agent as of cotton belonging to the confederate states, and it was understood by the claimant, at the time of the purchase, to be the property of the rebel government, and was purchased as such. The agent had been specially instructed by the confederate government "to sell any and all cotton he could, for the purpose of raising money to purchase munitions of war, and supplies for the confederate army;" but the purpose of the sale was not disclosed to the claimant, whose purpose was not to aid the confederate states, buying the cotton at the market value, and regarding it as a mere business transaction of "cotton for cash." The cotton was delivered to him at the time when the money was paid, he then being a resident of Claiborne county, within the confederate lines.

2. The cotton was captured in May, 1865, and the proceeds, or some portion thereof, are in the treasury.

And the Court of Claims, upon the foregoing facts, decides as conclusions of law:

1. The government of the confederate states was an unlawful assemblage, without corporate power to take, hold or convey a valid title to property, real or personal.

2. The claimant was chargeable with notice of the treasonable intent of the sale by the confederate government, and the transaction was forbidden by the laws of the United States, and wholly void, so that the claimant acquired no title to the property which is the subject of suit.

This decision the supreme court affirm, resting their judgment on the second proposition. Mr. Justice Miller delivered the opinion. Mr. Justice Clifford and Mr. Justice Davis concurred in the result, but not in the reasoning of the opinion of the court, and Mr. Justice Field dissented.

The Legal News also publishes an opinion of the Supreme Court of Illinois, in Maltman v. Williamson, holding, that when goods are sold for cash, and the vendee fails to pay for them on delivery, interest may be collected from the time of the delivery of the goods.

It also concludes, from its last week's number, its report of the case of Hewitt v. Long, involving the question of the right of the father and mother, as against each other, to the custody of their minor children, publishing in this number the dissenting opinion of Mr. Chief Justice Breese, in which Sheldon, J., concurs.

In the Legal Intelligencer, of December 4, we note the following decisions:

Neill v. Gallagher, Common Pleas of Philadelphia: 1. All the houses in a certain row were, less than twenty years ago, built five feet back from the building line, but there was no express agreement among the property-owners to this effect. *Held*, that a special injunction would not be granted to prevent defendant from erecting a bay window on the five feet recess.

2. The mere setting back of a building from the line of a street by the owner, for his own convenience or comfort, is not of itself a dedication of the land thrown out, and he may reclaim it at will.

And the following of the Supreme Court of Pennsylvania:

Appeal of the executors of John M. Porter, deceased: A suitable tombstone on the grave of a decedent, is a legitimate item of credit in the accounts of an executor; especially so in a case like the present one.

Adams v. The Pittsburgh Ins. Company: The evidence must be clear, uncontradictory and distinct, to establish a custom or usage in a particular port warranting the captain of a steamboat, under the direction of a part owner, to bind the owners of vessels navigating the Ohio and its tributaries, for the amount of a premium note for the insurance of the boat, executed by the captain.

Ballantine v. White: 1. The 4th section of the act of April 22d, 1856, in reference to declarations of trusts, etc., being in writing, does not prevent the admission of parol evidence to show that a transfer, though in form an absolute conveyance, was intended to be a mortgage.

2. The "equity of redemption," referred to in the 6th section of the same act, as to the limitations of suits, etc., is confined to such an equity "after re-entry made for any condition broken," and does not apply to the equity of redemption of a mortgage.

3 A wife may testify on behalf of her husband under the act of 1869, and the fact that she may, on cross-examination, be compelled to testify against him, does not disqualify her.

4. A refusal to enter a non-suit is not the subject of review in the supreme court.

5. After testimony had been given to show that certain receipts had been altered, the evidence of experts should have been admitted to prove that the alterations were not made at the same time with the body of the instrument

6. In equitable ejectments the judge acts as chancellor with the assistance of the jury; how far he may be called on to exercise his discretion upon the credibility of witnesses, where the parties testify, and their testimony is in direct conflict, not decided.

The Dollar Savings Bank v. Bennett: A mere verbal agreement by a purchaser at a sheriff's sale with his own money, that he will hold the premises in trust for the defendant, neither vests any equitable estate in the defendant, nor does it give any ground for an action, being a mere *nudum pactum*.

Hageman v. The People's Fire Insurance Co.: A judgment entered in conformity with the charter of this company, on a premium note, is a lien against the property insured.

Legal News and Notes.

—AN exchange states that the revised statutes of the United States, by throwing out obsolete statutes, conflicting provisions, etc., render the construction of the tariff laws an easy question now, and the quibbles and technicalities set up by importers, under the old statutes, are avoided under the present simple and comprehensible compilation.

—INTERNATIONAL RAILWAY CONGRESS.—The Swiss government has presented notes at London, Berlin, Paris, St. Petersburg, Vienna and Rome, proposing an international congress of all railway administrations in Europe. Four points are, it is stated, proposed for deliberation, viz: (1.) The limits of the responsibility of the company which originally receives the goods for a distinct destination and of the companies which transport the goods afterward. (2.) What is to be considered a competent tribunal in case of disputes between the diverse interest? (3.) The establishment of a uniform procedure to ascertain the damages caused to goods during the time they are in the keeping of the railway companies. (4.) The acceptance, as a general rule, that the company which finally delivers the goods shall be responsible to the receiver, receiving, of course, its rights as against the companies which preceded it in the carrying.—[*Chicago Railway Review.*

—JUDGE DURELL has tendered his resignation, or at least written it out, to take effect December 1. In an interview with a reporter of the New York Herald, the Judge defends his "midnight order," as follows: "Congress passed, as you know, the thirteenth, fourteenth, and fifteenth amendments. Afterward was brought forward by Mr. Morton, as I understand, in the United States Senate, the enforcement act, which increased the powers given to the United States Circuit Court, and gave it jurisdiction both in law and equity. Now in the fall election of 1872, in Louisiana, I was required to act under that statute. The United States Court has certain duties, and among others is that of the appointment of commissioners to watch over the polls. I was requried to go over and open that court by Judge Woods, of that circuit court, he having been authorized so to do by the amended enforcement act, and it was within his jurisdiction to require the United States Judge to perform these duties. That went on and was continued until the day of election. After the polls were closed and the day of election passed away, Mr. Kellogg, the republican candidate for governor, filed a bill in chancery, on the chancery side of the circuit court for the district of Louisiana. The object of this was the preservation of evidence. This bill alleged, among other matters, that a large number of citizens of the state of Louisiana, who had a right to cast their votes at the gubernatorial election, had been excluded from voting, on account of their color and former condition. It stated further, that the returns were held by unlawful parties. It asked, then, that the proof as to these facts might be taken and deposited in the office of the clerk of the court. Such proof was to be used at any action of the law for the office of governor. At the same time, a certified copy of all the returns had to be taken for the office of governor at that election. I gave certain interlocutory orders, for the purpose of carrying out the objects of the bill, and also for the purpose of securing the evidence to be used in any action of the law. I declared, among other things, that the state court had declared certain men were the returning court, and I followed the state court for that. And here I stopped. Nothing more was done. Nothing else had been done, except running a race for the governorship. Mr. Warmouth would not give up the returns. If they had obeyed my orders and had handed those returns to my clerk, there would have been an end, so far, of the United States war, certainly. I took possession of the state-house (Mechanics' Institute, it was, in fact), in order to get at the returns. They ran away with them and they have not yet been produced. Now, I understand, they say they are in Baltimore. This case was conducted according to the proceedings in other cases. Now, that is all I had to do with it."

This explanation is certainly cool. The idea of a United States District Judge demanding the returns of the votes cast at an election for governor of a state! Judge Durell will have to explain further, in order to lift from his judicial reputation the cloud of infamy with which his extra-judicial and most outrageous conduct has enveloped it.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor. } ST. LOUIS, FRIDAY, DECEMBER 18, 1874. { SUBSCRIPTION: $8 PER ANNUM, in Advance.
S. D. THOMPSON, Ass't Editor. }

A GOOD SUGGESTION.—The communication from "C.," in another column, embodies some excellent suggestions in regard to a mode by which lawyers may keep their libraries intact, and at the same time oblige each other by lending books when required. Those who have had valuable liabraries depleted by the inevitable book-borrower (and who has not?) will read C.'s suggestions with interest, and, we doubt not, with profit.

A PARTING WORD.—We shall probably not have an opportunity of addressing our readers again through these columns during the present year, and as some of them will not be with us during the coming year, we tender to such a parting shake of the hand, and to all our best wishes for a merry Christmas and a happy New Year. In looking back, we see that we promised several things when we began, which we have not fulfilled. We also confess that we have been somewhat hasty at times in expressing opinions, although we trust we have been honest and not dull. We hope to do better next year, and shall endeavor to weed out some of our errors and not let them go to seed. We also hope, with the experience of the past year, to make the JOURNAL, during the coming year, more *useful*, and hence more deserving of the patronage of the profession.

OUR NEXT NUMBER.—We notified our readers some time since that we should close the present year with number 53. The unexpected length of the index, the fact that we publish with it a complete table of all cases reported, digested or cited, and the further fact that were we to issue a fifty-third number, it would fall on the first day of the new year, the day of publication of our first number of the second volume, induces us to print it as number 52 instead of number 53. Should any of our readers feel disposed to complain at this, we would remind them that we have published during the year several numbers of extra size, thus giving them thirteen pages more reading matter than they would get in 52 numbers of our regular size. Our next number, therefore will consist of an index and table of cases, and as it will not be very entertaining reading, our readers will not be disappointed if it does not appear on the precise day.

Foreign Larcenies.

The Monthly Western Jurist, for December (Bloomington, Ill.), contains an article under the caption "Larcenies in Foreign Countries not Punishable in the United States." This article is chiefly valuable from the fact that it sets out at full length the opinion of the Supreme Court of Ohio, in Stanley v. The State MS., a case which was decided at the November, 1873, term of that court. This case contains a very full and able discussion of the question, and collates a large number of authorities, the result of which seems to be:

1. That where goods are stolen upon the high seas and carried into England, the thief cannot be convic'ed in the courts of the common law in England. 13 Coke, 53; 3 Inst. 113; 1 Hawk. P. C. ch. 19, § 52.

2. That where goods are stolen in another sovereignty and carried into England, the thief cannot be convicted in England. Regina v. Madge, 9 Car. & P. 29.

3. That formerly where goods were stolen without the body of a county of England, but within the United Kingdom or the Provinces, and carried into England, the thief could not be convicted in England. As where goods were stolen in the island of Jersey: Rex. v. Prowes, 1 Moody C. C. 349. Or in Scotland: 2 East P. C. 772, ch. 16, § 156. But this has been changed by statute, so that the thief may be prosecuted in any county where found with goods in his possession, stolen by him in any part of the United Kingdom. 13 Geo. 3, ch. 31, § §4 and 7; 8 Geo. 4 ch. 29, § 76.

4. That the following cases hold that where goods are stolen in one of the United States, and carried by the thief into another, the courts of the latter state have jurisdiction to convict him of larceny: Hamilton v. The State, 11 Ohio, 435; The State v. Ellis, 3 Conn. 185; The State v. Bartlett, 11 Vt. 650; The State v. Underwood, 49 Maine, 181; Watson v. The State, 36 Miss. 593; The State v. Johnson, 2 Oregon, 115; The State v. Bennett, 14 Iowa, 479; Ferrell v. Commonwealth, 1 Duvall, 153; Commonwealth v. Collins, 1 Mass. 116; and several subsequent cases in Massachusetts.

5. That the following cases hold the contrary: People v. Gardner, 2 Johns. 477; People v. Schenk, 2 Johns. 479; The State v. Le Blanch, 2 Vroom, 82; Simmons v. Commonwealth, 5 Binn. 617; The State v. Brown, 1 Hayw. 100; Simpson v. The State, 4 Humph. 456; Beall v. The State, 15 Ind. 378; The State v. Reonnals, 14 La. An. 278. But this rule was afterwards changed in New York by statute.

6. That there are two cases which hold that where goods are stolen in a foreign country and brought into one of the United States, the courts of such state have jurisdiction to convict the thief of the larceny: The State v. Bartlett, 11 Vt. 650; The State v. Underwood, 49 Maine, 181.

7. That there are two cases in which this is denied: Comm. v. Uprichard, 3 Gray, 434, and Stanley v. The State, *supra*.

After collating at length the authorities, the court in Stanley's case reason the question as follows:

The judgment below is wrong, unless every act of the defendant, which was necessary to complete the offence, was committed within the state of Ohio and in violation of the laws thereof. This proposition is not disputed. It is conceded by the prosecution that the taking, as well as the removal of the goods *animo furandi*, must have occurred within the limits of Ohio. It is also conceded that the first taking, as well as the first removal of the goods alleged in this case to have been stolen, was at a place beyond the limits of the state, and within the jurisdiction of a foreign and independent sovereignty. Now, the doctrine of all the cases is that the original "taking" and the original asportation of the goods by the prisoner, must have been under such circumstances as constituted a larceny. If the possession of the goods by the defendant, before they were brought into this state, was a lawful possession, there would be no pretense that the conviction was proper. The same, if his possession was merely tortious. The theory of the law, upon which the propriety of the conviction is claimed, is based on the assumption that the property was *stolen* in Canada by the prisoner.

By what rule shall it be determined whether the acts of the prisoner, whereby he acquired the possession of the goods in Canada, constituted the crime of larceny? By the laws of this state? Certainly not. The criminal laws of this state have no extra-territorial operation. If the acts of the prisoner, whereby he came in possession of the property described in the indictment, were not inhibited by the laws of Canada, it is perfectly clear that he was not

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guilty of larceny there. It matters not that they were such as would have constituted larceny if the transaction had taken place in this state.

Shall the question whether or not the "taking" of the property by the prisoner was a crime in Canada, be determined by the laws of that country? If this be granted, then an act, which was an essential element in the combination of facts of which Stanley was found guilty, was in violation of the laws of Canada but not of this state; and it was because the laws of Canada were violated that the prisoner was convicted. If the laws of that country had been different, though the conduct of the prisoner had been the same, he could not have been convicted. I can see no way to escape this conclusion, and if it be correct, it follows that the acts of the prisoner in a foreign country, as well as his acts in this state, were essential elements in his offence; therefore, no complete offence was committed in this state against the laws thereof.

I have no doubt the legislature might make it a crime for a thief to bring into this state property stolen by him in a foreign country. And in order to convict of such crime, it would be necessary to prove the existence of foreign laws against larceny. The existence of such foreign laws would be an ingredient in the statutory offence. But that offence would not be larceny at common law, for the reason that larceny at common law contains no such element. It consists in taking and carrying away the goods of another person in violation of the rules of the *common law*, without reference to any other law or the laws of any other country.

It may be assumed that the laws of *meum et tuum* prevail in every country, whether civilized or savage. But this state has no concern in them further than to discharge such duties as are imposed upon it by the laws of nations, or through its connection with the general government, by treaty stipulations.

Our civil courts are open for the reclamation of property which may have been brought within our jurisdiction, in violation of the rights of the owner; but our criminal courts have no jurisdiction over offences committed against the sovereignty of foreign and independent states.

We are unable to perceive any substantial ground of distinction, with respect of this question, between larcenies committed in other states and those committed in a foreign country. With reference to the punishment of crimes against their own jurisdiction, the different states of the American Union seem as distinctively sovereign and independent, with reference to each other, as the state of Ohio is sovereign and independent with reference to the Dominion of Canada.

Power of the Judiciary to Control the Official Acts of Officers of the Executive Department of the Government.

We published some time since (*ante*, p. 401) a very important opinion of the Supreme Court of Texas, in the case of Bledsoe v. The International Railroad Company, involving the question whether the judiciary of that state has power to control by *mandamus* an official act of the comptroller, and resolving the question in the negative. The reasons on which that decision was based are still no doubt fresh in the minds of some of our readers. They were briefly these: that the office of comptroller is created by the constitution of the state; that by that instrument he is named one of the executive magistracy of the state, as fully as is the governor himself; and hence, that any attempt on the part of the judiciary to compel him to deviate from the course he chooses to take in the performance of an official act (although that act be, as many cases express it, a *ministerial* one merely, and one not involving an exercise of discretion) involves an invasion on the part of the judiciary of the jurisdiction and powers of a distinct, separate and co-ordinate department of the government.

Our readers will remember that this opinion was by a divided court, the opinion of the court having been delivered by a special judge, sitting (we believe) in the place of Mr. Justice Moore, who was incompetent by reason of having been of counsel in the case. It would be imagined that such a decision, however able the reasoning of the opinion delivered by the majority, would not put to rest a question of such importance. Accordingly we find that very soon after this decision had been pronounced, substantially the same question came before the court again in the case of Keuchler, Commissioner of the General Land Office of Texas, v. Wright. This was a suit by *mandamus*, instituted in 1871, by George W. Wright, to compel the Commissioner of the General Land Office of the State of Texas, to issue to him a patent to land which he had located and surveyed, by virtue of a land certificate for the unlocated balance issued to Henry Buckler, for 640 acres of land assigned in writing to said Wright by Eliza Higgins, widow of Henry Buckler, and her present husband, Wm. L. Higgins, and Isabella Buckler, claiming to be the widow and heir of Henry Buckler, to which written transfer of said certificate was attached the private acknowledgement of the said married woman, taken before a justice of the peace in the state of Arkansas. This land certificate was located and surveyed on lands known as the "State sections," within the Memphis, El Paso and Pacific Railroad reservation. The Commissioner appeared by the Attorney General, and demurred to the petition of Wright, and justified his refusal to issue the patent on the ground that the lands located and surveyed by Wright were, by the constitution and laws of the state in force, reserved from location by virtue of such certificate. The only evidence before the court was a certified copy of the papers on file in the General Land Office. The court below determined (the case being submitted to the court on the pleadings and on said certified copy of the papers in the Land Office) in favor of the plaintiffs, and awarded a peremptory *mandamus* against the commissioner, from which judgment an appeal was taken, and brought into the Supreme Court in 1872. This court, in 1872, delivered an opinion, and rendered a judgment reversing the judgment below and dismissing the suit. At the same term a rehearing was granted. In 1873 the Supreme Court delivered another opinion, sustaining the first, and confirming its own judgment already rendered in the case. At the same term, in 1873, another motion for rehearing was made by Wright, which was continued at another term, and the judgment suspended to await the determination of the motion for rehearing. The case, then, came before the present bench on a motion for a rehearing, and was again argued to enable the members of the court to decide upon the propriety of granting the motion. This a majority of the court united in refusing on the merits of the case, while asserting that the district court has jurisdiction to award a mandamus against the commissioner of the general land office, to compel him to perform a ministerial duty which is clearly enjoined by law.

When it is remembered that in Texas the office of commissioner of the general land office is created by the constitution, and that this officer is, equally with the governor and comptroller, a member of the executive magistracy of the state, the significance of this decision will be seen. It overrules Bledsoe v. The International Railroad Company, and establishes the principle that under the present constitution of Texas the district court has jurisdiction to award a *mandamus* against an officer of the executive department of the government, to compel the performance of official acts where the

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law does not make the performance of them discretionary with the officer. The opinion of the majority of the court was delivered by Mr. Justice Moore, who, as above stated, did not sit in the Bledsoe case. His opinion will be found in the Chicago Legal News for November 21 and November 28. His opinion is long, embraces a very thorough citation of the adjudications bearing upon the question, and is very forcibly reasoned. Mr. Chief Justice Roberts dissented at great length, and in his opinion examines the question involved with an ability which, in our judgment, stamps him as one of the foremost jurists of the country. He examines a very great number of authorities with a searching discrimination, and expresses his views in forcible, and at times, in eloquent language. We have a copy of his opinion before us as published in the Houston Daily Telegraph for August 30.

Quite a number of decisions have been made by the American courts on the question here involved, some of them affirming, others denying the jurisdiction which the majority of the court in this case adjudge to exist. Some of these cases we have examined at length; others but hastily, and we doubt whether, since the original case of Marberry v. Madison, 1 Cranch, 137, the question has ever been more thoroughly considered than in this case.

The question involved is one of great difficulty, and powerful arguments may be brought to bear on both sides of it. In support of the jurisdiction it is urged that we live in a government of law, and that if any officer of the goverment, be he the governor himself, captiously refuses to perform a plain duty involving the rights of a citizen, such citizen ought not to be compelled to suffer the wrong, but ought to have redress in the judicial tribunals according to the law of the land. This argument is clearly stated, and an array of cases cited in support of it, in the opinion of Mr. Justice Moore, who uses the following language:

While it must be admitted no human government can be organized which will, in all instances, secure the citizen in the complete and perfect enjoyment of all his rights of person and property, and there must be an end of controversy somewhere, whether the result attained is what it should be or not, yet I cannot see that this is a reason why the citizen should be deprived of all remedy touching the matters of individual right depending upon the performance of a merely ministerial duty. The time-honored maxim, that there is a remedy for every wrong, if not true to the letter, is surely persuasive that an element of judicial power of so much importance, recognized from time immemorial by the courts of the country from which our jurisprudence is derived, and exercised under a similar constitutional provision to ours by the courts of every state in the union, is not denied to our courts. Northwestern N. C. R. Co. v. Jenkins, 65 N. C., 173; State v. Lawrence, 3 Kan. 95; State v. Secretary of State, 33 Mo. 293; People v. Smith, 43 Ill. 219; Hemmerick v. Hunter, 14 La. An. 221; State v. Wrotnowski, 17 La. An. 156; State v. Draper, 48 Mo. 213; Swan v. Buck, 40 Miss. 219; Swan v. Work, 24 Miss. 439; *ex parte* Pickett, 24 Ala. 91; *ex parte* Echols, 39 Ala. 698; State v. Bordelon, 6 La. An. 68; People v. Smith, 48 Ill. 219; People v. Secretary of State, 58 Ill. 90; Swan, Auditor, v. Josselyn, 14 S. & M. 106; Auditor v. Adams, 13 B. Monroe, 150; Douglas v. Hastings, 15 Wis. 75; Free Press Association v. Nichols, 45 Vt. 7; Bryan v. Collet, 15 Iowa, 538; Auditor v. Hardin, 8 B. Monr. 648. In the last two of these cases the same objections to the jurisdiction of the court, which has been relied upon here, where directly presented and lucidly discussed, and decided in favor of the jurisdictional right of the court to award the writ. To enquire into and determine as to matters of this character, and to prevent the rights of citizens from being "sported away" at the whim or caprice of officers in the exercise of merely ministerial duty, is plainly, in my opinion, the exercise of the judicial power conferred by the constitution. The court of England and America have always claimed and used it as such. The legislative and executive departments have at all times heretofore recognized and acquiesced in its exercise by the judicial department, even when it was not regulated and defind by statute.

On the other hand it is urged that litigation must end somewhere, and that it is a sufficient answer to all objections that exclusive jurisdiction has been vested by the constitution in an officer of the executive department of the government to perform certain acts and to decide certain questions, and that no jurisdiction has been expressly granted to any other tribunal by that instrument to review his decisions, or control his discretion in the exercise of his official functions; and that the assumption of such a power by the judiciary would be an invasion by one co-ordinate department of the government of the powers delegated exclusively to another, which might lead to unseemly conflicts of jurisdiction and even to anarchy. It is urged with much force that courts are but men; that men are greedy of power, and that courts are greedy of jurisdiction; and that if the boundary is once passed which separates the province of the courts from that of the other co-ordinate departments of the government, there are no well-defined barriers to check their aggressions. "There must of necessity," said Mr. Chief Justice Roberts in his dissenting opinion, "be a finality—a finality in the determination of the rights of individuals, in whatever departments they may arise or pertain to, and some man, or set of men, must make the final determination. In a despotism, such one man is easily pointed out. In a republican state, such as ours, wherein all of the powers of government are divided into three distinct departments, there must be a final determination of each department for itself, of all such matters as are assigned to it in the division. Otherwise there is no division—no binding, effective and 'distinct' division of powers."

We incline in opinion with the chief justice. His reasoning strongly resembles that of Mr. Justice Cooley in the case of People v. Badgley (*ante*, 299), and seems to our mind conclusive. The case of an office created, and its duties defined by an act of the legislature, may rest on somewhat different grounds. But we perceive no substantial distinction with respect to this question, between the case of the governor of a state and that of any other officer of the executive department thereof whose office is created and whose powers are defined by the organic law. Unless the same organic law has granted to another jurisdiction power to control such officer, he is above control. "Were the courts to go so far," said Mr. Justice Cooley in the case of People v. Badgley, *supra*, "they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government."

Constitutional Law—Release of State's Lien upon Railroads.

SILAS WOODSON AND H. CLAY EWING v. URIEL A. MURDOCK AND LUTHER C. CLARK.

[Continued from our last.]

Mr. Justice MILLER dissenting.

I cannot agree to the judgment of the court, and think the principle involved of sufficient importance to justify an expression of my views.

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For many years previous to the late civil war, the principal railroads in the state of Missouri had been the objects of the special care of the people, and had received large pecuniary aid from the state. This aid had been given at various times and in divers sums, in the shape of the bonds of the state, to the extent, in the aggregate, of twenty-five millions of dollars or more. For these sums, which were treated as loans, the railroad companies had consented to statutory liens in the nature of mortgages, with conditions to pay the bonds of the state, interest and principal, as they fell due. If the terms of the loan were not precisely as I have stated in all cases, they were substantially so, and any variations in special instances do not affect the qestion under consideration.

The state of Missouri was, almost as much as any state in the Union, the seat of the worst calamities of that war. Its people were divided among themselves; regualar armies marched and counter-marched over its soil, and each side used or abused the railroads to their utmost capacity when within their control. But, above all, the local guerilla warfare, to which the disputed control of her territory and the divided allegiance of her people subjected them, was the cause of immense destruction and damage of her railroads. These companies, therefore, emerged from the war with their roads in a state of repair which hardly admitted of use, and the rolling-stock so deteriorated that new supplies were indispensable. Their credit was low, their means exhausted, and their property apparently worth but little. They were unable to meet their obligations to the state, and were largely in arrears for the interest on the state bonds.

The state itself was in little better condition. To the heavy burdens of increased taxation, imposed by the federal government to support the war and to pay its debt, was now added the nenecessity of paying the interest on the large debt of the state incurred in aid of the railroad companies.

The question forced itself upon the people of the state and the railroad companies, what is to be done in this emergency? The people of the state felt the injustice, in their over-burdened condition, of being called on to pay, without aid from the corporations, the debt incurred for their benefit, and this hardship was not diminished by the consideration that the roads were owned and controlled by stockholders, very few of whom were citizens of Missouri. The railroad companies felt that if their roads were to be made capable of accomplishing the purpose of their creation, all their means and all their credit must be devoted to repairing and rebuilding the road and refurnishing the rolling-stock.

The railroad companies and that part of the people of the state who felt a stronger interest in the roads, appealed to the generosity of the legislature to relieve the roads from the burden of the debt to the state. Those who believed that the credit of the state and the relief of the people from the burden of excessive taxation were of paramount importance, thought the state should relieve herself, as far as possible, by enforcing her lien at the expense of the stockholders, and by sale of the roads, realize all they would bring, and, appropriating this to the payment of the bonds of the state, diminish to that extent the taxation necessary to pay the interest on her large public debt.

The appeal for leniency to the railroad companies had many and able advocates, and was warmly urged by them, and assisted by all the appliances which that class of corporations use with so much effect. The legislature had in several instances released liens altogether on some roads, and had postponed liens to let in subsequent ones, thus showing what might be expected of that body.

It was in the midst of the discussion of this question that the members of the constitutional convention of 1865 were elected, and in the face of the difficulties which it presented, that the convention assembled.

They took cognizance of the matter. They understood that they were expected to adopt some plan of relief, and whatever plan was adopted must be based mainly, if not exclusively, on one or the other of the two propositions we have named. We are not called upon to give judicial construction to what they did, and, by all the rules of sound interpretation, it must be done in view of the condition of affairs which their action was intended to relieve, and of the public sentiment which they intended to represent.

It was very clear, then, it is equally clear *now*, looking alone to what was incorporated into the constitution by that convention, that wholly rejected the idea of leniency to the railroad companies, and that its sole care was to conserve the pecuniary interest of the state.

As the constitution stood when the convention assembled, it was in the power of the legislature — of any legislature — at any time, under the pressure of any influence, to release the lien of the state on the roads, or to make any other compromise of the claim of the state. If the convention was fully determined against this policy, it was their first duty to take this power from the legislative body altogether. The first thing to be done was to forbid the legislature from granting this relief. In the effort to carry out this purpose the convention placed in the body of the constitution, article IV., section 15, the declaration that "the general assembly shall have no power *whatever* to release the lien held by the state upon any railroad."

It seems to me strange that this provision should be the subject of a divided opinion as to its meaning. The release here meant could not have been the execution of a technical instrument called a release. No such absurdity can be imputed to the convention, because if the debt was paid, or otherwise discharged, so that the lien no longer existed, the making of such an instrument was of no value to any one. The thing prohibited was the discharge or remission in any shape of the specific lien which the state had on the roads for the payment of the bonds she had advanced or loaned to the companies. To make this more emphatic, all power *whatever* on this subject was taken away. No pressing exigency, no motive however pure or generous, and no consideration even of pecuniary wisdom in which the legislature might indulge or believe was to justify this discharge of the lien which the state held as security for her advances. How can it be maintained in the face of this, that while the legislature could not release from motives of grace, and for the purpose of gratuity, it could release on a purpose of compromise, by accepting one-third or one-half of the debt secured by the lien? If one-third could be accepted, then one-tenth. If five millions could be accepted when ten were due, then five dollars could be accepted. It is to be borne in mind that we are considering the constitutional power of the legislature to release the lien, and on this question we are not at liberty to consider whether it acted wisely or reasonably. If they could release at all, or for any consideration, the court cannot say they have exceeded their power. But the constitution seems to place all this beyond question by saying it shall not have any power *whatever* to do this thing.

The work of the convention was, however, to be submitted to a vote of the people. If it received a majority of the votes cast, it became the fundamental law of the land. Otherwise it passed for nothing. Other propositions were submitted separately, and might be adopted or rejected without hazarding the whole instrument. But so important did the convention deem this provision that they put it into the body of the new constitution, so that the latter could not be adopted without including the former.

If, however, the question of releasing the road from its debt to the state was thus settled in the negative, there still remained the question of the present enforcement of the lien by sale or otherwise. This question was left by the convention to a vote of the people, in a separate ordinance, which might be adopted or rejected without defeating the constitution itself, but which, if adopted, became part of the constitution.

Both the constitution and this ordinance were submitted at the same time, and both were adopted and became part of the funda-

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mental law of the land at the same time. This ordinance throws a flood of light on the intention of the men who framed the constitution in adopting the section we have just discussed. It imposed a tax of ten per cent. on the gross receipts of the three principal roads from October, 1864, to October, 1868, and fifteen per cent. thereafter; to be devoted to the payment of the principal and interest of the bonds loaned by the state; and it required that if either of said companies neglected or refused to pay said tax, the general assembly should provide by law for the sale of that road. The fifth section of this ordinance is as follows:

"Whenever the state shall become the purchaser of any railroad or other property, or the franchises sold as hereinbefore provided for, the general assembly shall provide by law in what manner the same shall be sold for the payment of the indebtedness of the railroad company in default; but no railroad or other property or franchises purchased by the state shall be restored to any such company until it shall have first paid, in money or in Missouri state bonds, or in bonds guaranteed by this state, all interest due from said company, and all interest thereafter accruing shall be paid semi-annually in advance; and no sale or other disposition of any such railroad or other property or their franchises shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money or in the bonds or other obligations of this state."

The manner in which this ordinance was put to the people is significant. The ballot was to be, "shall the railroads pay their bonds?" "Yes." "Shall the railroads pay their bonds?" "No." The former was a vote for adopting the ordinance; the latter was a vote against it. It is thus seen that if this ordinauce was adopted, both the convention and the people were in earnest in their determination not to release any claim the state had in those companies. The peculiar provision of the above section makes this very clear. If the state became the purchaser the legislature should provide for the manner of its resale; but in no event was it to be restored by resale or otherwise to the company who had owned it, until that company had first payed in money, or bonds of the state of Missouri, all the accrued interest due from said company; and all interest thereafter to accrue was to be paid in advance semi-annually. It was also provided that *no* sale or other disposition of such railroad should be made without reserving a lien upon all the property and franchises thus sold or disposed of *for all sums remaining unpaid.*

The sale or disposition here spoken of had reference to a sale to other parties than the defaulting company. And even in that case the ordinance provided that none should be made which did not secure the state for all her liabilities on account of the road. The clause can have no other meaning but this, though it is ably argued that it means such part of the consideration of the new sale as may be on credit. But, taking the constitutional provision, the prohibtion in the ordinance against a restoration of the roads without payment of what is due, and security for what is to become due, it seems to me hardly to admit of a doubt that *in no event* was the road to pass from the control of the state, without security against any loss by reason of these bonds. But however this may be, the constitutional prohibtion against releasing the lien, the provisions of the ordinance for the levy of a severe tax on the gross receipts, the direction for a sale if it was not paid, and the two provisions against restoration it to the same company until full payment, indicate to my mind the unmistakable determination of the convention and the people that the companies should, in the language of the prescribed ballot, "*pay their bonds*,"—pay them in full,—or lose their roads, their property and franchises.

The answer made to all this is, that while the legislature could not release the *lien* they could not remit the *debt*. That while they could not restore the road to the same company after the state had bought it in, they could sell to the company the debt which that company owed the state at any price it chose. That while the state could not release the lien by any legislative act, it could compromise or sell the debt, and thus defeat, destroy, or part with that lien.

It is said the convention intended to prohibit the legislature from dealing as it chose with the *debt*, it could easily have said so, instead of using the word *lien*. If the convention had said that the legislature shall have no power to discharge the *debt* without full payment, it could then be argued with much more force that the *lien* might be released though the debt could not be touched. On the other hand, so long as the lien remained the debt must remain, for there could be no lien without the debt. It seems to me, therefore, that the convention used the stronger and better term, the one which included both, and which expressed precisely what they meant, namely, that both the debt and the lien of the debt should remain inviolate except by payment. If there could be any doubt of this, the form of submission of the ordinance on which the people voted, that the "roads should pay their bonds," makes it too clear for dispute.

But of what avail are constitutional restrictions of legislative power, or legislative restrictions of municipal power, if they are disregarded by the legislatures and municipalities?

It may be said that there remains to the people the protection of the courts. But language is at best a very imperfect instrument in the expression of thought, and the fundamental principles of government found in constitutions must necessarily be declared in terms very general, because they must be very comprehensive.

The ingenuity of causists and linguists, the nice criticism of able counsel, the zeal which springs from a large pecuniary interest, and the appeal of injured parties against the bad faith of the legislatures who violate the constitution, are easily invoked, and their influence pursuasive with the courts, as they always must be.

And if language as plain as that we have been considering, a purpose so firmly held and clearly expressed is to be fritted away by construction, then the courts themselves become but feeble barriers to legislative will and legislative corruption, and the interest of the people, which alone is to suffer, has but little to hope from the safeguards of written constitutions.

These instruments themselves, supposed to be the peculiar pride of the American people, and the great bulwark to personal and public rights, must fall rapidly into disrepute if they are found to be efficient only for the benefit of the rich and powerful, and the absolute majority on any subject will seek to enforce their views without regard to those restrictions on legislative power which are used only to their prejudice.

My brother Davis concurs in this dissent.

Burglary—Larceny—Effect of Acquittal of One of Two Felonies Charged in the Separate Counts of an Indictment.

BELL AND MURRAY v. THE STATE.

Supreme Court of Alabama, July Term, 1874.

Present, Hon. T. M. PETERS, Chief Justice.
" " R. C. BRICKELL, Associate Justice.

1. **Rev. Code of Alabama, § 3695—What Averment in Indictment under, Constitutes Charge of Grand Larceny and not of Burglary.**—Under § 3695 of the Revised Code, a count in an indictment which charges that the defendants "broke into and entered" a certain described building mentioned in that section, and "feloniously took and carried away" certain specified personal property of a third person, "of the value of more than one hundred dollars," is a count for grand larceny and not for burglary. To constitute a good count for burglary, there should have been an averment that the breaking and entry were "with intent to steal or to commit a felony."

2. **Same—What Count Charges Burglary Only.**—A count which charges that the defendants "broke into and entered" a certain described building, included in § 3695 of the revised code, "with the intent to steal," charges burglary only, and under such a count there can be no conviction for grand larceny.

3. **Same—What Count Charges both Burglary and Grand Larceny.**—Under a count charging that the defendants "broke into and entered" a certain de-

scribed building, mentioned in § 3695 of the revised code, "with the intent to steal," and "feloniously took and carried away" certain specified articles of personal property of a specified third person, "of the value of more than one hundred dollars," there may be a conviction for either or both of the offences charged.

4. **Conviction for Grand Larceny and Burglary had under One Count—What Punishment Awarded.**—Where there is a conviction of both burglary and grand larceny charged in the same count, but one punishment should be awarded.

5. **Merger—What Offences not Subject to Doctrine of.**—Burglary and grand larceny being, under the provisions of the revised code, distinct felonies of the same grade and subject to the same nature of punishment, are not subject to the doctrine of merger.

6. **Conviction of One of Two Felonies Charged in Separate Counts of Indictment—Effect of, as to Felony not Passed on by Jury.**—A verdict finding the defendants guilty of burglary on the trial of an indictment charging, in separate counts, both burglary and grand larceny, is tatamount to an acquittal of grand larceny, and thereafter expunges that charge from the indictment.

7. **Same—Acquittal, by what not Impaired.**—The acquittal thus obtained is final, and not impaired by a judgment rendered by the appellate court, on the defendants' appeal, reversing the conviction for burglary and remanding the cause for further proceedings.

8. **New Trial on Reversal—On what Charge Defendant is Liable to be Retried.**—The acquittal of grand larceny on the first trial being final, and in contemplation of law obliterating that charge from the indictment, takes away any legal foundation for a verdict on the second trial, finding the defendants "guilty of grand larceny, as charged in the indictment."

9. **Same—What will Operate an Acquittal.**—Such a verdict is a nullity, and is no legal reason for discharging the jury from their deliberations on the charge of burglary, the only one remaining in the indictment. If the jury are discharged because of the rendition of this void verdict, without the consent of the defendants, the discharge operates an acquittal of the burglary.

10. **Acquittal—When Supreme Court will Order Discharge of Defendants from Custody on Reversal of Judgment of Lower Court.**—In the case at bar, defendants having been acquitted of grand larceny on the first trial, and the unauthorized discharge of the jury, on the second trial, being tantamount to an acquittal of the charge of burglary, the whole indictment was disposed of, and the defendants thereby entitled to their discharge. Such a motion having been made and overruled in the court below, the supreme court, on appeal, reversed the judgment and sentence of the court below, and caused the appropriate order to be entered in this court, discharging the defendants.

Appeal from the City Court of Montgomery.

Tried before Hon. JOHN D. CUNNINGHAM.

The indictment in this case contained four counts. The first count was *nolle prossed*. The second count charges that the defendants, Bell and Murray, "broke into, and entered, a building which it described, in which "goods, merchandise, trunks, silverware, etc., were at the time kept for deposit, with the intent to steal," against the peace, etc., etc. The third count charged that the defendants "broke into, and entered, a building," described in the count, in which merchandise, silverware, trunks, etc., "were at the time kept for deposit, and feloniously took and carried away" certain specified articles of personal property, "of the value of more than one hundred dollars, the property of Mrs. Georgia E. Saffold," against the peace, etc. The fourth count was identical with the third, with the exception that it charged that the breaking and entering were done "with the intent to steal."

At the spring term, 1873, of the city court, the defendants having gone to trial on plea of not guilty, were convicted of burglary. The verdict of the jury was, "we, the jury, find the defendants, Richard Bell and George Murray, guilty of burglary." The judgment entry, after reciting the empanneling of the jury on the 26th of March, 1873, the defendants' plea, etc., and the verdict of the jury, concludes, "and the said defendants were remanded to jail to await the sentence of the court." The record shows that on the 2d of April, 1873, the court sentenced the defendants in accordance with the verdict. There is nothing in the record or bill of exceptions to show that the defendants either consented or objected to the discharge of the jury.

The criminating evidence against the defendants on that trial, was the recent and unexplained possession of the stolen property, taken at the time of the burglary, which property Bell and Murray were endeavoring to sell under very suspicious circumstances at the time of their arrest. The defendants appealed to the supreme court, which "reversed and annulled the judgment and sentence of said city court," and remanded the cause "to the said city court for further proceedings therein," on the ground that the court below erred in not allowing the defendants a peremptory challenge to a juror. See the case reported 50 Ala. 675, which, for convenience of citation, has been called Murray and Bell v. The State.

At the spring term, 1873, of the city court, when the case was again called for trial, the defendants pleaded their joint and separate plea of *autrefois acquit* as to each and all the charges of grand larceny contained in the several counts of the indictment. This plea was, in short, by consent, and was based upon the verdict and matters and things of record on the former trial, including the bill of exceptions then reserved, and the judgment of reversal rendered by the supreme court. The court sustained a demurrer to the plea, and the defendants pleaded not guilty to the indictment, and went to trial on issue joined by the state on that plea. By consent, the testimony contained in the bill of exceptions, reserved in the former trial, was introduced in evidence, and that was all the evidence offered. The verdict of the jury was, "we, the jury, find the defendants guilty of grand larceny, as charged in the indictment, and recommend them to the mercy of the court."

The defendants moved in arrest of judgment, on the ground that it appeared from the records of the court in the identical cause, that the defendants had, at a former term, been acquitted on the identical indictment in the present case, of the identical and same offence of which the jury found them guilty in the present case, which acquittal was still of force, etc., etc.

They also moved the court to discharge them from custody, and to render judgment of acquittal, notwithstanding the verdict, of all the charges contained in the indictment, on the ground that the proceedings in the former trial were equivalent to an acquittal of the charge of grand-larceny, and the proceedings on the second trial were equivalent to an acquittal of the charge of burglary; whereby the whole case was at an end, etc.

The court overruled both of these motions and sentenced the defendants, in accordance with the verdict, for grand larceny.

The defendants appeal, and here assign for error—

1. Sustaining the demurrer to the plea of *autrefois acquit*.
2. Overruling the motion in arrest of judgment.
3. The refusal to discharge the defendants.

Thos. G. Jones and J. M. Falkner, for appellants.

1. None of the counts which did not charge the breaking and entry to have been felonious, or in the language of § 3695 of the Rev. Code, "with the intent to steal or to commit a felony," charge burglary. The breaking and entry may have been lawful, as where a man breaks into a house to extinguish a fire in the building, and afterwards commits a larceny. Where the intent with which the breaking, etc., is done, is not directly alleged, the court cannot say, as matter of law, that *burglary* is charged. A *jury*, on the facts charged in the third count, might find either a verdict of burglary or not as they found the *intent*. If this be so, all presumptions being solved against the indictment and in favor of the defendant, the court cannot hold that count as charging burglary. State v. Merrick, 19 Maine, 398; Arch. Crim. Pleading, vol. 2, p. 328; 2 Hale, 184. As to difference between alleging the fact of an unlawful intent and the facts from which it arises, see Bliss v. Anderson, 31 Ala. 625.

2. The verdict of "guilty of burglary," on first trial, operated an acquittal of all the charges of larceny. 3 Ala. 200; 6 Ala. 200; 28 Ala. 82.

3. A judgment, on conviction or acquittal, is not necessary in order that either may constitute a bar to another indictment for the same offence. 14 Ohio, 295; 5 Yerger, 24; 25 N. Y. 506; 44 Ala. 10; 43 Ala. 402.

4. Burglary and larceny are separate and distinct offences; neither is a grade or degree of the other. 2 Hale, 245; 46 Ala. 721; 24 Conn. 57.

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5. These offences are not subject to the doctrine of merger under our law. Hamilton v. The State, 36 Indiana, 286; Whart. Am. Crim. Law, vol. 1, § 564; 29 Ala. 62.

6. The jurisdiction of the supreme court, on appeal, in a criminal case, arises from the statute and the waiver by defendant of so much of his constitutional right not to be twice tried for the same offence, as will give it the right to order retrial. The waiver will not be presumed to go beyond defandants' necessities. The appeal was not from the acquittal of larceny, but from the conviction of burglary. If defendants had been wholly acquitted, no court would have had jurisdiction of an appeal, and the principle is not different as to the offence of which the defendants were acquitted, because at the same time there was a conviction and sentence for another offence. Hurt v. State, 25 Miss. 374; 1 Bishop Crim. Law (Ed. 1857), § 677; 40 Ala. 14. There is no warrant in the constitution authorizing a court to require a defendant to barter away his acquittal as the price of the revision of an illegal conviction.

7. On the second trial defendants could not be retried for the offence of which they had been acquitted by reason of the verdict and proceedings on the first trial. They should have been tried for *burglary* alone. Campbell v. The State, 9 Yerger, 338; Martin v. State, 30 Wiscon. 222; Gilmore v. State, 4 Cal. 337; State v. Ross, 25 Missouri, 32; State v. Kettleman, 35 Missouri, 105; Gunther v. People, 25 N. Y. 406; State v. Tweedy, 11 Iowa, 351; Mounts v. State, 14 Ohio, 295; Morman v. State, 24 Mississippi, 51; 1 Swann, 14; 6 Humphries, 410; 2 Tyler, 471; 2 Va. Cases, 311; ; 8 Robinson (La.), 185; United States v. Keen, 1 McLean, 429; 8 Smedes & Marshall, 576; 4 Scammon, 168; 7 Blackford, 186.

8. No charge of grand-larceny being contained in the indictment, on the second trial, the verdict of guilty of grand-larceny on that trial was a nullity. It was no reason for the discharge of the jnry. That discharge was unauthorized and operated an acquittal of the burglary. Having been acquitted of larceny on the first trial, and the discharge of the jury on the second trial being equivalent to an acquittal of the other charge, the whole case is ended and the defendants entitled to their discharge. McCauley v. State, 26 Ala.; *Ex parte* Vincent, 43 Ala. 402; Grogan v. The State, 44 Ala. 10.

Attorney-General *Gardner* and *Sayre & Graves, contra.*

On an appeal of a case to the supreme court, and a reversal thereof, the case stands precisely as though a new trial were granted, or as though it had never been tried, and the court must try it over as it originally did, unless some count in the indictment is decided by this court to be bad.

In North Carolina and South Carolina, where a defendant is acquitted upon one count of an indictment and convicted on another, and appeals, if a *venire de novo* is awarded, it must be to retry the whole case. The State v. Stanton, 1 Iredell, 424; The State v. The Commissioners, 3 Hill, S. C. 239.

Where a defendant being indicted for burglary and larceny, according to the ordinary form, in one count, was acquitted of the burglary but convicted of the larceny, and obtained a new trial, it was held that the revision of the case pervaded the whole indictment, and that on the second trial he was to be arraigned on the burglary as well as the larceny portion of the count. State v. Morris, 1 Blackford, 37.

So the Circuit Court of the United States for the Eastern District of Pennsylvania held, that after a new trial on a conviction for manslaughter, the charge of murder was reopened. U. S. v. Hardin, 6 Penn. L. J. 23; 1 Wall., p. 127. In this case Justice Grier says, to a party of prisoners who applied for a new trial, having been convicted of manslaughter in said court, "Let me now solemnly warn you to consider well the choice you shall make; another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law, * * * * * and when your solemn election shall have been put upon record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you."

In burglary and larceny, where, after the acquittal of the greater offence, but conviction of the less, a new trial is granted, the whole case is said to have been opened, and the defendant exposed on the second trial to the double charge. The State v. Morris, 1 Blackf. 37; Morris v. The State, 8 S. & M. 762; Esmon v. State, 1 Swann (Tenn.), 14; State v. Kittle, 2 Tyler, 471.

The decisions in this state, on which the defendants will rely, are The State v. Coleman & Owen, 3 Ala., p. 14, and Martin & Flinn v. The State, 28 Ala. 71. The point decided in these cases was not made by the record, nor did it come into question in either case. Besides, they are not applicable to the case at bar; these and all the other decisions cited by the defendants' counsel, it will be observed by the court, are cases where the conviction was of a lower grade of offence, and the court held that it amounted to an acquittal as to the higher grade of offence, and the authorities are by no means uniform as to this doctrine, and we do not think it the settled law of the land.

But the defendants do not cite a *single case* where a conviction of a higher offence is a bar to a prosecution for a lower offence, of a kindred kind, because the smaller offences are embraced in the greater. This is a conviction of burglary, as in the case at bar, and includes all the minor offences of a kindred kind; it includes that of grand larceny.

Take, for instance, the case of Stokes, which so recently engaged the public mind. He was first found guilty of the *murder* of Fisk; the case was reversed by the New York Court of Appeals. On a second trial, he was convicted of *manslaughter.* Do we hear of any plea on his behalf, on the second trial, that he was *acquitted* of manslaughter, by the first verdict, of *murder?* Do we hear of any motion in arrest of judgment on the above ground? Would the court have entertained a plea so contrary to all reason. Such a decision would be the abrogation of the criminal code. Take an appeal, as in the case at bar, on some technicality, have the case reversed, then plead a former acquittal as to all the counts in the indictment, except the one found on, then risk the jury finding on some other count; if they miss it on the first appeal, try it again and again, and finally it would be impossible to convict, it matters not what would be the magnitude of the crime.

The proposition asserted, virtually, by the defendants' counsel is, that *two convictions* are in fact an acquittal.

BRICKELL, J.—A paradox is a proposition seemingly absurd, yet true in fact. An instance is, that under the constitution and laws of Alabama, and under an indictment charging the defendant with two distinct felonies, two verdicts rendered at different terms of the primary court, the first expressly finding him guilty of one of the felonies, the second expressly finding him guilty of the other, may, when accompanied by an unauthorized discharge of the second jury, amount to an acquittal, and operate as such.

Section 9 of article 1 of our state constitution, provides: "That no person shall be accused, arrested, or detained, except in cases ascertained by law, and according to the forms which the same has prescribed; and that no person shall be punished but by virtue of a law established and promulgated prior to the offence, *and legally applied.*"

Section 2 of article 6 of that constitution, is in the following words: "Except in cases otherwise directed in the constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions and regulations, not repugnant to this constitution, as may from time to time be prescribed by law."

The restrictions and regulations as to the appellate jurisdiction of the supreme court in criminal cases have been prescribed by

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law and are contained in chapter xii, title 3, part iv, embracing §§ 4302 to 4316, inclusive, of the revised code of Alabama. Section 4302 declares, that any question in law arising in any of the proceedings in a criminal case tried in the circuit or city court, may be reserved by *the defendant, but not by the state*, for the consideration of the supreme court, and if the question does not distinctly appear on the record, it must be reserved by bill of exceptions duly taken and signed by the presiding judge as in civil cases. By the sections of the code above recited, the defendant in any criminal case, but not the state, may take the case to the supreme court by appeal or writ of error; and in any case taken to the supreme court under the provisions of said chapter, no assignment of errors, or joinder in error, is necessary; but "the court must render such judgment as the law demands;" and if it reverses the judgment of the primary court, may order a new trial, or the discharge of the defendant, "or make such other order as the case may require." Rev. Code, § 4314, 4316.

In the language of Chief Justice Gibson, "our jurisprudence abounds with unreasonable advantages enjoyed by the accused. The least slip in the indictment is fatal; *a new trial cannot be awarded after an acquittal produced by the most glaring misdirection;* and the prisoner is to be acquitted whenever there is a reasonable doubt of his guilt. These, and many other unreasonable advantages, the law allows on principle of humanity or policy." * * * * * "But feeling, as I do, a horror of judicial legislation, I would suffer any extremity of inconvenience, rather than step beyond the legitimate province of the court, to touch even a hair of any privilege of a prisoner," etc., etc. The Commonwealth v. Lester, 17 Serg. and Rawle, 164.

The indictment here to be considered was found at the February term, 1873, of the City Court of Montgomery, and consists of four counts. The first count was *nol prossed*. The second charges that the defendants "broke into and entered a building," described in that count, "with the intent to steal." The third count charges that the defendants "broke into and entered a building," described as in the second count, "and feloniously took and carried" away certain specified articles of personal property of a specified third person, "of the value of more than one hundred dollars." This third count contains no averment as to the intent with which the defendants broke into and entered the building. The fourth count charges that the defendants "broke into and entered a building," described as in the second and third counts, "with the intent to steal, and feloniously took and carried away" personal property, as described in the third count, "of the value of more than one hundred dollars."

Under § 3695 of our revised code, which defines burglary differently from the common law, the second count is a count for burglary only, and does not include, nor authorize a conviction for the offence of grand larceny. Fisher v. The State, 46 Ala. 720.

Under the definition of burglary, contained in that section of the code, the third count is not a count for burglary, because it contains no averment that the defendants broke into and entered the building "with intent to steal or to commit a felony." An averment of the existence of the intent to steal or to commit a felony, at the time they broke into and entered the building, was essential to make that count a good one for burglary. Oliver v. The State, 17 Ala. 587; Ogletree v. The State, 28 Ala. 693; Moore v. The Commonwealth, 6 Metc. R. 243. As that count did not contain such averment, it is a count for grand larceny only. The fourth count is a count for burglary and grand larceny; and under it, the defendants might, on the first trial, have been convicted of either, or of both of these offences. But if they had been convicted of both, under that count, there could have been but one penalty, because, in that event, the merciful and just construction in favor of the defendants would have been, that as both offences were charged *in the same count*, they should be deemed as "one continued act," for which but one penalty could be adjudged. Josslyn v. The Commonwealth, 6 Metc. R. 236.

Under our code, burglary and grand larceny are distinct felonies of the same grade, subject to the same nature of punishment, and may be joined in the same indictment, but are not subject to the doctrine of merger. Johnson v. The State, 29 Ala. 62; Hamilton v. The State, 36 Ind. 286; Wilson v. The State, 37 Ala. 134; Whar. Amer. Crim. Law, vol. 1, § 564.

When the defendants were put on trial under this indictment, at the February term, 1875, of the City Court of Montgomery, and evidence as to their guilt was submitted to the jury, they were in jeopardy, both as to burglary and larceny; and might have been convicted and punished for both under the *distinct counts* of the indictment. Josslyn v. Commonwealth, 6 Metc. R. 236.

If, on that trial, the verdict of the jury had been, "we, the jury, find the defendants guilty as charged in the indictment," or, "we, the jury, find the defendants guilty of burglary and grand larceny as charged in the distinct counts of the indictment," they certainly could have been tried again for both burglary and grand larceny, after they had brought the case to this court and procured a reversal of the judgment of the city court.

But on that trial, the verdict was, "we, the jury, find the defendants, Richard Bell and George Murray, guilty of burglary." That verdict was received by the city court, and judgment and sentence thereon entered by that court, against the defendants, to the effect that each of them be confined in the penitentiary for specified periods.

The defendants thereupon took the case to the supreme court under the provisions of the code above cited. And at the June term, 1873, this court reversed the said judgment and sentence of the city court and remanded the case to that court "for further proceedings."

As the indictment was for burglary and grand larceny, and the verdict was only for burglary, the necessary intendment of the finding was, that the defendants were not guilty of the alleged larceny." "As to all which is not found, the conclusion must be that the jury intended to acquit." Nancy v. The State, 6 Ala, 483; Nabors v. The State, 6 Ala. 200; Burns v. The State, 8 Ala. 313; Martin and Flinn v. The State, 28 Ala. 71, and authorities cited in appellant's brief.

The legal effect of that verdict of acquittal of larceny, whether any judgment was rendered on it or not, was to put the alleged larceny as completely out of the indictment and case as if it had never been in the indictment or case. Mount v. The State, 14 Ohio, 295; Shepherd v. People, 24 New York, 406; The State v. Martin, 30 Wisconsin, 223; People v. Gilmore, 4 Cal. 376; Hurt v. The State, 25 Miss. 378; Campbell v. State, 9 Yerger, 333; 1 Bish. Crim. Law (Ed. 1856), § 676; State v. Ross, 29 Missouri, 32; Jones v. State, 13 Texas, 168; Morris v. State, 8 Smedes and Marshall, 762, and authorities in appellant's brief.

The case, when brought by the defendants to this court at its June term, 1873, had, by the aforesaid proceedings in the city court, become a case for burglary only. This court was bound to treat it as such; and in reversing the judgment and sentence of the city court, at the instance of the defendants, the supreme court had no jurisdiction to deprive them of the advantages which the law gave them as the result of the final verdict. The jurisdiction of this court, in the case as brought, was appellate only. As the case when brought here, had become one for burglary only, it remained a case for burglary only when remanded to the city court. Authorities, *supra*.

After the case was thus remanded, the city court, in effect, required the defendants not only to be tried for the alleged burglary, but again to be put in jeopardy for the alleged larceny, of which they had been acquitted as aforesaid. They were put on trial for both burglary and grand larceny, precisely as if there had been no former trial or former verdict. On this trial, at the February term, 1874, of the city court, the same evidence which had been adduced on the former trial was introduced, but the verdict was,

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"we, the jury, find the defendants guilty of grand larceny as charged in the indictment, and recommend them to the mercy of the court." The city court received this verdict, remanded the defendants to jail to await sentence, and discharged the jury. No consent of the defendants to this discharge of the jury appears, and such consent cannot be presumed.

If this last verdict were of any validity, its undoubted effect and meaning in law would be, that the jury found the defendants not guilty of burglary. But that verdict is a mere nullity, because the charge of grand larceny had been put out of the case by the verdict and proceedings on the former trial. Fisher v. The State, 46 Ala. 721.

A verdict which is a mere nullity, is no legal reason for the discharge of the jury. And when, as here, that is the only reason for the discharge of the jury, and there is no evidence that the defendants consented to such discharge, the legal effect of such discharge is the acquittal and discharge of the defendants from any further prosecution for the offence or offenecs set forth in the indictment. *Ex parte* Vincent, 43 Ala. 402; McCauley v. State, 26 Ala. 135.

It is not the verdict finding defendants guilty of grand larceny on the last trial which acquits them of burglary. At the time of that trial, there remained in law no such charge as grand larceny in the indictment. That which acquits defendants on the last trial, is not the void verdict, but the discharge of the jury, charged with the trial of defendants for burglary, without necessity and without their consent. The void verdict had no effect. The jury should have been instructed to return to their deliberations. As the jury was not so instructed, but was discharged without a verdict on the only charge by law it was authorized to consider, and without consent of defendants, that dispersion of the jury operated an acquittal. So, on the first trial, when defendants were in jeopardy for both burglary and larceny, the discharge of the jury without rendering a verdict as to larceny, and without consent of defendants (although it did render a verdict as to burglary), operated an acquittal of the larceny. This is one of the strongest and most logical reasons for the rule, that where defendants are put on trial on several counts, and the jury find only as to one, the defendants are thereby acquitted as to the others.

It is a settled rule in this state, that the unauthorized discharge of a jury, charged with the trial of a defendant in a criminal case, is tantamount to his acquittal of all the alleged offences upon which the jury did not expressly pass, or were prevented from passing by the unwarranted discharge. From this rule it follows, that where two charges are contained in an indictment, and on the first trial there was a discharge of the jury without necessity and without consent of defendants before the jury had passed, and whereby they were prevented from passing on the first offences, that discharge is tantamount to an acquittal of the offence not passed on. If, on the second trial, the jury, which then, *in law*, are charged to inquire into the second offence only, are discharged without necessity, and without defendants' consent, that discharge operates an acquittal of the second and only remaining offence, whereby defendants are freed from the whole charge.

Strictly speaking, then, it is not the two verdicts against the defendants in the present case which operates an acquittal, but the unwarranted discharge of the jury on the last trial, as shown by the record.

We have been aided in our investigations of this case, and the important and delicate questions it involves, by the elaborate and exhaustive briefs of the counsel for the appellants, creditable to their industry and discrimination. To these we refer as containing the citation of many authorities not cited in this opinion, sustaining the conclusion we have reached.

The judgment of the city court is reversed, and a judgment must be here rendered discharging the appellants.

SAFFOLD, J., not sitting, being related by marriage to the prosecutor.

NOTE.—For the above highly interesting and important decision, we are indebted to Thomas G. Jones, Esq., the able reporter of the decisions of the Supreme Court of Alabama, by whom it was prepared for publication as we print it, and as it will appear in a future volume of his reports.

[Communicated.]

Lawyers' Libraries.

EDITORS CENTRAL LAW JOURNAL:—One of the greatest and most annoying difficulties which lawyers meet with in the preservation of their libraries, arises from the very general and unavoidable practice of borrowing, which prevails in all places except, perhaps, the largest cities of the country. While many books are doubtless lost by the carelessness of their owners, the great number which get misplaced from the negligence of those who borrow, is one of the sorest grievances of this much abused and long-suffering profession. It is one for the prevention of which very many devices have been planned and attempted, most of which have proved utter failures, and all of which are subject to countless objections.

If a lawyer, after great trouble and much ill-afforded expense, has succeeded in securing a good library, large or small, it is a constant laceration of his tenderest feelings to see his shelves gradually becoming depleted and his treasured volumes gone—he knows not whither. He may post up a flaming notice on his office wall, entreating his brethren, with the most touching earnestness, to "leave a memorandum of books borrowed," even adding, sometimes, an expression of his extreme readiness to allow his books to be taken, and may provide a neat little book, with a string and pencil, in which to enter the name and number of the volume taken in his absence; he may issue the most positive and overwhelmingly minute instructions to his office-boy to insist on requiring the borrower to make the entry or give his name and address so that the entry may afterwards be made; he may in his notice threaten the "utmost rigor of the law," if books taken are not punctually returned; he may do anything, adopt a thousand different plans, one after another, as his puzzled fancy may suggest, to save his precious books, but all in vain. The inexorable borrower prowls on among his treasures, in season and out of season, regardless of his entreaties and despair, until at last his rarest sets of reports are broken up, his most valuable text-books are missing without trace, and his once perfect and almost invaluable library is a mere wreck and shadow of its former glory; and every time "the law-book man" comes around, he must deny himself the pleasure and profit of buying some new book, "just out, the very thing he wants," in order that he may make good the depredations of the borrowers.

If he selfishly locks up his cases, he will soon have the unenviable reputation among his fellows of "a stingy fellow," and, moreover, cannot himself go out to borrow with a good grace, for be it known that he, himself, is a *great borrower*, withal. In other words, the practice is so common, so universal and so unavoidable, that none can say, as some pretend to do, that they "neither borrow nor lend."

The object of this communication is to suggest to the profession a remedy for this great and growing evil.

Let all the lawyers of a town or city unite in the employment of some worthy, quick and capable young student, whose duty it must be to make out and keep up a complete, classified catalogue of every library in the place. This catalogue should show every book in every library, its date, edition, editor and owner, and copies of the original (which should not leave the custody of the librarian), could be furnished by the librarian, at a slight cost, to every lawyer who desires it. It should be the duty of this librarian to make frequent periodical visits to each library, noting changes, loans and returns, books missing and found, and to "keep the run" of every volume, searching for those unaccounted for, and as far as possible, keeping all in their proper places. This labor, once reduced to a system, would be very slight, and the compensation therefor, contributed by so many, could be easily adjusted, and paid without hardship to any individual.

If there exists no law association through which the matter could be arranged, let some enterprising student take hold of it and secure subscriptions, or go on without subscriptions, and as soon as the utility and value of the plan is demonstrated, every lawyer who has the slightest feeling of regard for his books, or sentiment of justice and gratitude for a service rendered, will gladly join in the good work.

Besides this, the simple contact with the books, and acquired familiarity with their names, dates, editions, editors, authors, contents and relative value, will, in itself, furnish the librarian with a fund of information scarcely less valuable than his course of reading.

Trusting that I have not trespassed too largely on your space, and that good may result from my suggestion, I am, etc.,

C.

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Book Notices.

A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES. By JAIRUS WARE PERRY. Second Edition, in two Volumes. Boston: Little, Brown & Co. 1874. Sold by Soule, Thomas & Wentworth, St. Louis.

It is gratifying to the pride of American lawyers to know that the bold undertaking of Mr. Perry, to produce a work that should rival the excellent English Treatises of Mr. Hill and Mr. Lewin on the Law of Trusts and of Trustees, has been successful.

Mr. Perry's work covers all the ground which is included in the English Treatises named, and he illustrates these subjects with the aid of American judgments, and in addition thereto his work embraces matters which are peculiar to the jurisprudence of this country. or have here received their fullest development.

The plan of Mr. Perry's treatises is comprehensive, embracing everything that fairly belongs to the Law of Trusts, whether gxpress or Implied, Resulting or Constructive, including Executory trusts, trusts under Wills, under Assessments for Creditors, under Mortgages and Deeds of Trust with power of sale, trusts for Infants and Married Women, for Charitable Uses, and for the benefit of Bondholders and Railway Mortgages, and other trusts which need not be here more particularly enumerated.

Of course the execution of this plan involves a discussion of the origin, definition and character of Trusts in the Roman and English Law, the Parties to trusts, and the Property that may be the subject of a trust, the nature of the Estate taken by the trustee, the powers and duties of trustees, and the remedies which they may apply and which may be applied against them.

All these subjects and others, which are subsidiary and incidental, are discussed by the author with a pains-taking care and accuracy, with a fullness of learning and precision of statement, that has placed his work in the very first rank of legal productions.

The vast extent of the field which Mr. Perry's labors embraces, is shown by the fact that his two volumes contain 1265 pages of *condensed* law, in which it is difficult to find a redundant statement or expression, or more than an occasional paragraph made up from quotations from individual jndgments.

The thoroughness and minuteness of the work is endorsed by the fact that the table of cases occupy 108 double-column pages, which is explained by the circumstance that it has been the purpose of the author to cite *all* the cases down to the date of publication, on the subjects treated. The reasons for doing this are satisfactory. In this country we have forty States, each making law and publishing judicial decisions. Besides this, there are the Federal Courts sitting in the various States, and the Supreme Court of the United States. In only the larger places can complete law libraries be found. Some towns have the Reports of one state, and others different Reports. The usefulness of a text book is much increased by a full citation of cases. If the citations are in *exact* support of the proposition to which they are adduced, they are worth more than the space they occupy, unless the proposition is so elementary as to be universally admitted, and so clear as to leave no doubt as to its extent and application.

We cannot conclude this meagre and brief notice of the work before us, without tendering our congratulations to the author, that the merits of his production have been so soon appreciated by the profession, and that this has led to so early a demand for a second edition. We could have wished it possible that the matter could have been put into one volume, for sake of economy and convenience, but a book of nearly 1300 pages, on good paper, cannot be handled, and since two volumes were found necessary, we venture to think they would have been yet more acceptable had the notes been more full of illustrations, judiciously drawn from well-considered judgments, of leading courts or eminent judges. But it is scarcely gracious, where so much has been furnished, to complain that more has not been given.

THE INTERNATIONAL REVIEW. Bi-Monthly. $5 00 per annum; single numbers $1 00. A. S Barnes & Co., Publishers, 111 and 113 William street, New York; 113 and 115 State street, Chicago.

The International Review, for January, will contain:

Judge T. M. Cooley's (of Michigan) "Guarantee of Order and Republican Government in the States," which discusses the legitimacy of the executive interference in such cases as have arisen in Rhode Island, Arkansas, Louisiana, and other states. This is one of the ablest articles that has yet appeared on this subject, and will be likely to attract wide attention in political circles.

Dr. McCosh's (of Princeton) "Ideas in Nature Overlooked by Dr. Tyndall." Marked interest has been evinced in this expected reply to the great Belfast address. Numerous extracts having appeared from Dr. McCosh's lecture and reported conversations, we desire to state that this article is written expressly for the readers of the International Review, and is a new, and the only original exposition of his views.

The Association for the Reform and Codification of the Laws of Nations, by Dr. James B. Miles, Secretary of the Association, Boston. A present and conspicuous need among nations, is a well-digested code of international law, and an International Tribunal to settle the differences of nations, not adjusted by the ordinary methods of negotiation.

The work undertaken by this Association, and its history, are of the utmost importance to the whole world, and no other American has a more intimate knowledge of it than Dr. Miles.

Vienna and the Centennial, is the title of a timely article by Prof. J. M. Hart, of New York. It is an intelligent description of that magnificent failure, financially, of 1873, and maps out some dangerous shoals for our centennial commission to avoid.

The following *foreign articles* are also of present importance:

The University System in Italy, by Prof. *Angelo de Gubernatis*, Florence; and Baron Liebig, by his successor in the chair of Agricultural Chemistry, Munich, Prof. *August Vogel*.

A TREATISE ON THE LAW OF NELIGENCE. By FRANCIS WHARTON, LL.D., author of "Conflict of Laws," "Criminal Law," and "Medical Jurisprudence." Philadelphia: Kay & Brother, 1874. Sold by Soule, Thomas & Wentworth, St. Louis.

This is a new and comprehensive work of 880 pages, divided into 1001 sections. We received it some weeks since, but have refrained from noticing it until we could give it a careful examination. The result of that examination is the conviction that the work is one of extraordinary merits. It differs in its mode of treatment from the excellent practical treatise of Shearman & Redfield, which is devoted almost exclusively to an exposition of the law of Negligence, as developed in the common-law tribunals of Great Britain and this country. On the other hand. Dr. Wharton has produced a work intended to be thoroughly practical, and at the same time philosophical. All that has been said of value on the subject of Negligence in the Roman law, and by the modern jurists of continental Europe, is given by the learned author, and in addition the views and judgments of the eminent judges and writers of the two great countries which have the common law for the basis of their jurisprudence.

The most valuable feature of the work is the successful manner in which the author has combined original and philosophical discussions, and the results of the best thought and reflections of the great jurists of the civil law, with a full and minute view of the adjudicated cases in England and America.

None but a writer of Dr. Wharton's learning and experience in the preparation of legal works, could have produced such a treatise as the present. Nothing seems to have escaped the diligence of the author, who even cites cases as yet only published in the current legal periodicals.

It is impracticable, in the limits of a notice, to descend into details, but we may remark that the author's chapters on the Master's Liabilities *to* and *for* Servants, on Contributory Negligence, including Injuries to Children, on the Negligence of Railways and other Corporations, are noticeably thorough and valuable.

One of the most marked features of the work is the demonstration of the author that the three degrees of negligence which Sir Wm. Jones and Lord Holt have done so much to engraft upon the common law, have no basis in the Roman law, and is a refinement which the practical sense of the modern judges has repudiated.

After the luminous and learned exposition of the author on this subject, no one can hereafter doubt that the doctrine of *culpa levissima* (*slight* negligence as a ground of actionable liability) is derived from the speculations of scolastic medieval jurists, and not from the Roman law, and that it is now practically discarded in England and America, and is, in fact, a subtlety which cannot be applied to the practical affairs and business of life.

The author's conclusions on this subject, which affects the whole doctrine of negligence, are thus stated:

"§ 58. (1.) That the doctrine of a third grade of *culpa* (negligence), called *culpa levissima* [or the omission to ward off every possible casuality, the antithesis of the most exact diligence], is taken by Lord Holt and Sir William Jones, not from the classical Roman law, which was the law of business Rome, but from the scholastic jurists, who dealt with the question as belonging rather to speculative than to regulative jurisprudence.

"(2.) That by present authoritative expositions of the Roman law, it is rejected.

"(3.) That while it lingers still in Anglo-American text-books [notably Story on Bailments], it is practically dropped by Anglo-American courts

"(4.) That it is incompatible with the necessities of business jurisprudence.

"(5.) That the classification into two degrees, *culpa lata* (gross negligence) and *culpa levis* (slight or special negligence), is sufficiently exact for all philosophical purposes and sufficiently flexible for the purposes of practical jurisprudence."

In executing his plan the author divides his work into three books. The first, containing eleven chapter, treats of the General Principles appertaining to

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the subject. The second, divided into twenty chapters, treats of Negligence in the discharge of *duties based on contract*. The third, comprised in twelve chapters, is devoted to Negligence in the discharge of duties *not* based on contract

We may observe, before closing, that the author falls into a slight error in one respect in giving the substance of the interesting case of Kellogg v. Milwaukee and St. Paul Railway Co., tried before Miller and Dillon, JJ., in the U. S. Circuit Court for Iowa, at the May term, 1874, and first published in the CENTRAL LAW JOURNAL, June 4, of that year. In this case the defendant company owned a steam ferry boat (the Jennie Brown), and an elevator more than 100 feet high, constructed of pine, situated on the bank of the Mississippi river. During an unusually high wind blowing in the direction of the plaintiff's lumber yard and mill, distant 388 feet from the elevator, the saw-mill and lumber yard took fire from the burning elevator, and were destroyed. The plaintiff's action was for the value of the mill and lumber thus consumed, and he alleged that the defendant's negligence caused the elevator to catch fire, and that this was the immediate or proximate cause of his loss. The defendant's negligence was alleged to consist in the omission to use "spark-arresters" on the chimney of the Jennie Brown, and in not using due care, in view of the violent wind then prevailing, in working the boat while in the immediate vicinity of the combustible elevator, to prevent sparks from coming in contact with it. The author states (sec. 154) that "the defendant was clearly guilty of negligence in not having spark-arresters to his smoke-pipe." This is doubtless a true proposition of law with regard to railway locomotives, running in settled regions of country. Ib. sec. 874. But on the trial of the case of Kellogg, the evidence tended quite clearly to show that spark-arresters could not be successfully used on the boats navigating the Mississippi, and that from necessity they had to be abandoned. Under the testimony, it was left to the jury to determine whether the neglect to use them was negligence, and the jury in finding for the plaintiff, must, under the evidence, have proceeded upon some other ground than the one that "the defendant was clearly guilty of negligence in not having spark-arresters to his smoke-pipe."

We have not space further to extend our notice of this most interesting and valuable book. It will add to the already distinguished name of its author, and the work, surpassing in the richness of its materials, and in masterly and exhaustive treatment, the English treatises on Negligence, by Mr. Saunders and by Mr. Campbell (both published in 1871), cannot fail to give him an enviable and enduring European fame. We unreservedly commend it to our readers, not only as a work of immense learning, and abounding in acute and philosophical discussions, but also as one of great practical, every-day value.

Summary of our Exchanges.

Middleton v. New Jersey, etc., Railroad Co., Chicago Railway Review for Dec. 5, has the following syllabus: The New Jersey statute, which provides that where the property of an insolvent corporation, in the hands of a receiver or trustees appointed under the original act, is incumbered with mortgage or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation thereupon, the court of chancery may order the receiver or trustees to sell the same, clear of incumbrances, at public or private sale, for the best price that can be obtained, bringing the money into the court of chancery, there to remain subject to the same liens and equities of all parties in interest as was the property before it was sold, and to be disposed of as the said court by its decree shall order and direct,—pronounced constitutional.

White v. Freedmen's Bank, Sup. Court, Dist. Columbia, Washington Law Reporter, Dec. 1: 1. Leased premises were used as a hotel, and the lessee executed trust deeds on the furniture to secure the parties from whom he purchased, and to other creditors. Subsequently the landlord accepted in lieu of the lessee, another tenant, who bought out the lessee and assumed the payment of all rent in arrear, and of all liens upon the furniture. Upon the faith of this agreement, the tenant paid all the back rent, and the rent accruing for some time afterward, to the landlord. He also paid off a large portion of the claims secured by the deeds of trust. Held, that the balance due upon such trust deeds had priority over the landlord's lien for rent, and that there was a change of tenantry as well as of property in the furniture.

2. A landlord will lose his lien by conduct which misleads *bona fide* purchasers for valuable consideration.

3. Where trustees have money in their hands, claimed by a landlord upon his lien for rent, and by creditors having trust deeds on the furniture on the rented premises, a bill of interpleader will be sustained when the fund is not sufficient to pay both.

Norment v. Fastnaght, same court, same journal:

An expert cannot give his opinion, whether upon the face of a conveyance of real estate, it covers the premises in controversy.

Ex parte Dewitt C. Baxter, same court, same journal:

1. An improvement described in the claim as "The combination of the hearth-plate of a portable furnace with wrought-iron tubular legs connected together, all substantially as set forth," does not indicate, in any degree, invention. It is simply the result of the judgment and knowledge which is expected of every competent mechanic, and is not patentable.

2. The properties and advantages of hollow wrought-iron legs as supports for a structure, being well-known, to substitute them for solid legs in a portable forge, is but the application of knowledge already possessed by competent mechanics, and does not require invention.

The same journal publishes a decision of the secretary of the interior, with the following syllabus: 1. A state selection has the effect of an entry of the land selected, and withdraws the tract from further disposal.

2. Although a state selection be abandoned, yet all settlements upon or entries of the tract, prior to the cancellation of the selection, are illegal.

Crighton v. Kerr, Sup. Court United States, Legal Gazette, December 4: A withdrawal, "without prejudice to the plaintiff," of a general appearance entered by an attorney for the defendant, means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal; that all his rights are to remain as they then stood. Hence, where there has been error in the beginning of an action, as *ex. gr.*, one of foreign attachment, by reason of want of notice required by statute to be given to the defendant, and an attorney appears generally for such defendant, and so cures the defect, the advantage thus given to the plaintiff is not taken away by a withdrawal declared to be "without prejudice" to him. And the court states that it does not intend to intimate that the result would have been different had the appearance been withdrawn unconditionally.

Chicago and Northwestern Railroad Co. v. Chicago and Pacific Railroad Co., United States Circuit Court, Eastern District of Wisconsin, same journal, opinion by Drummond, J., holding:

1. Where the legislature of a state has not declared in what particular way one railroad shall cross or intersect another, but has only referred to it in general terms, then it may be competent for a court of equity to control the railroads as to the crossings.

2. Where a corporation is created by another state, although it may be associated with a corporation in this state, and their interests be common, a court of equity can protect the interests of a joint proprietor in property that is being injuriously affected.

Com. v. Hartranft, Pittsburg Legal Journal, Dec. 2: Jurisdiction of Supreme Court of Pennsylvania, under the new constitution.

Simonds v. Boston, Supreme Court of Pennsylvania, same journal: 1. Under the statutes 22d and 23d Car, 2, where the damages found by the jury in an action of trespass, are under the value of forty shillings ($5.33½), the latest time when the judge can certify that the freehold or title of the land mentioned in the declaration was chiefly in question, to give a plaintiff full costs, is at final judgment.

2. Where the trespass to the land or freehold is laid as the principal cause of action, and the asportavit of that which has been made personal property by severance, is laid in aggravation of the trespass, full costs do not follow without the certificate.

3. Where the asportavit and conversion of that which has become personal property by the act of the trespasser, is laid as a separate and distinct claim, although the plaintiff goes on to charge a trespass on the land, it does not bar his right to recover full costs without the certificate.

4. The *Narr.* charged that the defendants broke and entered a certain island and close of the plaintiff, and that they seized, took, and carried away ten thousand bushels of sand (of which the island was partially composed) of the value of five hundred dollars, and converted and disposed of the same to their own use; and that they also injured and despoiled the island, etc. Verdict for plaintiff for $5.00. *Held*, that the court below was correct in entering judgment for full costs.

Tatty v. Freedman's Trust Co., Supreme Court, District of Columbia, Washington Law Reporter, December 8: 1. A claim against the late corporation of Washington, commonly called a voucher, consisting of a bill for work performed by plaintiff for the corporation, together with certificates of the proper officers, that it was duly approved and allowed for the sum of $6,096.75, is not strictly a commercial instrument; but where it has been endorsed in blank by the plaintiff, and delivered to a broker as security to raise money, and no mark put on it to designate a wish to control it, or to restrict the endorsement, and a paper of this kind is extensively used for the purpose of borrowing money: *Held*, that he could not maintain replevin to recover the voucher from

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an innocent *bona fide* holder for a valuable consideration, without tendering him the amount paid therefor.

2. Where the plaintiff made his promissory note for $3,000, payable to his own order, and endorsed it and delivered it to a broker to get discounted, giving him the voucher as security; and the note was discounted and the proceeds paid plaintiff; and the broker claimed that the voucher was given upon agreement that he might sell and dispose of it at any time for 90 cents on dollar, and the plaintiff claimed he was not to sell it until after maturity, and non-payment of the note; and the broker sold it to the defendant before such maturity, for a valuable consideration, and without any notice or knowledge of such arrangement. *Held*, upon this state of facts it was proper for the justice who tried the case below, to instruct the jury to return a verdict for defendant, as there was no proof of tender before suit brought.

Ex parte J. L Pennock, same court, same journal: 1. If a chain is attached to a shaft rotated by the same mechanism as the rolls in a rolling-mill, other end being furnished with grappling-irons, by which the heated pile drawn from the furnace, and placed upon a platform suspended from a crane, when it is swung by the crane to the rolls, the whole machinery constitutes the proper subject of a patent. Wylie and Olin, associate justices, dissenting.

3. And a patent is valid which describes such machinery, and contains the following claim, viz: "In a rolling-mill, the revolving shaft with its drum-chain and grapple, or any equivalent power-driven hauling mechanism, in combination with a crane, arranged and operating in connection with the said mechanism to receive the fagot from the same and deliver it at the rolls." Wylie and Olin, associate justices, dissenting.

3. Whether the inventive faculty has been exercised, is a question of evidence, and is always to be considered in reference to the condition of the art and the result accomplished; and where the combination is new, and the benefit great, the presumption is strongly in favor of originality.

The same journal publishes a decision of the secretary of the interior, holding that when a claim, under the pre-emption law, is defective in the matter of citizenship, such defect cannot be cured by the retroactive effect of the United States statutes, if an adverse right has intervened.

The Albany Law Journal, for December 12, has an article by Josiah H. Bissell, Esq., of Chicago, Ill., on Limitations of Claims Against Estates. It publishes a long extract from the opinion of the New York Court of Appeals, in the case of Tilton v. Beecher, holding that a bill of particulars in an action for criminal conversation is a matter of discretion with the inferior court. It has an extract from the Irish Law Times, on the Duties of Carriers in the Protection of Goods; and contains its usual amount of other interesting matter.

The Chicago Legal News, for December 12, prints an opinion of the Supreme Court of the United States, Mr. Justice Strong, in the case of the Ship Belle of the Sea v. Higgins. This was a proceeding to enforce a bottomry lien, and the court hold that there was no evidence of actual payment, as claimed by the owners, and that the ship was not discharged from the lien unless there was actual payment of the bond, or unless the libelants agreed to pay it and look to the freights, the general average, and the insurance, exclusively, for their reimbursement.

It also prints the opinion of the New York Court of Appeals in the Tilton-Beecher bill of particulars case.

It also prints an opinion of the Circuit Court of Peoria county, Illinois, Tipton, J., holding that the city council of Peoria, has the power to determine when and where, and the expediency of, the location of the street-railroad of the city; that their determination, without fraud, is final, and the courts cannot interfere by injunction or otherwise; that under its charter the city has power to authorize onehorse railroad to locate its line upon and over the road of another company; that a company so authorized has authority to condemn the right of way or use of such other company's road for the necessary use of its cars, and that the county court has jurisdiction of such condemnation proceedings.

It also prints an opinion of the Supreme Court of Illinois, in Culver v. Third National Bank of Chicago. This was an action of assumpsit, in the Superior Court of Cook county, brought by the Third National bank of Chicago, claiming to be a creditor of the Northwestern Glass Company, against Howard Z. Culver, alleged to be a stockholder in that company. It was agreed there were many other suits depending on the decision of this, and the court therefore, gave it careful consideration. The court hold, that the act of 1867, under which the glass company was incorporated, was intended by the legislature as a substitute for the act of 1849, they at the time having the whole subject fully before them, and this being so, the stockholders are primarily liable by section nine of that act. It is also held that a creditor may pursue his remedy at law against a stockholder.

It also publishes an opinion of the same court, Sheldon, J., stating under what circumstances abstracts of title may be received in evidence in place of original deeds.

The Legal News contains considerable other interesting matter of minor importance.

Legal News and Notes.

—THE Tilton-Beecher suit promises a rich feast for the scandal-loving. One thousand jurors have been summoned.

—IT is said that large bodies move slowly; but Delaware, one of the smallest states of the Union, still retains the whipping-post.

—THOMAS DUNPHY, a prominent lawyer of New York city, formerly partner of Edwin James, died on the 7th inst.

—SIR JOHN BRUGES KARSLAKE, the eminent English lawyer and Queen's counsel, has become totally blind. His affliction was caused by overwork, and there is hope that it may prove temporary.

—MISSOURI is to have a constitutional convention, the late election having, according to the official count, resulted in a majority of 283 in favor of the measure.

—MR. ATTORNEY-GENERAL WILLIAMS has decided that the Hustings Court of Staunton, Va., is fully authorized, under the laws of Congress, to naturalize persons.

—MR. JUSTICE SWAYNE, of the Supreme Court of the United States, having reached his seventieth year, is entitled, under the law, to retire on full pay—a step which he contemplates taking, but has not yet fixed the day.

—JUDGE BALLARD, sitting in the United States District Court for the Western District of Tennessee, has sustained a motion to quash the indictments against the Gibson county kuklux, for want of jurisdiction, and the prisoners are discharged.

—"GATH" writes to the Chicago Tribune that General Sherman "had to keep nine servants in Washington, of whom he gets rid of one-half in Saint Louis." This reminds us of the Irish captain, who, when told on a march that there were five soldiers in one ambulance, shouted, "the half o' ye's get out!"

—WE are pleased to learn that Hon. John Lowell, United States District Judge for the District of Massachusetts, is preparing for publication a treatise on the bankrupt law. One of the best legacies a judge can leave behind him is to embody in a book the result of his experience on some topic that comes constantly before him in his judicial capacity.

—THE amendments to the New York constitution, voted on at the late election, were all adopted by very large majorities. That forbidding special legislation, had 414,345 votes in its favor, to 97,965 opposed. The largest vote was on an amendment, which provides additional security against bribery at elections, the whole number in its favor being 459,658, and against it 179,891.

—HON. EDWARD P. COWLES, formerly a justice of the Supreme Court o New York, died in Chicago on the first instant. He was admitted to the bar in 1839, was appointed to the bench in 1853, and was re-appointed at the close of his official term. Retiring at the close of his second term, he resumed the practice of the law, in which he was very successful. He died from a hurt while returning from a visit to California.

—JUDGE JAMESON, author of the work on constitutional conventions, has written a letter to the Chicago Tribune, in which he says distinctly, "I think it established, in the public law of the United States, that it is always in the power of a legislature to call a convention whenever it may deem it necessary or expedient to do so with a view either to amend or remodel the constitution." The only exception he allows is an express prohibition, by the constitution itself, of the exercise of such a power.

—JUDGE DURELL'S resignation will make five United States district judges who have left the bench within the past eighteen months, the other four being Sherman of Ohio, Delahay of Kansas, Story of Arkansas, and Busteed of Alabama. We wonder that they do not all resign. We do not see what there is to stay for. Certainly it is not the salary, and as to the honor, there certainly is not much honor in being judge of a *nisi prius* court of limited jurisdiction, if it is for life. And then to be tied up for life to an office from which you cannot get away long enough to go a-fishing, It is too much greatness.

—SIR JOSHUA ROWE, K. C. B., for many years Chief Justice of Jamaica, died in London last month. He was appointed chief justice in 1832. He was then a young man. At his decease he was nearly eighty years of age. He was remarkable for his upright conduct as a judge and the general correctness of his decisions. A few years ago he retired on a pension, when he was succeeded by the Hon. Bryan Edwards, who received the honor of knighthood on the occasion.

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THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.

ST. LOUIS, FRIDAY, DECEMBER 25, 1874.

SUBSCRIPTION: $8 PER ANNUM, in Advance

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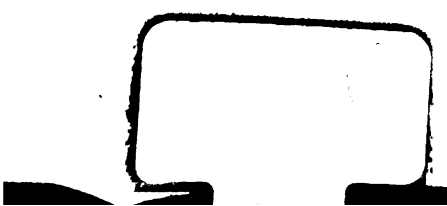

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